

Appeal brought on 2 March 2007 by Erste Bank der österreichischen Sparkassen AG against the judgment of the Court of First Instance (Second Chamber) delivered on 14 December 2006 in Joined Cases T-259/02 to T-264/02 and T-271/02 Raiffeisen Zentralbank Österreich AG and Others v Commission of the European Communities concerning Case T-264/02

(Case C-125/07 P)

(2007/C 117/10)

Language of the case: German

Parties

Appellant: Erste Bank der österreichischen Sparkassen AG (represented by: F. Montag, Rechtsanwalt)

Other party to the proceedings: Commission of the European Communities

Form of order sought

- Partial annulment of the judgment of the Court of First Instance of the European Communities (Second Chamber) of 14 December 2006 in Joined Cases T-259/02 to T-264/02 and T-271/02 ⁽¹⁾ in so far as it dismissed the action in Case T-264/02 against Commission Decision C (2002) 2091 final of 11 June 2002 relating to a proceeding under Article 81 of the EC Treaty and annul the aforementioned Commission Decision in so far as it imposes a fine on the applicant;
- In the alternative, an appropriate reduction in the fine imposed on the applicant in Article 3 of Commission Decision C (2002) 2091 final of 11 June 2002 relating to a proceeding under Article 81 of the EC Treaty;
- In the further alternative, annulment of the judgment of the Court of First Instance mentioned in Point 1 and reference of the case back to the Court of First Instance;
- The defendant to pay the costs in any event.

Pleas in law and main arguments

1. It is submitted that the contested judgment failed to have regard to the scope of the right to be heard. The applicant did not receive a proper hearing with respect to the planned attribution by the Commission of the market shares for the Austrian savings bank sector. The Court erred in law in assuming in its judgment that the defendant's reference in the statement of objections to the applicant as the lead institution of the savings bank sector was sufficient to safeguard the applicant's right to a fair hearing. The defendant should also have pointed out to the applicant the conclusions it intended to draw from that factor.

2. As regards the substance of the case, it is contended that the Court failed to appreciate that the defendant's Decision

a. infringed Article 15(2) of Regulation No 17/1962 because the conduct of GiroCredit in respect of the period before its takeover by the applicant was attributed to the applicant. Instead GiroCredit's conduct with regard to that period should have been attributed to the Bank Austria group as it (i) controlled GiroCredit and influenced its participation in the Lombard Club, (ii) took part in the agreements of the Lombard Club through another group member company and (iii) still legally existed at the time when the Decision was adopted.

b. infringed Article 15(2) of Regulation No 17/1962 because the market shares of the savings banks, which were legally and economically independent during the period when the infringement occurred (1995 to June 1998), were attributed to the applicant. There was no legal basis for the attribution of the savings bank sector to the applicant. Furthermore, there were no preconditions for the legal bases which the Court and the defendant took into consideration.

c. infringed Article 81(1) EC as the attribution to the applicant of the market shares for the savings bank sector meant that, in the final analysis, the conduct of the legally and economically independent savings banks was attributed to the applicant without regard to the strict preconditions which the Court has set out concerning the attribution of conduct by others.

d. infringed Article 15(2) of Regulation No 17/1962 as the fine should not have been imposed on account of the unlawful attribution to the applicant of GiroCredit and the savings bank sector and was in any event too high.

e. infringed Article 15(2) of Regulation No 17/1962 even if the attribution to the applicant of the savings bank sector had occurred lawfully, which it did not, as the attribution to the applicant of the entire savings bank sector was unlawful because a separate fine was imposed on Bank Austria and Erste österreichische Sparkasse — Bank AG respectively with the result that their market shares should not also have been taken into account again, and thus twice, in fixing the fine to be paid by the applicant.

f. infringed Article 81(1) EC as the agreements of the Lombard Club did not result in any 'perceptible' effect on trade between Member States with the result that Article 81(1) EC should not have been applied in the present case.

⁽¹⁾ OJ C 331, p. 29.