ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
9 July 2003 *

In Case T-219/01,

Commerzbank AG, established in Frankfurt am Main (Germany), represented by H. Satzki and B. Maassen, lawyers,

applicant,

v

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

defendant,

* Language of the case: German.

APPLICATION for annulment of the decision of the hearing officer of 17 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 the euro zone,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: R. García-Valdecasas, President, P. Lindh and J.D. Cooke, Judges,

Registrar: H. Jung,

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), repealing Commission Decision 94/810/ECSC, EC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission (OJ 1994 L 330, p. 67).

2 The third and sixth recitals of Decision 2001/462 state respectively that the conduct of administrative proceedings should be entrusted to an independent person experienced in competition matters — the hearing officer — who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings and that in order to ensure independence he should be attached, for administrative purposes, to the member of the Commission with special responsibility for competition. Moreover, measures should be taken to increase transparency as regards the appointment, termination of appointment and transfer of hearing officers.

3 Pursuant 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 subsequent decision regarding administrative proceedings in competition matters. Under the same article, the hearing officer is to seek to ensure in particular that, in the preparation of draft Commission decisions relating to 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 lays down that:

'1. Where a person, an undertaking or an association of persons or undertakings has received [from the Commission] one or more of the letters listed in Article 7(2) [including those notifying 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 Pursuant to Article 9 of Decision 2001/462:

'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.'

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. The Commission 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 1 August 2000 the Commission sent a statement of objections to the applicant as part of that investigation.

8 On 24 November 2000 the applicant submitted its observations in that regard.

9 The applicant's views were heard at a hearing held on 1 and 2 February 2001.

10 It is apparent from Commission press releases dated respectively 11 April, 7 and 14 May 2001 that the Commission decided to terminate the infringement procedure opened against the Netherlands, 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 Furthermore, a Commission 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.

12 By letter dated 15 August 2001, addressed to the hearing officer of the Commission, the applicant asked to be informed of the circumstances which had led to the termination of the administrative procedure in the parallel cases. The applicant also indicated that it considered wider access to the files essential, especially as regards the documents of the procedure relating to the German and

Netherlands banks. For purposes of its defence, the applicant sought in particular to know why the procedure against the Netherlands GWK Bank had been closed, even though according to the statement of objections that bank had supposedly played an important role in the alleged infringement and had not reduced its bank fees for exchanging currencies of the euro zone in Germany.

13 By a first letter dated 17 August 2001 (hereinafter the 'contested act'), the hearing officer rejected that request for access to the said documents on the following grounds:

'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, Commerzbank has 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. In so doing, account has been taken of your right to mount an unlimited 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 client. 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 is it possible 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].'

14 By application lodged at the Registry of the Court of First Instance on 24 September 2001, the applicant brought the present action.

15 On the same date it submitted to the Court a separate application for interim measures in the form, first, of suspension of the operation of the contested act 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 (Commerzbank AG).

16 On 5 October 2001 the Commission submitted its observations on the application for interim measures. 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, which it did on 23 October 2001.

17 By order of 5 December 2001, the President of the Court of First Instance dismissed the application for interim measures for lack of serious evidence that the action in the main proceedings was admissible.

18 By application lodged at the Registry of the Court of Justice on 10 December 2001, the applicant appealed against that order. The case was registered under number C-480/01 P(R).

19 On 11 December 2001 the Commission adopted Decision 2003/25/EC relating to a proceeding under Article 81 of the EC Treaty (Case COMP/E-1/37.919 (ex 37.391) — Bank charges for exchanging euro-zone currencies — Germany) (OJ 2003 L 15, p. 1). In that decision, which concluded the administrative procedure initiated in particular against the applicant, the Commission held that the applicant had infringed Article 81 EC and ordered it to pay a fine.

20 By order of 27 February 2002, the President of the Court of Justice ruled that there was no longer need to adjudicate on the application in Case C-480/01 P(R) brought against the order of the President of the Court of First Instance of 5 December 2001 in so far as the adoption of Decision 2003/25 by the Commission on 11 December 2001 had removed any interest on the part of the applicant in continuing with the application for interim measures.

21 In its rejoinder, lodged at the Registry of the Court of First Instance on 5 March 2002, the Commission stated that there was no longer need to proceed to judgment in the present case, as the adoption of Decision 2003/25 on 11 December 2001 rendered nugatory the request for access to the documents, the purpose of which was to prevent the adoption of such a decision. On 9 April 2002 the applicant submitted its observations in that regard.

22 By letter of 14 November 2002, the applicant informed the Court of First Instance that the present action had become partly devoid of purpose, as the Commission had given it access to some of the documents in question.

23 In the light of the content of that letter, the Registrar asked the applicant whether it intended to withdraw partially from the action.

24 By letter of 10 February 2003, the applicant reiterated that it had had access to some of the documents in question. However, it requested annulment of the contested act, as it had not had access to all the information in question, and applied for the Commission to be ordered to pay the costs.

25 By letter of 26 March 2003, the Commission stated that the applicant had indeed had access to a limited number of documents. However, that access had been granted under a separate procedure for access to the documents and only after the adoption of Decision 2003/25. Moreover, it observed that it was immaterial which documents had been released, as the present application had become devoid of purpose as a result of the adoption of Decision 2003/25 and was, in any event, inadmissible. In those circumstances, it considered that it should not be ordered to pay the costs.

Forms of order sought

26 The applicant claims that the Court of First Instance should:

— annul the contested act;

— order the Commission to pay the costs.

27 The Commission claims that the Court of First Instance should:

— rule that the action is devoid of purpose or, in the alternative, dismiss it;

— order the applicant to pay the costs.

Law

28 Under Article 113 of its Rules of Procedure, the Court of First Instance may at any time of its own motion consider whether there exists any absolute bar to proceeding with an action, including, as the Court has consistently held, the conditions for the admissibility of an action for annulment, and is to give its decision in accordance with Article 114(3) and (4) (orders of the Court of First Instance in Cases T-100/94 *Michailidis and Others* v *Commission* [1998] ECR II-3115, paragraph 49, and T-354/00 *Métropole Télévision (M6)* v *Commission* [2001] ECR II-3177, paragraph 27).

29 Under Article 114(3) of the Rules of Procedure, unless the Court of First Instance otherwise decides, the remainder of the proceedings shall be oral. In the present case, the Court finds that it has sufficient information from the documents produced and the explanations given by the parties during the written procedure to enable it to rule on the admissibility of the action without opening the oral procedure.

Arguments of the parties

30 The applicant first claims that the contested act constitutes a decision within the meaning of Article 249(4) EC and that the Commission itself described it as a decision. Moreover, it maintains that the hearing officer adopted the contested act pursuant to Article 8 of Decision 2001/462, which permits the adoption of decisions.

31 In that regard, the applicant points out that the latter article makes provision, in the context of competition proceedings, for an independent interlocutory procedure for access to the documents that leads to the adoption of a reasoned decision.

32 Secondly, the applicant states that the Commission's refusal to grant the request of the undertakings involved to consult the file before the adoption of Decision 2001/462 was merely a preparatory procedural measure (judgment of the Court of First Instance in Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667). However, in Decision 2001/462 the Commission had, according to the applicant, created an independent administrative procedure to safeguard the right to be heard and strengthened the role and independence of the hearing officer. Hence, in the opinion of the applicant, if the objectives of Decision 2001/462 are to have any meaning, decisions adopted by the hearing officer now constitute acts against which an action for annulment may be brought.

33 Moreover, according to the applicant, even before the adoption of Decision 2001/462, preliminary decisions could, in exceptional circumstances, be the subject of an action for annulment (judgment of the Court of Justice in Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965). In the applicant's view, this applies to decisions taken by the hearing officer under Article 9 of Decision 2001/462 regarding business secrets, and there is no reason why decisions taken under Article 8 of Decision 2001/462 should be different in nature.

34 Even if the hearing officer's decisions refusing requests for access to the file were not actionable acts, according to the applicant there are particular circumstances in the present case that make it comparable to the application that gave rise to the judgment in *AKZO Chemie* v *Commission*.

35 Thirdly, the applicant observes that the purpose of its request for access to the contested file is not to assert its right to have its views heard regarding the objections raised against it, as consideration of these questions forms part of the examination of the action against the final decision concluding the administrative proceedings.

36 In requesting access to the contested file, the applicant seeks an opportunity to express its views on the criteria on which the Commission based its decision to suspend the parallel administrative proceedings against other banks. In its opinion, that information would enable it to prove that the principle of equal treatment had been infringed, in that the administrative proceedings against other banks had not been concluded by the adoption of a final decision finding that they had infringed Article 81 EC.

37 The applicant maintains that the only information it has in this regard is that the suspension of some of the administrative proceedings against other banks was justified by the fact that they had reduced their banking fees, by amounts that varied very widely from one bank to another.

38 According to the applicant, an action against a final decision of the Commission would not afford it sufficient legal protection. It could lead, at best, only to annulment of that decision, without the applicant having the opportunity to prevent its being adopted, thereby contributing to the economy of the proceedings.

39 The applicant maintains that the contested act harmed its interests in that regard by altering its legal situation and produced binding legal effects in that its right to a fair hearing could no longer be upheld once a final decision had been adopted.

40 Consequently, in the view of the applicant, taking account of the criteria developed by case-law, an action for annulment of the contested act is admissible, regardless of the new rules resulting from the adoption of Decision 2001/462.

41 In its reply, the applicant observes that on 11 December 2001 the Commission adopted a final decision finding that it had infringed Article 81 EC and imposing a fine. It considers that in that situation it is no longer possible to ensure respect for its right to be heard before the adoption of a decision imposing a fine.

42 Having itself closed the administrative proceedings by adopting that final decision, the Commission cannot, in the applicant's view, assert that the applicant no longer has an interest in acting in the present application. The applicant maintains that its interest in annulment of the contested act now consists in the fact that, if annulment is granted, the Commission will be required to allow it access to the information it has requested on the circumstances that justified the suspension of the parallel administrative proceedings against other banks. That information would enable the applicant to justify the application for annulment brought against the Commission's final decision of 11 December 2001. Furthermore, to permit the Commission to exempt the decisions of the hearing officer from judicial review by accelerating the proceedings would necessarily lead to an infringement of certain procedural safeguards.

43 The applicant maintains that in that regard the facts of the present case are distinctly different from those of the cases that led to the judgment in *Cimenteries CBR and Others* v *Commission*. In the present case, according to the applicant,

after a long investigation the Commission suspended the administrative proceedings initiated against other banks and notified the adoption of a final decision imposing a fine on the applicant; in so doing, the Commission limited its discretionary power.

44 In conclusion, the applicant considers that the contested act is a decision within the meaning of Article 230 EC.

45 Without formally raising an objection of inadmissibility, the Commission contends that the application is manifestly inadmissible and also cites the judgment in *Cimenteries CBR and Others* v *Commission* (paragraph 42). In that regard, it asserts that none of the differences which the applicant claims exist between the present case and those in *Cimenteries CBR and Others* v *Commission* justify departing from the principle established by the Court of First Instance in that judgment.

46 It challenges, moreover, the parallel between decisions adopted pursuant to Article 8 of Decision 2001/462 and those adopted under Article 9, which the applicant draws with regard to the question whether an act open to challenge has been committed, as in the Commission's view the subject-matter of the two above-mentioned provisions is different.

47 Moreover, the Commission maintains that despite the transfer of powers to the hearing officer and the strengthening of his independence, decisions he adopts under Article 8 of Decision 2001/462 are merely procedural provisions that can be challenged only in the context of an action for annulment of the final decision (judgment in *Cimenteries CBR and Others* v *Commission*).

48 As to the applicant's claim that the publication of a decision imposing a fine would have damaging consequences and in particular would give an adverse

impression of the applicant by comparison with other accused banks, the Commission considers that that does not constitute a legal effect of the contested act but a reparable economic consequence. In that respect, the situation of the applicant is, in the view of the Commission, identical to that of the cement producers whose action was ruled inadmissible in the judgment in *Cimenteries CBR and Others* v *Commission*.

49 Furthermore, according to the Commission, the applicant may bring an action against the final decision, which will fully restore its rights and privileges within the framework of an *inter-partes* procedure (judgment in *Cimenteries CBR and Others* v *Commission*, paragraph 47). In addition, the applicant's arguments based on procedural economy militate in favour of an examination of all the aspects of the infringement proceedings as part of an action for annulment of the final decision.

50 The Commission also maintains that the reasons that led it to suspend the administrative proceedings against other banks are irrelevant to the applicant.

51 It concludes that there is no reason to depart from the principle that a separate action cannot be brought against the refusal to authorise access to the file in the context of infringement proceedings.

Assessment by the Court

52 It is settled case-law that in order to ascertain whether contested measures are acts within the meaning of Article 230 EC it is necessary to look to their substance (judgments of the Court of Justice in Case 60/81 *IBM* v *Commission*

[1981] ECR 2639, paragraph 9, and of the Court of First Instance in Case T-113/00 *DuPont Teijin Films Luxembourg and Others* v *Commission* [2002] ECR II-3681, paragraph 45).

53 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 having a significant effect on his legal position. In the case of acts or decisions drawn up in a procedure involving several stages, only measures definitively laying down the position of the institution upon the conclusion of that procedure may in principle be contested, and not a provisional measure intended to pave the way for the final decision (judgment in *IBM* v *Commission*, paragraphs 8 and 9, and judgments of the Court of First Instance in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 42, and in *Cimenteries CBR and Others* v *Commission*, paragraph 28).

54 It is therefore for the Court to ascertain whether the act contested by the applicant brings about a distinct change in its legal position.

55 In the present case, the contested act is the refusal of the hearing officer to grant the applicant access to information on the circumstances that led to the suspension of certain administrative proceedings against other suspected banks. The applicant's request for access to the file was submitted under Article 8(1) of Decision 2001/462.

56 In this regard, it has to be remembered that the procedure for access to the file in competition cases is intended to allow the addressees of a statement of objections to examine evidence in the Commission's files so that they are in a position effectively to express their views on the conclusions reached by the Commission in its statement. Access to the file is thus one of the procedural guarantees intended to protect the rights of the defence and to ensure, in particular, that the

right to be heard provided for in Article 19(1) and (2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87) and in Article 2 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47) can be exercised effectively (judgment in *Cimenteries CBR and Others* v *Commission*, paragraph 38).

57 Observance of the rights of the defence 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. Due observance of that general principle requires that the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged by the Commission (judgment of the Court of Justice in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraphs 9 and 11, and judgment in *Cimenteries CBR and Others* v *Commission*, paragraph 39).

58 Even though the contested act in the present case may constitute an infringement of the applicant's right to be heard, that infringement, which renders the entire administrative proceedings unlawful, does not affect the applicant's legal situation until a final decision finding that it infringed Article 81 EC has been adopted. Hence, as the contested act in itself produces only limited effects, characteristic of a preparatory measure forming part of an administrative procedure initiated by the Commission, it cannot constitute grounds to justify the admissibility of the present action before that procedure has been completed.

59 The Court of First Instance has already ruled to that effect in the judgment in *Cimenteries CBR and Others* v *Commission*, paragraph 42. However, the applicant asserts that the facts of the present case differ from those of the case

that led to the judgment in *Cimenteries CBR and Others* v *Commission*, and that the legislative framework has changed since the time of that judgment.

60 The applicant claims, for example, that in contrast to the situation in the case that led to the judgment in *Cimenteries CBR and Others* v *Commission*, in the present case the Commission notified the adoption of a final decision, which it actually adopted on 11 December 2001 and by means of which it imposed a fine on the applicant.

61 However, that circumstance cannot call into question the fact that the contested act itself does not alter the applicant's legal situation. Indeed, the admissibility of an action must be judged by reference to the factual and legal situation prevailing when the application is lodged (judgment of the Court of Justice in Case 50/84 *Bensider and Others* v *Commission* [1984] ECR 3991, paragraph 8, and order of the President of the Court of First Instance in Case T-236/00 R II *Stauner and Others* v *Parliament and Commission* [2001] ECR II-2943, paragraph 49). On the day on which the present application was lodged the Commission had not yet adopted the final decision, nor had it notified any details as to its possible content.

62 In any case, as has already been stated in paragraph 58 above, if the contested act constitutes an infringement of the applicant's right to be heard, that infringement affects the applicant's legal situation only as a result of the adoption of Decision 2003/25 on 11 December 2001, which found that the applicant had infringed Article 81 EC, and can lead to a finding that the administrative proceedings were unlawful only in the context of an action brought against that decision.

63 Such an action, in the course of which the applicant would be able to plead an infringement of its right to be heard, would be an appropriate means of adequately protecting the applicant's rights, for the consequences of the refusal of

access to the file on the administrative proceedings could be remedied by finding that Decision 2003/25 was unlawful and then annulling it.

64 Nor is the conclusion set out in paragraph 58 above invalidated by the argument that the applicant bases on the strengthening of the hearing officer's independence in the performance of his duties.

65 It should be borne in mind in this regard that the post of hearing officer was established in 1982 (see the notice on proceedings implementing the competition rules of the EEC and ECSC Treaties (Articles [81] and [82] of the EEC Treaty, Articles 65 and 66 of the ECSC Treaty, OJ 1982 C 251, p. 2), and that the examination of requests for access to the documents lodged by the parties in competition proceedings, which previously came within the competence of the officials of the Directorate-General for Competition, was transferred to hearing officers by Decision 94/810. It is true that Decision 94/810 and subsequently Decision 2001/462 were adopted with the intention of strengthening the independence of hearing officers. As a result of that development, hearing officers no longer belong to the Directorate-General for Competition but are attached to the member of the Commission responsible for that Directorate-General. In that spirit, Decision 2001/462, which repealed Decision 94/810, also changed the conditions for the appointment of hearing officers and adjusted their terms of reference in order to enable them to safeguard the right of the parties to be heard for the entire duration of the administrative procedure; it did not, however, alter the nature of the procedure laid down for requests from the parties for access to documents (see Article 5(1) and (2) of Decision 94/810 and Article 8 of Decision 2001/462).

66 As stated above, however, the contested act forms part of an administrative procedure initiated and conducted by the Commission, from which it cannot be separated and it did not, in itself, immediately and irreversibly affect the legal situation of the applicant.

67 Consequently, the principle established by the Court of First Instance in the judgment in *Cimenteries CBR and Others* v *Commission* remains valid in the present case, despite the transfer of responsibilities to hearing officers and the amendments to the relevant legislative framework.

68 Furthermore, the applicant asserts that measures adopted by the hearing officer under Article 8 of Decision 2001/462 are acts against which an action can be brought, as are decisions he adopts under Article 9 of that decision.

69 However, the purpose of the first and second paragraphs of Article 9 of Decision 2001/462 is to lay down rules for situations in which the Commission intends to disclose to a third party information which may contain business secrets of an undertaking involved in the procedure.

70 In such instances, the final decision of the Commission to disclose such information to a third party against the wishes of the undertaking concerned forms part of a procedure regarding business secrets and may cause harm to the undertaking concerned, regardless of whether the Commission adopts a final decision concluding the administrative proceedings against that undertaking (see, by analogy, the judgment in *AKZO Chemie* v *Commission*, paragraph 20, and the order of the Court of First Instance in Case T-90/96 *Automobiles Peugeot* v *Commission* [1997] ECR II-663, paragraphs 33 to 36).

71 Since the contested act in the present case did not form part of the procedure relating to business secrets laid down in Article 9 of Decision 2001/462 and, as has already been found, cannot itself jeopardise the interests of the applicant by affecting his legal situation, the parallel drawn by the applicant between the

decisions adopted by the hearing officer under respectively Article 8 and Article 9 of Decision 2001/462 must be rejected.

72 Consequently, the principle laid down by the Court in the judgment in *AKZO Chemie* v *Commission* — according to which an action may be brought against a decision adopted by the Commission as part of a procedure corresponding to that provided for in Article 5(3) and (4) of Decision 94/810 and by means of which it notifies an undertaking involved in a procedure that the information submitted by the latter does not constitute business secrets and may therefore be divulged to third parties — is not applicable in the present case. In that regard, it is immaterial that in the present case it is no longer Decision 94/810 but Decision 2001/462 that is applicable. In fact, Article 9 of Decision 2001/462 is essentially identical to Article 5(3) and (4) of Decision 94/810.

73 It follows from the foregoing that the present action for annulment must be dismissed as inadmissible without there being any need to rule on the Commission's submission that there is no need to proceed to judgment (see paragraph 21 above) or, in view of the fact that the Commission has released some of the documents requested by the applicant (see paragraphs 22 to 25 above), on the scope of the dispute.

Costs

74 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the applicant has been unsuccessful, the latter must be ordered to bear its own costs and to pay the costs incurred by the Commission, including those relating to the summary procedure.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby orders:

1. **The application is dismissed as inadmissible.**

2. **The applicant shall bear its own costs and those of the defendant, including those relating to the procedure for interim relief in Case T-219/01 R.**

Luxembourg, 9 July 2003.

H. Jung
Registrar

R. García-Valdecasas
President