ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
7 November 2003 *

In Case T-198/03 R,

Bank Austria Creditanstalt AG, established in Vienna (Austria), represented by C. Zschocke and J. Beninca, 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 suspenson of the operation of the decision of the Commission's hearing officer of 5 May 2003 to publish the non-confidential version of the Commission's decision of 11 June 2002 in Case COMP/36.571/D-1 — Austrian Banks ('Lombard Club'),

* Language of the case: German.

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

makes the following

Order

Legal background

1 Under Article 3(1) 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), where the Commission 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'.

2 Article 20 of Regulation No 17, which relates to professional secrecy, lays down that information acquired as a result of the application of various articles of that regulation 'may be used only for the purpose of the relevant request or investigation' (paragraph 1), that the Commission, its officials and other servants 'are obliged not to 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' (paragraph 2) and finally that the provisions of paragraphs 1 and 2 'do not prevent publication of general information or surveys which do not contain information on individual undertakings or associations of undertakings' (paragraph 3).

3 According to Article 21(1) of Regulation No 17, the Commission must publish 'the decisions which it takes pursuant to Articles 2, 3, 6, 7 and 8'. Under paragraph 2, the publication must 'state the names of the parties and the main content of the decision' and 'must have regard to the legitimate interest of undertakings in the protection of their business secrets'.

4 Article 9 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21) lays down that:

'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 first and second paragraphs shall apply *mutatis mutandis* to the disclosure of information by publication in the *Official Journal of the European Communities*.'

Facts and procedure

5 By a decision of 11 June 2002, adopted in connection with Case COMP/36.571/D-1 — Austrian Banks ('Lombard Club'), the Commission found that from 1 January 1995 to 24 June 1998 the applicant had participated in an agreement with several other Austrian banks (Article 1) and therefore decided (Article 3) to impose a fine on the applicant and the other banks involved in the procedure ('the decision to impose fines').

6 By letter dated 12 August 2002, the Commission sent the applicant the draft of a non-confidential version of the decision to impose fines and asked it to agree to publication of that version.

7 On 3 September 2002 the applicant (like most of the other banks involved) brought an action for annulment of the decision to impose fines, which was registered under number T-260/02. By its application, the applicant does not contest the facts stated by the Commission in the decision in question but only the level of the fine imposed on it.

8 By letter dated 10 September 2002, in reply to the request of 12 August 2002 for agreement to publish the decision, the applicant asked the Commission to publish the decision to impose fines without the statement of facts relating to the year 1994 contained in recital 7 and to replace recitals 8 to 12 of the decision by a text proposed by the applicant.

9 A meeting between the responsible staff of the Commission and the lawyers of all the addressees of the decision to impose fines was held on 7 October 2002. They were unable to reach agreement, however, in particular on the applicant's request

of 10 September 2002. With reference to this request, on 22 October 2002 the responsible director of the Commission's Directorate-General for Competition sent the applicant a letter, in which he reiterated the Commission's view on publication of the decision to impose fines and enclosed a revised non-confidential version of that decision.

10 On 6 November 2002 the applicant asked the hearing officer to grant its request of 10 September 2002.

11 By letter dated 20 February 2003, the hearing officer expressed the opinion that the said request was unfounded and presented the applicant with a new non-confidential version of the decision to impose fines.

12 By letter dated 28 February 2003, the applicant stated that it continued to oppose publication of this non-confidential version.

13 By letter dated 5 May 2003, the hearing officer presented a revised non-confidential version of the decision to impose fines and decided to reject the applicant's objection to publication of that decision ('the contested decision'). In accordance with the third paragraph of Article 9 of Decision 2001/462, the hearing officer stated that this version of the decision to impose fines ('the contested version') contained no information covered by the guarantee of confidential treatment under Community law.

14 By an application lodged at the Registry of the Court of First Instance on 6 June 2003, the applicant brought an action for annulment of the contested decision under paragraph 4 of Article 230 EC.

15 By separate document lodged at the Registry of the Court of First Instance on the same day, the applicant applied for operation of the contested decision to be suspended until judgment had been delivered in the main proceedings and, in the alternative, for the Commission to be prohibited from publishing the contested version until that time.

16 On 30 June 2003 the Commission submitted its written observations on the application for interim measures. The hearing before the President of the Court of First Instance was held on 12 September 2003.

Law

17 Pursuant to Articles 242 EC and 243 EC in conjunction with the first paragraph of Article 225 EC, 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 necessary interim measures.

18 Pursuant to Article 104(2) of the Rules of Procedure of the Court of First Instance, an application for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. Those conditions are cumulative, so that an

application for interim measures must be dismissed if any one of them is absent (order of the President of the Court of Justice in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30).

19 In the context of his overall examination, the judge hearing an application for interim measures enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be assessed (order of the President of the Court of Justice in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 22).

Admissibility

20 The Commission contends that the application in the main proceedings is inadmissible. In its opinion, the contested decision is not an act open to challenge.

21 In this regard it has to be stated that according to settled case-law the issue of the admissibility of the main application should not in principle be examined in proceedings relating to an application for interim measures, so as not to prejudge the substance of the case. It may nevertheless be necessary, when it is contended that the main application to which the application for interim measures relates is manifestly inadmissible, to establish whether there are any grounds for concluding *prima facie* that the main application is admissible (order of the President of the Court of Justice in Case 376/87 R *Distrivet* v *Council* [1988] ECR 209,

paragraph 21; order of the President of the Court of First Instance in Case T-13/99 R *Pfizer Animal Health* v *Council* [1999] ECR II-1961, paragraph 121 ('the *Pfizer* order'), confirmed on appeal by order of the President of the Court of Justice in Case C-329/99 P(R) *Pfizer Animal Health* v *Council* [1999] ECR I-8343, and order of the President of the Court of First Instance in Case T-392/02 R *Solvay Pharmaceuticals* v *Council* [2003] ECR II-4555, paragraph 53).

22 It therefore has to be examined whether there are grounds for concluding *prima facie* that the main application is admissible.

Arguments of the parties

23 In its application for interim measures the applicant contends that the contested decision is open to challenge. As that decision concludes an administrative procedure on whether and how to publish a decision to impose fines, the applicant maintains that it is final and can therefore be challenged. Pursuant to Article 20(1) to (3) of Regulation No 17, the applicant is entitled to demand that publication of the decision to impose fines comply with the provisions of Article 21(1) and (2) of that regulation. The detailed factual descriptions that the Commission intends to publish are, in the opinion of the applicant, not only unusual but also unnecessary, as the applicant admitted the anti-competitive conduct of which it is accused as long ago as 1998, that is to say at the outset. Their publication would prejudice the reputation of the applicant and its employees.

24 The Commission contests the admissibility of the present application for interim measures on the ground that the contested decision does not harm the applicant. According to the Commission, the right to suppress the publication of particular

sections of such a decision is subject to two conditions. First, the sections in question must be business secrets or similarly protected information, and, secondly, the undertaking's interest in protection of that information must outweigh the public interest in its publication. According to the Commission, however, the applicant has not named a single business secret or similarly protected item of information that is to be contained in the contested version. Consequently, it has no interest in opposing the contested decision.

25 In addition, according to the Commission, publication is not a consequence of the contested decision but stems directly from Article 21(1) of Regulation No 17. Article 21(2) of that regulation provides no grounds for preventing the publication of a decision of the kind in question or sections thereof, but merely describes for the benefit of third parties the information the Commission is obliged to publish.

26 The complaint about the portrayal of the applicant's conduct in 1994 essentially relates, in the opinion of the Commission, to the legality (at issue in Case T-260/02) of the decision to impose fines and was therefore submitted out of time in the context of the main application in the present case. In any event, as it does not relate to the publication of any business secret or similarly protected information, the applicant has no interest in bringing proceedings in relation to that complaint.

27 At the hearing the applicant contested the Commission's analysis. In particular, citing the third paragraph of Article 9 of Decision 2001/462, it pointed out that this provision also applies to the Commission's publication of information that is not a business secret. The applicant asserts that, in the event of objection to an item of information that the Commission intends to publish, the procedure laid down in the third paragraph of Article 9 of the decision is to be followed. Under

this procedure, in accordance with Article 21(2) of Regulation No 17, the Commission may publish only the main content of decisions issued, *inter alia*, under Article 3 of the regulation. In the opinion of the applicant, the main content of a decision cannot be equated to the entire decision. Consequently, the applicant is entitled to object to elements in the contested version that it does not consider to be essential.

28 In response to that argument the Commission contended that whereas the first and second paragraphs of Article 9 of Decision 2001/462 relate expressly to the disclosure of information that could constitute business secrets, the third paragraph of Article 9 deals with the publication of such information. Consequently, the decision of a hearing officer based on the latter provision can only be open to challenge to the extent that it concerns business secrets.

Assessment by the judge hearing the application for interim measures

29 Pursuant to the fourth paragraph of Article 230 EC, '[a]ny natural or legal person may... institute proceedings against a decision addressed to that person'.

30 In the present case it is common ground that the contested decision is addressed to the applicant. It has to be established, however, whether that decision represents *prima facie* an act that is open to challenge.

31 According to settled case-law, proceedings for annulment may be brought under Article 230 EC against acts or decisions the legal effects of which are binding on,

and capable of affecting the interests of, the applicant by having a significant effect on his legal position (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9; Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 28; and order in Case T-219/01 *Commerzbank* v *Commission* [2003] ECR II-2843, paragraph 53).

32 As is evident from the arguments submitted to the judge hearing the application for interim measures, the Commission considers the application in the main proceedings to be inadmissible essentially because the applicant has in no way demonstrated that the contested version contains business secrets. In its opinion, the applicant therefore has no interest in bringing proceedings because disclosure of the information to which it objects cannot have a significant effect on its legal position.

33 It must first be pointed out that Article 287 EC and Article 20 of Regulation No 17 prohibit only the disclosure of information covered by the obligation of 'professional secrecy' and which the Commission has acquired in the course of an investigation carried out in accordance with that regulation. As is evident from Article 21(2) of Regulation No 17, the Commission is under the same obligation when deciding on publication in the Official Journal of the decisions referred to in that article. It follows that a decision in which the Commission declines to acknowledge, in connection with such publication, that certain information that a person involved requires to be treated confidentially represents business secrets has legal effects for that person (see, by analogy, Case 53/85 *AKZO* v *Commission* [1986] ECR 1965, paragraphs 17 and 18; order in Case T-90/96 *Peugeot* v *Commission* [1997] ECR II-663, paragraphs 34 and 36; order in *Commerzbank* v *Commission*, paragraphs 69 and 70, and order of the President of the Court of First Instance in Case T-213/01 R *Österreichische Postsparkasse* v *Commission* [2001] ECR II-3963, paragraph 49).

34 The fact that a decision to publish is taken by the hearing officer on behalf of the Commission on the basis of the third paragraph of Article 9 of Decision 2001/462, as in the present case, is at least *prima facie* irrelevant (see, by analogy, the order in *Commerzbank* v *Commission*, paragraphs 69 and 70).

35 If the contested version were to contain information that could constitute business secrets of the applicant, its publication in implementation of the contested decision would have the inevitable and irreversible consequence that those secrets would be disclosed to third parties. The applicant would therefore be entitled to question the validity of that decision.

36 In the present case, however, the Commission specifically contends that the information in question clearly does not constitute business secrets. Although it is not for the judge hearing the application for interim measures to examine the correctness of this statement in the course of the present proceedings, it is evident especially from the applicant's oral submissions that the applicant does not in fact contest this assertion on the part of the Commission. It is therefore necessary to examine whether the applicant is none the less entitled to challenge the validity of the contested decision.

37 In this regard it must be stated that, in the light of the case-law cited in paragraph 33 above, the Commission's interpretation of Article 21 of Regulation No 17 — according to which it is obliged to publish at least the main content of every decision issued on the basis *inter alia* of Article 3 of the regulation — appears *prima facie* rather convincing. It is not irrelevant that this interpretation corresponds to the Commission's long-standing practice with regard to publication, while the interpretation advocated by the applicant rests on reasoning *a contrario* that any publication which the Commission is not expressly required to make is unlawful.

38 It cannot be excluded, however, that the Commission's obligation to publish a decision pursuant to Article 21(2) of Regulation No 17 extends only to publication of its 'main content'. It is conceivable that, with regard to the Commission's general obligation to publish only non-confidential versions of its decisions, in other words versions making no reference to the business secrets of the addressees, the Community legislature intended to grant the addressees of decisions issued in accordance with Articles 2, 3, 6, 7 and 8 of Regulation No 17 a special right to object to the Commission's publication in the Official Journal (and, where applicable, also on its internet pages) of information that although not confidential is not 'essential' to an understanding of the operative part of those decisions.

39 That this appears *prima facie* to be an interpretation of Article 21 of Regulation No 17 that is to be taken seriously is confirmed to some extent by the wording of the third paragraph of Article 9 of Decision 2001/462 (see paragraph 4 above), which at first sight appears to be ambiguous. It cannot be excluded that, as the applicant contends, this provision applies to the publication of information in general and not only to business secrets and that consequently the applicant is entitled to challenge the publication of information that in its opinion is sensitive and which is not essential to understanding the Commission decision, the publication of which is at issue.

40 As such an interpretation of the third paragraph of Article 9 of Decision 2001/462 would apply, if it were upheld by the judge hearing the application in the main proceedings, to the information in recitals 8 to 12 of the contested version, it cannot be excluded that it would also extend to all the information in recital 7 of that version. As this information relates to 1994, it is difficult not to conclude that its publication is not 'essential' to understanding the reasons for a decision such as the decision to impose fines, which in Article 1 of its operative part finds that an infringement was committed during the period from 1 January 1995 to 24 June 1998.

41 In that case, if the judge hearing the application in the main proceedings confirmed the applicant's claimed right to oppose publication of this information, such publication, which would obviously be irreversible, would be such as to have a significant effect on the applicant's legal position.

42 There are therefore factors which *prima facie* permit the conclusion that the contested decision is an act open to challenge and that the applicant is therefore entitled to apply for its annulment under the fourth paragraph of Article 230 EC. As it can therefore not be excluded that the applicant's main head of claim is admissible, it is necessary briefly to examine the admissibility of the alternative head of claim seeking suspension of the publication of the decision to impose fines. As the subject-matter of the alternative head of claim is in fact the same as that of the main head of claim, namely the temporary prohibition of publication of the contested information, it should not be treated separately.

43 In these circumstances, in relation to the main head of claim for suspension of the contested decision, it must be examined whether the requirement of urgency is met.

Urgency

Arguments of the parties

44 According to the applicant, the urgency requirement is met in the present case. It maintains that it will suffer material and non-material damage which will not be able to be remedied even after annulment of the contested decision.

45 With regard to material damage, the applicant mentions a class action that has already been brought in the United States. At the hearing, it stated that a hearing in this case had been set for 24 October 2003 in New York. In addition, it said it feared that claims for damages might be brought in Austria against it and the other Austrian banks to which the decision to impose fines was addressed. It claims that the American and Austrian claimants will probably make use of the sensitive information made available to them by publication of the decision in question. It is also conceivable, in the applicant's opinion, that the Austrian prosecuting authorities could identify those working with the applicant and the other banks involved, as a result of publication of the decision to impose fines, and could use this information in prosecutions that have already begun.

46 As to non-material damage, the applicant maintains that disclosure of the identity of its employees could seriously infringe their personal rights. Under the data protection legislation, it has a duty to protect the interests of its employees. Publication of the sensitive information contained in the contested version would thus seriously damage the applicant's reputation.

47 According to the applicant, this damage would be irreversible. In its opinion, subsequent annulment of the contested decision could not neutralise the effects of publication of the contested version, as the sensitive information in question would have entered the public domain, all the more so as neither Austrian nor American law prohibits information that has unlawfully become public knowledge in this manner from being used as evidence.

48 The Commission contends that the material damage claimed by the applicant is purely financial. If such damage occurred, in the Commission's opinion it would not be irreparable or even reparable only with difficulty. It maintains that in any event the damage is purely hypothetical, as it depends on the occurrence of uncertain events.

49 With regard to the non-material damage claimed by the applicant, the Commission asserts that the applicant provides no evidence to show that serious and irreparable damage to its reputation is foreseeable with a sufficient degree of probability. Any actions brought against it by its employees would lead to only financial damage, which could subsequently be remedied. According to the Commission, the applicant provides no further information on the alleged damage to the reputation of certain employees, so that no causal relationship is established between such damage and any impairment of its own reputation.

Assessment by the judge hearing the application for interim measures

50 It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the need for an interim order in order to avoid serious and irreparable damage being caused to the applicant (see order of the President of the Court of Justice in Case C-208/03 P(R) *Le Pen* v *Parliament* [2003] ECR I-7939, paragraph 77). It is for that party to adduce proof that it cannot await the outcome of the main action without suffering such damage (order of the President of the Court of Justice in Case C-278/00 R *Greece* v *Commission* [2000] ECR I-8787, paragraph 14; order of the President of the Court of First Instance in Case T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, paragraph 43; and order in *Österreichische Postsparkasse* v *Commission*, paragraph 66). It does not have to be established with absolute certainty that the harm is imminent; it is sufficient that the harm in question, particularly where it depends on the occurrence of a number of factors, should be foreseeable with a sufficient degree of probability (order in *Commission* v *Atlantic Container Line and Others*, paragraph 38, and order of the President of the Court of First Instance in Joined Cases T-195/01 R and T-207/01 R *Government of Gibraltar* v *Commission* [2001] ECR II-3915, paragraph 96).

51 Although it is true that, in order to establish the existence of serious and irreparable damage, it is not necessary to require absolute proof that the damage would occur and it is enough for it to be reasonably foreseeable, the fact remains

that the applicant is still required to prove the facts which are deemed to attest to the probability of such serious and irreparable damage (order of the President of the Court of Justice in Case C-335/99 P(R) *HFB and Others* v *Commission* [1999] ECR I-8705, paragraph 67, and order in *Greece* v *Commission*, paragraph 15).

52 The damage alleged by the applicant relates primarily to the possible use of the contested version in actions for damages against it in the United States, in Austria or even, as stated at the hearing, in Germany. As the Commission rightly pointed out, in the present case it is therefore clear that any damage that the applicant might suffer would be purely financial. This is also true of the danger adduced by the applicant that its employees might bring actions against it if they took the view that it had failed in its duty to protect their interests.

53 With regard to such damage, it has to be remembered that according to settled case-law damage of a purely pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable or even as being reparable only with difficulty, since it may be the subject of subsequent financial compensation (order of the President of the Court of Justice in Case C-471/00 P(R) *Commission* v *Cambridge Healthcare Supplies* [2001] ECR I-2865, paragraph 113, and order in *Solvay Pharmaceuticals* v *Council*, paragraph 106).

54 On the basis of that principle, the requested suspension of operation would be justified only if it appeared that, in the absence of such a measure, the applicant would be placed in a situation that could endanger its existence or irreversibly alter its market share (the *Pfizer* order, paragraph 138, and order in *Solvay Pharmaceuticals* v *Council*, paragraph 107).

55 In the present case the applicant has at no time demonstrated or even genuinely claimed that operation of the contested decision would endanger its existence. Nor has it asserted that it would lose market share as a result of the operation of the contested decision.

56 In these circumstances the inevitable conclusion is that that pecuniary damage cannot justify the suspension of operation for which the applicant has applied.

57 Moreover, the damage invoked remains largely, if not entirely, hypothetical in so far as it is based on the occurrence of future and uncertain events. Such damage cannot justify granting the interim measures requested (see order in *Government of Gibraltar* v *Commission*, paragraph 101). As matters stand at present, it is impossible to predict the influence or effect that the possible use of the information contained in the contested version in current and future civil proceedings to which the applicant refers could have on the outcome of those actions. Consequently, the mere commencement of actions for damages or indeed other actions does not appear capable of causing serious and irreparable harm to the applicant (see order of the President of the Court of Justice in Case C-180/01 P(R) *Commission* v *NALOO* [2001] ECR I-5737, paragraph 57).

58 As to the criminal prosecutions allegedly instituted in Austria against the applicant and the other banks involved, it is not for the judge hearing the application for interim measures to speculate on whether those proceedings are based on the decision to impose fines. The damage claimed in this respect by the applicant is patently hypothetical. Furthermore, at the hearing the applicant

stated that the proceedings brought against it will probably be settled without it having to acknowledge guilt. Even if the national authorities did not terminate those proceedings and the applicant were ultimately found guilty, the resulting damage would in any case be essentially pecuniary.

59 As regards the alleged non-material damage, in its application for interim measures the applicant provides only very scant evidence that could justify the expectation of serious and irreparable damage to its reputation with the probability required by the case-law cited in paragraphs 50 and 51 above. As it emerged in particular from the statements of the applicant at the hearing, some of the information contained in the contested version is sensitive and could be used both by persons who wish to bring civil proceedings and by those who have already brought such proceedings against it.

60 However, the applicant does not contend that the information in question is confidential and does not indicate to what extent its use in civil proceedings brought against it could seriously damage its reputation. In particular, it does not explain what influence or impact the use of this information could have on the course of actions which are pending or likely. It has therefore to be concluded that the non-material damage in question is purely hypothetical.

61 On the question of the alleged damage to the reputation of its employees, it must first be stated that the Commission disputes that the publication in question would make it possible to discover the identity of such employees. As the judge hearing the application for interim measures cannot rule on this matter, it is sufficient to note that, even if there is a danger of the identity of particular natural persons being disclosed, the applicant has not provided the slightest shred of evidence to show how this could lead to serious damage to its reputation with a sufficient degree of probability.

62 It follows from the foregoing that the applicant has not successfully proved that the requirement of urgency has been met.

63 For that reason the application must be dismissed, without it being necessary to examine whether the requirement to show that a *prima facie* case exists has been satisfied.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

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

2. **Costs are reserved.**

Luxembourg, 7 November 2003.

H. Jung — Registrar

B. Vesterdorf — President