

Case T-198/03

Bank Austria Creditanstalt AG

v

Commission of the European Communities

(Competition — Administrative procedure — Publication of a decision finding an infringement of Article 81 EC and imposing fines — Fixing of deposit and borrowing rates by Austrian banks ('Lombard Club') — Rejection of a request to omit certain passages)

Judgment of the Court of First Instance (Second Chamber), 30 May 2006 . . . II - 1439

Summary of the Judgment

1. *Actions for annulment — Actionable measures — Definition — Measures producing binding legal effects*
(Art. 230, fourth para., EC; Council Regulation No 17; Commission Decision 2001/462, Art. 9, third para.)

2. *Competition — Administrative procedure — Information gathered by the Commission under Regulation No 17 — Professional secrecy*
(Art. 287 EC; Council Regulation No 17, Arts 19(2) and 20(2))

3. *Actions for annulment — Interest in bringing proceedings*
(Arts 230, fourth para., EC and 287 EC; Council Regulation No 17, Art. 20)

4. *Competition — Community rules — Infringements — Decision finding an infringement or imposing a fine*
(Arts 81(1) EC, 82 EC and 83(2)(a) EC; Council Regulation No 17, Arts 3, 15(2) and 21(1))

5. *Community law — General principles of law — Legality*

6. *Acts of the institutions — Publication*
(Arts 254 EC and 255 EC; Art. 1 EU; Council Regulation No 17, Art. 21(1))

7. *Competition — Administrative procedure — Establishing whether information is covered by professional secrecy*
(Art. 287 EC; European Parliament and Council Regulations Nos 45/2001 and 1049/2001; Council Regulation No 17, Arts 20(2) and 21(2))

8. *Competition — Community rules — Infringements — Decision finding an infringement or imposing a fine*
(European Parliament and Council Regulations Nos 45/2001 and 1049/2001, Art. 4; Council Regulation No 17, Art. 20)

9. *Competition — Community rules — Infringements — Decision finding an infringement or imposing a fine*
(Council Regulation No 17, Arts 2, 3, 6, 7, 8 and 21(1) and (2))

10. *Competition — Fines — Decision imposing fines*
(Council Regulation No 17)

11. *Actions for annulment — Pleas in law*

(Art. 230, fourth para., EC; European Parliament and Council Regulation No 45/2001)

12. *Acts of the institutions — Acts of the Commission — Commission's discretion as to the extent to which such acts should be published*

1. The acts or decisions against which proceedings for annulment may be brought under Article 230 EC are measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position.

In that regard, the aim of Article 9 of Decision 2001/462 on the terms of reference of hearing officers in certain competition proceedings is to provide, on a procedural level, for the protection required by Community law of information which has come to the knowledge of the Commission in the context of proceedings applying the competition rules. The first two paragraphs of Article 9, referring to the protection of business secrets, concern specifically the disclosure of information to persons, undertakings or associations of undertakings with a view to exercise by them of their right to be heard in the course of proceedings applying the competition

rules. On the other hand, in the case of disclosure of information to the general public, by means of its publication in the *Official Journal of the European Communities*, those provisions only apply mutatis mutandis pursuant to the third paragraph of Article 9 of Decision 2001/462. This means, inter alia, that when the hearing officer takes a decision under that provision, he must ensure compliance with the obligation of professional secrecy in relation to information not requiring protection as special as that afforded to business secrets, and particularly information that may be divulged to third parties having a right to be heard in respect thereof but the confidential nature of which prevents disclosure to the public.

In addition, according to that decision, the hearing officer must also ensure compliance with the provisions of Regulation No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community

institutions and bodies and on the free movement of such data, when he takes a decision under Article 9 authorising disclosure of information.

obligation of professional secrecy enjoys the protection afforded by Community law of information which has come to the knowledge of the Commission in the context of proceedings applying the competition rules, which covers a sphere extending beyond business secrets of undertakings.

It follows that, when the hearing officer takes a decision under the third paragraph of Article 9 of Decision 2001/462, he must not merely examine whether the version of a decision taken under Regulation No 17 and intended for publication contains business secrets or other information enjoying similar protection. He must also check whether that version contains other information which cannot be disclosed to the public either on the basis of rules of Community law affording such information specific protection or because it is information of the kind covered by the obligation of professional secrecy. Accordingly, the hearing officer's decision does produce legal effects in as much as it determines whether a text for publication contains such information.

A distinction should be drawn, in this respect, between the protection that must be afforded to information covered by the obligation of professional secrecy in relation to persons, undertakings or associations of undertakings having a right to be heard in the context of proceedings applying the competition rules, and that which should be afforded to such information in relation to the general public.

(see paras 26, 28, 31-34)

2. Article 20(2) of Regulation No 17 states that, inter alia, information acquired as a result of the application of Regulation No 17 and of the kind covered by the

The obligation on officials and other servants of the institutions not to disclose information in their possession covered by the obligation of professional secrecy, laid down in Article 287 EC and implemented, in the field of competition rules applicable to undertakings, by Article 20(2) of Regulation No 17, is mitigated in regard to persons on whom Article 19(2) confers the right to be heard. The Commission may communicate to such persons certain information covered by the obligation of professional secrecy in so far as it is necessary to do so for the proper

conduct of the investigation. However, that power does not apply to business secrets, which are afforded very special protection. Conversely, information covered by the obligation of professional secrecy cannot be disclosed to the general public, irrespective of whether business secrets or other confidential information are involved.

The need for differential treatment is justified where the concept of business secrets covers information of which not only disclosure to the public but also mere transmission to a person other than the one who provided the information may seriously harm the latter's interests.

(see paras 28-30)

3. The aim of Article 20 of Regulation No 17 and Article 287 EC relating to professional secrecy is, *inter alia*, to protect persons concerned by proceedings applying the competition rules under Regulation No 17 from the harm liable to arise from the disclosure of information obtained by the Commission in the course of those proceedings. Hence, an undertaking concerned by

those proceedings, in principle, has a legal interest in bringing proceedings against the hearing officer's decision to publish the non-confidential version of the Commission decision imposing on it a fine for infringement of the competition rules.

The publication by a third party of the statement of objections does not affect that undertaking's legal interest in bringing proceedings. Even if the information contained in those documents were identical to that contained in the contested parts of the decision imposing fines, the scope of the latter is entirely different from that of a statement of objections. A statement of objections seeks to provide the interested parties with an opportunity to make their point of view known on the Commission's provisional findings against them. Conversely, the decision imposing fines contains a description of the facts which the Commission considers to be established. Thus, the publication of the statement of objections, as harmful as it may be for the interested parties, cannot deprive the addressees of the decision imposing fines of their interest in contending that the published version of that decision contains information protected from disclosure to the public.

By the same token, the legal interest of the addressee of a decision in challen-

ging that decision cannot be denied on the ground that it has already been implemented, since annulment per se of such a decision may have legal consequences, in particular by obliging the Commission to take the measures needed to comply with the Court's judgment and by preventing the Commission from repeating such a practice.

Finally, the fact that circumstances leading an applicant to apply for suspension of operation of the contested decision no longer exist does not mean that the legal interest in the annulment of that decision has disappeared.

(see paras 42-45)

4. The requirement on the Commission under Article 21(1) of Regulation No 17 to publish the decisions which it takes pursuant to Article 3 of that regulation applies to all decisions in which an infringement is found or a fine imposed, and it is unnecessary to ascertain whether those decisions also contain a direction to bring the infringement to an end or whether such a direction is justified in the light of the circumstances of the case.

(see para. 58)

5. The principle of lawfulness is recognised in Community law in the sense of requiring that a penalty, even of a non-criminal nature, may not be imposed unless it rests on a clear and unambiguous legal basis.

It cannot, however, be inferred from the principle of lawfulness that publication of measures adopted by the institutions is prohibited where it is not explicitly prescribed by the Treaties or by another act of general application. As Community law currently stands, such a prohibition would be incompatible with Article 1 EU, according to which, within the European Union, 'decisions are taken as openly as possible'.

(see paras 68, 69)

6. The principle of openness, laid down in Article 1 EU, according to which 'decisions are taken as openly as possible' is reflected in Article 255 EC, which, subject to certain conditions, grants citizens a right of access to documents of the institutions. It is also expressed, inter alia, in Article 254 EC, which makes the entry into force of certain acts of the institutions subject to publication, and in numerous provisions of Community law which, like Article 21(1) of Regulation No 17, require the institutions to provide the public with an

account of their activities. In accordance with this principle, and in the absence of provisions explicitly ordering or prohibiting publication, the power of the institutions to make acts which they adopt public is the rule, to which there are exceptions in so far as Community law, in particular through provisions ensuring compliance with the obligation of professional secrecy, prevents disclosure of such acts or of certain information contained therein.

In order that information be of the kind to fall within the ambit of the obligation of professional secrecy, it is necessary, first of all, that it be known only to a limited number of persons. It must then be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties. Finally, the interests liable to be harmed by disclosure must, objectively, be worthy of protection. The assessment as to the confidentiality of a piece of information thus requires the legitimate interests opposing disclosure of the information to be weighed against the public interest that the activities of the Community institutions take place as openly as possible.

(see para. 69)

7. Neither Article 287 EC nor Regulation No 17 explicitly indicates what information, apart from business secrets, is covered by the obligation of professional secrecy. In that regard, it cannot be inferred from Article 20(2) of Regulation No 17 that that would be the case for all information acquired under that regulation, with the exception of information whose publication is mandatory under Article 21 thereof. Like Article 287 EC, Article 20(2) of Regulation No 17, which applies this provision of the Treaty to the field of competition rules applicable to undertakings, prevents only the disclosure of information 'of the kind covered by the obligation of professional secrecy'.

The Community legislature has balanced the public interest in the transparency of Community action against interests liable to militate against such transparency in various acts of secondary legislation, inter alia in Regulation No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data and Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents. While it is true that the concept of 'professional secrecy' is one of primary law in so far as it appears in Article 287 EC and secondary legislation can in no circumstances amend provisions of the Treaty, the interpretation

which the Community legislature gives to the Treaty with respect to a question which is not expressly dealt with therein none the less constitutes an important indication as to how the relevant provision is to be construed.

secondary legislation, such as Regulation No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. Conversely, this provision is not a bar to publication of information with which the public has the right to be acquainted through the right of access to documents.

It follows that, in so far as such provisions of secondary legislation prohibit the disclosure of information to the public or exclude public access to documents containing it, that information must be considered to be covered by the obligation of professional secrecy. Conversely, to the extent that the public has a right of access to documents containing certain information, that information cannot be considered to be of the kind covered by the obligation of professional secrecy.

(see para. 75)

(see paras 70-72, 74)

8. In relation to the publication of decisions taken by the Commission under Regulation No 17, Article 20 thereof prohibits, besides the disclosure of business secrets, in particular the publication of information covered by the exceptions to the right of access to documents that are laid down in Article 4 of Regulation No 1049/2001, regarding public access to European Parliament, Council and Commission documents, or information which is protected under other rules of
9. Article 21(2) of Regulation No 17 should be constructed as limiting the requirements on the Commission under Article 21(2) to publish the decisions it takes pursuant to Articles 2, 3, 6, 7 and 8 to setting out the parties concerned and the 'main content' of those decisions with a view to facilitating the Commission's task of informing the public of such decisions, having regard inter alia to the linguistic constraints connected with publication in the *Official Journal of the European Communities*. Conversely, that provision does not limit the Commission's power to publish the full text of its decisions, if, resources permitting, it considers it appropriate to do so, without prejudice to the obligation of professional secrecy.

While the Commission is therefore subject to a general obligation to publish only non-confidential versions of its decisions, it is not necessary, to ensure compliance with that obligation, to interpret Article 21(2) as conferring a specific right on addressees of decisions adopted under Articles 2, 3, 6, 7 and 8 of Regulation No 17 allowing them to prevent publication by the Commission in the Official Journal (and, where relevant, on the institution's website as well) of information which, even though not confidential, is not part of the 'main content' essential for understanding the operative part of those decisions.

Moreover, the interest of an undertaking which is a member of a cartel in the details of its offending conduct not being disclosed to the public does not warrant any particular protection, given the public interest in knowing as fully as possible the reasons behind any Commission action, the interest of the economic operators in knowing the sort of behaviour for which they are liable to be penalised and the interest of persons harmed by the infringement in being informed of the details thereof so that they may, where appropriate, assert their rights against the undertakings punished.

(see paras 76-78, 88)

10. The inclusion, in a decision imposing fines, of findings of fact in respect of a cartel cannot be conditional on the Commission having the power to find an infringement relating thereto or on its actually having found such an infringement. It is legitimate for the Commission, in a decision finding an infringement and imposing a penalty, to describe the factual and historical context of the conduct in issue. The same is true for the publication of that description, given that publication may be of use in allowing persons interested to understand fully the reasoning behind such a decision. In this respect, it is for the Commission to judge whether the inclusion of such matters is appropriate.

(see para. 89)

11. Regulation No 45/2001, on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, seeks to protect individuals with regard to the processing of personal data. A

legal person does not belong to the circle of persons which the regulation is intended to protect and cannot therefore invoke an alleged breach of the rules which that regulation prescribes.

(see para. 95)

12. Outside the obligations in respect of publicity imposed upon it inter alia by Regulation No 17, the Commission has considerable latitude in deciding, on a case-by-case basis, what publicity should be given to its acts. It is in no way required to treat acts of the same nature

identically in this respect. In particular, the principle of equality does not prohibit the Commission from posting texts whose publication in the *Official Journal of the European Communities* is envisaged, but which it does not yet have in all the official languages, in advance on its website in the languages available or in that (those) best known by interested members of the public. In this respect, the fact that only certain language versions are available to it constitutes a sufficient difference to justify the differential treatment.

(see para. 102)