OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 3 JUNE 1981

My Lords,

This case comes before the Court by way of a reference for a preliminary ruling made by the Amtsgericht of Rosenheim in the Federal Republic of Germany.

From the written observations submitted on behalf of the Bayerische Vereinsbank AG ("the Bank") it appears that, on 21 May 1979, Mr Züchner, the plaintiff in the action before the Amtsgericht, opened an account at the Bank's Rosenheim branch subject to its usual conditions. On 17 July 1979 Mr Züchner drew a cheque on the Bank for the sum of DM 10 000. The payee lived in Italy and the Bank charged Mr Züchner a fee of 0.15% of the amount of the cheque, the usual percentage charge made by the Bank for transfers abroad. This fee, DM 15, was debited to Mr Züchner's account. Mr Züchner then brought an action against the Bank claiming repayment of the DM 15 on the basis that the charging of such a fee in trade between Member States is discriminatory and infringes the provisions of the EEC Treaty, in particular Articles 7, 67, 85 and 86. The Bank repaid this particular sum, but Mr Züchner continued his action for a declaration that the charge is contrary to the Treaty.

The Amtsgericht referred the matter to the Court for a preliminary ruling, on the following question:

"In transfers of capital and other payments between banks within the common market, is the debiting of a general service charge at a rate of 0.15% of the sum transferred a concerted practice which may affect trade, and therefore contrary to Articles 85 and 86 of the EEC Treaty?"

The Amtsgericht seems to have excluded from the reference Articles 7 and 67 on the ground that neither give rights that may be relied on by individuals. None the less, in his written observations, Mr Züchner invited the Court to consider Article 67 and he devoted a considerable part of his written observations to an examination of that article and a number of others (such as Articles 13 and 30). In my view it would not be right to consider these submissions since the Amtsgericht has clearly limited the reference for a preliminary ruling to the competition rules.

As a preliminary matter Counsel for the Bank has submitted, without citing any authorities, that banks are to a large extent exempt from the competition rules. The two bases for this proposition to which he did refer are Articles 90 (2) and 104 et seq. of the EEC Treaty.

As far as Article 90 (2) is concerned, even if banks can be regarded as undertakings operating services of general economic interest, the Court pointed out in Case 127/73 *BRT* v *SABAM* [1974]

ECR 313 (at p. 318), that undertakings may only fall in this category if they have been entrusted with these functions by virtue of an act of public authority. This may be so where, as in Case 10/71 *Ministère public de Luxembourg* v *Muller* [1971] ECR 723, an undertaking is set up by law and granted certain privileges for the attainment of the objectives for which it was created, or where a purely private undertaking is entrusted by a Member State with operating such services. There is no finding here that the Bank has been entrusted by public authority with the operation of any services of general economic interest, let alone that honouring cheques made out to a foreign payee or, more generally, transferring its clients' funds abroad, fall within the particular tasks assigned by public authority to the Bank. Accordingly it seems to me that Article 90 (2) cannot be relied on by the Bank in the present state of the evidence in this case. Moreover even if such findings were to be made the competition rules are excluded only to the extent that they obstruct the performance in law or in fact of those tasks and so long as the development of trade is not affected to such an extent as would be contrary to the interests of the Community.

Articles 104 et seq. seem for present purposes to do no more than to indicate that some aspects of banking may be of general economic interest. They do not in my opinion go any way to exclude the Bank from the rules incorporated in Articles 85 and 86.

For there to be an infringement of Article 85, three conditions must be established: (i) there must be an agreement between undertakings, a decision of an association of undertakings or a concerted practice, which (ii) has as its object or effect the prevention, restriction or distortion of competition within the common market and which (iii) may affect trade between Member States.

As far as the first condition is concerned, the order for reference specifies only a concerted practice.

A concerted practice was defined by the Court in Case 48/69 *ICI* v *Commission* [1972] ECR 619 (at p. 655) as being a form of coordination between undertakings which knowingly substitutes practical cooperation for the risks of competition. It is not sufficient to establish prohibited conduct merely that the undertakings concerned have adjusted their way of carrying on business to take account of the actual or anticipated conduct of other competitors, but there must be "direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market" (Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission* [1975] ECR 1663 at p. 1942).

Mr Züchner has contended that the imposition by a number of banks of charges at the same rate is evidence of a concerted practice. A similar situation

arose in the *ICI* case, *supra*. The Court there held (at p. 655, paragraphs 66 to 68) that parallel behaviour may be strong evidence of a concerted practice if it leads to conditions of competition which do not correspond to the normal conditions of the market. This is to be decided on the evidence as a whole having regard to the nature of the products, the size and number of the undertakings, the volume and other specific features of the market.

As the Court remarked in the *Suiker Unie* case, *supra*, even the fact that an enterprise aligns its prices on the highest price charged by a competitor is not necessarily evidence of a concerted practice; it may be explained by an attempt to obtain the maximum profit (at p. 1962 paragraph 285). If, however, there is evidence that the enterprises involved supplied each other with information about their prices, there are grounds for a finding that they had engaged in a concerted practice.

It appears from the documents and from what was said at the hearing that the charge in question in the present case is a general charge in relation to all payments made out of Germany over DM 4 000 which seems to have been introduced in the 1950s and which is now part of the Bank's general conditions governing its relations with its clients. It is applied at the same, uniform rate (0.15%) to all transfers over DM 4 000, whatever the country in which the payee resides, whether it is within the Community or not. It is not the actual cost of each transfer but is apparently said to be a contribution towards the total cost of making all such transfers. The Bank only charges a nominal amount for transfers of less than DM 4 000, this nominal amount being the same as that levied on internal transactions.

The justification for this higher charge is said to be the greater complexity of foreign exchange dealings which cannot be cleared through any central organization, as is the case with transfers of funds within Germany which are cleared through the Deutsche Bundesbank. Credits may have to be kept in foreign currencies, arrangements made with foreign banks and staff employed who can deal with languages and currencies other than their own.

The Bank denies that there is any agreement or concerted practice between banks in Germany or elsewhere which has as its object or effect a result which is prohibited by Article 85. It was said that there was no concerted practice because the Bank took its decision to make this charge independently; there is no violation of Article 85 *ipso facto* even if other banks charge the same. A bank like any other undertaking is entitled to create the maximum profit without necessarily violating Article 85.

If the facts which have been referred to were all, it might be argued that there was no sufficient evidence of a concerted practice despite Mr Züchner's reference to other banks. But these facts are not all. It seems from answers given to

questions put by the Court that a similar charge to the one in issue here is made by other banks in Germany, although not all may adopt DM 4 000 as the threshold for the charge, and there may be different practices in relation to smaller sums. It is also accepted that the fact that the Bank and other banks make such a charge is, or is likely to be, known to each of them.

These factors may not in themselves necessarily establish a concerted practice but they certainly indicate that there is a question to be investigated by the national court.

The fact that the charge is the Bank's remuneration for the services it renders to its clients is no answer if either its imposition or its level is the result of a practice prohibited by the competition rules. It may be that, under normal conditions of competition, the charge would not be levied at all or would be levied at a lower rate, any loss arising from that aspect of the Bank's activities being borne by the profits from another sector. It is not impossible that the Bank would be prepared to make such transfers at a loss in order to retain its clients' custom.

If such a concerted practice fixing the level of charges for making transfers of money was established it would, in my opinion, be capable of fulfilling the second condition referred to previously, namely that of having as its object or effect the prevention, restriction or distortion of competition within the common market.

Even if the object of the concerted practice is not to prevent, restrict or distort competition, it certainly could have that effect (so long as it was a significant or material effect) by making the price charged for the services offered independent of purely economic factors and, thereby, tend to discourage a more efficient provision of those services. That again is a matter for investigation by the national court.

The national court must, to answer that question, examine the full economic context of the practice and, in particular, consider how many banks are involved in it and the number of transfers made by them (see, for example, Case 23/67 *Brasserie de Haecht* v *Wilkin* [1967] ECR 407). The economic importance of the concerted practice may be assessed by comparing the amount of those transfers with that of the transfers made by competitors of the banks involved in the practice. If the former are of a similar degree of importance, to, for example, the activities in question in Case 19/77 *Miller* v *Commission* [1978] ECR 131 (that is, of the order of 5%) as opposed to those in question in cases such as Case 56/65 *Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235 and Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295 (that is, less than 1%), the national court is entitled to conclude that the restriction on competition is significant. The national court may also take into account for this purpose the volume of the transfers made by the banks adhering to the concerted practice.

As far as the third condition is concerned, the effect on trade between Member States, the national court must decide, after examining all the facts, whether there exists a market for banking services extending to more than one Member State and whether the concerted practice is capable of affecting the supply of and demand for those services between the Member States in question. However, since the effect on trade between Member States need only be indirect (see, for example, Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299 at p. 341), it is sufficient if the national court finds as a fact that the imposition of the charge on foreign transfers is otherwise capable of affecting trade between the Member States by, for example, making foreign purchase more onerous.

Article 85 (2) does not in terms state that concerted practices are void because, *ex hypothesi*, this type of restrictive practice condemned by the Treaty does not, in general, give rise to a legal obligation binding the parties to it. Article 85 (1), however, states unequivocally that such a practice shall be prohibited as incompatible with the common market and the national court is obliged to give effect to that injunction. The effect, on Mr Züchner's liability to pay the charge in question to the Bank, of the prohibition of a concerted practice to which the Bank has been a party (if such be found to be the fact) is to be decided under German law.

A concerted practice, while lacking the consensual nature of an agreement or decision, implies a series of independent acts which between them substitute co-operation for competition. In contrast, one of the hallmarks of a dominant position covered by Article 86 is its unilateral nature. As a result, although the question referred to the Court by the Amtsgericht mentions both Article 85 and Article 86, it is right to point out that only the former applies if the facts establish the existence of a concerted practice. Nevertheless, it may be that, when making its findings of fact, the Amtsgericht may also wish to consider whether there is evidence of an abuse of a dominant position, rather than a concerted practice.

Turning, then, to Article 86, that provision may be applicable if three conditions are fulfilled: (i) that there is a dominant position within the common market or a substantial part of it (ii) an abuse of that position by one or more undertakings and (iii) an effect on trade between Member States.

A dominant position was defined by the Court in Case 27/76 *United Brands* v *Commission* [1978] ECR 207 (at p. 277) and Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461 at p. 520.

In order to determine whether a dominant position exists, it is necessary to analyse the structure of the market. A number of factors are relevant of which one of the more important (but not conclusive) is the market share of the undertaking in question. Other relevant factors are the organization of the undertaking, the technical knowledge and expertise required and the financial

resources available. Naturally, in order to place all these factors in their proper economic context, it is necessary for the national court to define the geographical extent of the market and the services to which it relates. For example, the national court must consider whether the market relates to all banking services or just transfers of money abroad, whether it covers the whole Community or just Germany.

If the conclusion is reached that the Bank does occupy a dominant position, the national court must then decide whether there has been an abuse of it, as defined in the *Hoffmann-La Roche* case (at p. 541). If, therefore, the national court finds that the Bank, while occupying a dominant position, has had recourse (1) to methods foreign to those employed where there is a normal degree of competition which (2) have the effect of further restricting the level of competition in the market, it is entitled to conclude that the second condition has been fulfilled. It must, of course, also consider whether there has been an effect on trade between Member States.

As a result, it is my opinion that, in view of the foregoing, the question referred to the Court by the Amtsgericht should be answered to the effect that, depending on the facts and all the circumstances, the debiting of a general service charge in transfers of capital and other payments between banks within the common market is capable of constituting a concerted practice contrary to Article 85 of the EEC Treaty.