JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

30 May 2006 *

In Case T-198/03,

Bank Austria Creditanstalt AG, established in Vienna (Austria), represented by C. Zschocke and J. Beninca, lawyers,

applicant,

v

Commission of the European Communities, represented initially by S. Rating, and subsequently by A. Bouquet, acting as Agents, and by D. Waelbroeck and U. Zinsmeister, lawyers, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the decision of the Commission's Hearing Officer of 5 May 2003 to publish the non-confidential version of the Commission decision of 11 June 2002 in Case COMP/36.571/D-1 — Austrian banks ('Lombard Club'),

* Language of the case: German.

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

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 29 November 2005,

gives the following

Judgment

Legal context

1 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) provides that, 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, concerning the obligation of professional secrecy, provides that information acquired as a result of the application of various articles of the regulation 'shall be used only for the purpose of the relevant request or investigation' (Article 20(1)), that the Commission and its officials and other servants 'shall not 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' (Article 20(2)) and, finally, that these first two provisions 'shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings' (Article 20(3)).

3 Under Article 21(1) of Regulation No 17, the Commission is required to publish 'the decisions which it takes pursuant to Articles 2, 3, 6, 7 and 8'. Article 21(2) states that such publication 'shall state the names of the parties and the main content of the decision' and that 'it shall 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) provides:

'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*.'

Background

5 By decision of 11 June 2002 in Case COMP/36.571/D-1 — Austrian banks ('Lombard Club'), the Commission found that the applicant had taken part, from 1 January 1995 to 24 June 1998, in a cartel with several other Austrian banks (Article 1), for which the Commission decided to impose a fine (Article 3) on it and the other banks concerned by the procedure ('the decision imposing fines').

6 By letter of 12 August 2002, the Commission sent the applicant a draft non-confidential version of the decision imposing fines and asked for its permission to publish that version.

7 On 3 September 2002, the applicant, like the majority of the other banks concerned, brought an action for annulment of the decision imposing fines, which was lodged at the Registry of the Court of First Instance under number T-260/02. In this action,

the applicant does not dispute the Commission's findings of fact, but only the amount of the fine imposed on it.

8 By letter of 10 September 2002, in response to the Commission's request of 12 August 2002 for authorisation to publish, the applicant asked the Commission to publish the decision imposing fines without the account of the facts relating to the year 1994 contained in Section 7 and to replace Sections 8 to 12 with a section of text proposed by the applicant.

9 On 7 October 2002, the relevant services of the Commission organised a meeting with the lawyers of all the addressees of the decision imposing fines. No agreement could be reached at the meeting on the version to be published in the light of the objections made by the applicant in its letter of 10 September 2002. The competent director of the Commission's Directorate-General for Competition, referring to that request in a letter to the applicant of 22 October 2002, repeated the Commission's view on the publication of the decision imposing fines and enclosed a revised non-confidential version of the decision.

10 On 6 November 2002, the applicant asked the Hearing Officer to grant its request of 10 September 2002.

11 Although he considered that the request was not justified, the Hearing Officer provided the applicant, by letter of 20 February 2003, with a new non-confidential version of the decision imposing fines.

12 By letter of 28 February 2003, the applicant stated that it still objected to the publication of that non-confidential version.

13 By letter of 5 May 2003, the Hearing Officer produced a revised non-confidential version of the decision imposing fines and decided to reject the applicant's objection to publication of the decision imposing fines ('the contested decision'). In accordance with the third paragraph of Article 9 of Decision 2001/462, the Hearing Officer stated that that version of the decision imposing fines ('the version at issue') did not contain information to which confidential treatment is guaranteed by Community law.

Procedure and forms of order sought by the parties

14 By application lodged at the Registry of the Court of First Instance on 6 June 2003, the applicant brought the present action under the fourth paragraph of Article 230 EC.

15 By a 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 on the substance and, in the alternative, for the Commission to be prohibited from publishing the version at issue until that time. That application was dismissed by order of the President of the Court of First Instance of 7 November 2003 in Case T-198/03 R *Bank Austria Creditanstalt* v *Commission* [2003] ECR II-4879. The decision imposing fines was published in the Official Journal on 24 February 2004 (OJ 2004 L 56, p. 1).

16 The objection of inadmissibility raised by the Commission, by a separate document lodged at the Registry of the Court of First Instance on 22 July 2003, was reserved for final judgment by order of the Second Chamber of the Court of First Instance of 30 March 2004.

17 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

18 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

19 The applicant advances six pleas in support of its action, alleging, respectively: breach of Article 21(1) of Regulation No 17; breach of Article 21(2) thereof; unlawful publication of the parts of the decision imposing fines relating to the year 1994; breach of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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 (OJ 2001 L 8, p. 1); breach of the principle of equal treatment and of Regulation No 1 of the Council of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 59) on account of the advance publication on the internet, in German, of the decision imposing fines; and, finally, breach of the duty to provide reasons.

20 The Commission considers that the application is inadmissible. It contends, first of all, that the contested decision may not be challenged since it does not produce legal effects which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in its legal position, and, secondly, that the applicant has no legal interest in bringing proceedings. Thirdly, the Commission takes the view that the applicant's pleas in support of its application are in themselves all inadmissible, which results in the application being inadmissible in its entirety. The Commission further considers that the pleas raised by the applicant are in any event unfounded.

21 In those circumstances, the first two pleas of inadmissibility raised by the Commission should first be examined before moving on to the admissibility and substance of the pleas raised by the applicant.

The pleas of inadmissibility raised by the Commission

The existence of a challengeable act

— Arguments of the parties

22 The Commission infers from Article 9 of Decision 2001/462 (reproduced in paragraph 4 above) that the Hearing Officer's decision can be considered to be a measure producing legal effects which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in its legal position only to the extent that the decision allowed the publication of 'business secrets' or other information enjoying similar protection.

23 The Commission takes the view that the decision on the extent of publication of the non-confidential version of a measure, on the other hand, falls within the Commission's discretion and cannot affect the legal position of the addressees of the decision.

24 The Commission maintains that the applicant did not refer, either in its request to the Hearing Officer or in its application to the Court, to any business secret or other information enjoying similar protection contained in the version at issue. It maintains that, in adopting the contested decision, the Hearing Officer in no way denied the confidentiality of any data whatsoever, and that, consequently, the decision cannot constitute a measure having adverse effects.

25 The applicant considers that the contested decision does produce legal effects binding on it. It contends that the scope of the contested decision goes beyond the statements on the absence of business secrets in the version at issue. The procedure provided for in the first and second paragraphs of Article 9 of Decision 2001/462 guarantees the protection of business secrets, whereas the third paragraph of Article 9 governs the disclosure of information to be published in the Official Journal, irrespective of whether there are business secrets.

— Findings of the Court

26 According to settled case-law, 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 (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; order in Case T-219/01 *Commerzbank* v *Commission* [2003] ECR II-2843, paragraph 53; and *Bank Austria Creditanstalt* v *Commission*, cited in paragraph 15 above, paragraph 31).

27 The Commission's contention that the contested decision, adopted under the third paragraph of Article 9 of Decision 2001/462, does not produce binding legal effects, because it does not determine whether there are business secrets or other information enjoying similar protection, cannot be upheld.

28 The aim of Article 9 of Decision 2001/462 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. 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 obligation of professional secrecy enjoys such protection.

29 The sphere of information covered by the obligation of professional secrecy extends beyond business secrets of undertakings (Opinion of Advocate General Lenz in Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, at 1977). 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. 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 (see, to that effect, *AKZO Chemie* v *Commission*, paragraphs 26 to 28). 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.

30 The need for differential treatment was recalled in Case T-353/94 *Postbank* v *Commission* [1996] ECR II-921, at paragraph 87, in which it was stated that the concept of business secrets concerns 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.

31 Thus, the first two paragraphs of Article 9 of Decision 2001/462, 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, 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.

32 Furthermore, as stated in the 9th recital in the preamble to Decision 2001/462, '[w]hen disclosing information on natural persons, particular attention should be paid to Regulation ... No 45/2001'.

33 The Hearing Officer must also therefore ensure compliance with the provisions of that regulation when he takes a decision permitting disclosure of information under Article 9 of Decision 2001/462.

34 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 inasmuch as it determines whether a text for publication contains such information.

35 This interpretation of the third paragraph of Article 9 of Decision 2001/462 is consistent with Article 21(2) of Regulation No 17, which provides that 'the publication ... shall have regard to the legitimate interest of undertakings in the protection of their business secrets'. That provision, which underlines the particular protection required for business secrets, cannot be construed as limiting the protection afforded by other rules of Community law, such as Article 287 EC, Article 20(2) of Regulation No 17 and Regulation No 45/2001, to other information covered by the obligation of professional secrecy.

36 It follows from the above that the contested decision does produce legal effects binding on the applicant by finding that the version at issue does not contain information protected from public disclosure. Hence, the plea of inadmissibility advanced by the Commission as to the absence of a challengeable act must be dismissed.

The applicant's legal interest in bringing proceedings

— Arguments of the parties

37 The Commission takes the view that the applicant has no interest in the annulment of the contested decision.

38 First, the Commission puts forward the reasons for which it considers the Hearing Officer's decision not to be a challengeable act.

39 Second, it contends that the decision imposing fines does not contain any information of which the public is unaware, given that the non-confidential versions of the statement of objections of 10 September 1999 and the supplementary statement of objections of 21 November 2000 in the same case had been made public by a third party. The Commission points out that, unlike other addressees of the decision imposing fines, the applicant did not bring an action before the Court of First Instance to prevent those versions from being sent to the third party in question.

40 Third, the Commission considers that the applicant has forfeited all interest in the annulment of the contested decision on account of the publication of the version at issue in the Official Journal. It maintains that, according to the arguments advanced by the applicant in support of its application for suspension of operation of the contested decision, the aim of the present action was to delay publication of the decision imposing fines for as long possible, at a time when its director-general was facing the threat of criminal consequences of the applicant's participation in the 'Lombard Club' cartel. The Commission contends that, since the prosecutions brought against the board members of the participants in this cartel have in the meantime been dropped, the applicant has lost all reason to challenge the publication of the version at issue.

41 The applicant disputes these arguments, contending, first of all, that the contested decision infringes provisions for the protection of its individual interests in several respects. It argues inter alia that the version at issue is based on information that the Commission obtained pursuant to Regulation No 17 and is covered by the obligation of professional secrecy under Article 20 of that regulation and under Article 287 EC.

— Findings of the Court

42 The aim of the provisions on professional secrecy relied on by the applicant 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, it cannot be denied that the applicant, in principle, has a legal interest in bringing proceedings against the contested decision.

43 The publication by a third party of the statements of objections referred to in paragraph 39 above does not affect the applicant'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 and the statement supplementing it, 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.

44 In relation to the decision imposing fines being published after these proceedings were brought, it should be recalled that the legal interest of the addressee of a decision in challenging 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 (*AKZO Chemie* v *Commission*, cited in paragraph 29

above, paragraph 21; Case 207/86 *Apesco* v *Commission* [1988] ECR 2151, paragraph 16; Case T-46/92 *Scottish Football Association* v *Commission* [1994] ECR II-1039, paragraph 14; order in Case T-256/97 *BEUC* v *Commission* [1999] ECR II-169, paragraph 18).

45 Finally, the Commission's argument that the applicant's sole aim in bringing the present action for annulment was to delay publication of the decision imposing fines in order to prevent the information contained in that decision from being used for the purposes of the prosecution of the applicant's director-general, so that it lost any legal interest in bringing proceedings once the Austrian judicial authorities had dropped the prosecution, is not supported by the documents in the case. It follows in particular from the order in *Bank Austria Creditanstalt* v *Commission*, cited in paragraph 15 above (paragraphs 44 to 47), that the reference to those criminal proceedings is only one of the points relied on by the applicant to demonstrate that the condition as to the urgency of suspending operation of the contested decision was met. The applicant alleged, in its application for interim relief, that the contested decision would cause it harm in other respects as well. Further, 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.

46 Hence, the plea of inadmissibility put forward by the Commission as to the absence of a legal interest in bringing proceedings must also be dismissed.

The pleas advanced by the applicant

47 The applicant's first two pleas, alleging breach of Article 21(1) and (2) of Regulation No 17, should be dealt with first before moving on to the third and sixth pleas, alleging unlawful publication of the factual description relating to the year 1994,

then the fourth plea, alleging a breach of Regulation No 45/2001, and finally, the fifth plea, alleging that the advance publication on the internet, in German, of the decision imposing fines was unlawful.

The first plea, alleging a breach of Article 21(1) of Regulation No 17

— Arguments of the parties

48 The applicant contends that the decision imposing fines does not belong to the category of decisions whose publication is mandatory under Article 21(1) of Regulation No 17. It argues that, according to that provision, only those decisions taken pursuant to Articles 2, 3, 6, 7 and 8 of Regulation No 17 are to be published, and that Article 20 of Regulation No 17 on the protection of professional secrecy prohibits publication of any other decision taken on the basis of that regulation. According to the applicant, the provisions of Regulation No 17 for the protection of business secrets by the Commission (Article 20(2) of Regulation No 17) are the rule and those dealing with the publication of decisions (Article 21 of Regulation No 17) are the exception.

49 The applicant points out that Article 3 of Regulation No 17 concerns decisions whereby the Commission requires the undertakings concerned to bring the infringement found to an end. It maintains that the decision imposing fines cannot be treated in the same way as those decisions, since the infringement had ceased well before the decision was adopted. According to the applicant, the direction in Article 2 of the operative part of the decision imposing fines to bring the infringement to an end is therefore redundant, indeed non-existent. The applicant infers from this that the publication of the decision imposing fines is prohibited, in its entirety, by Article 20 of Regulation No 17.

50 The Commission disputes the admissibility of this plea, asserting, first of all, that the publication of the decision imposing fines does not stem from the contested decision, but from Article 21(1) of Regulation No 17. Second, the Commission makes the observation that the applicant can no longer contend, by the present application, that the direction contained in Article 2 of the decision imposing fines to bring the infringement to an end is unlawful since this ground of challenge, which is not directed at the contested decision but at the decision imposing fines, has been raised too late. Third, the Commission maintains that the manner in which this plea is set out in the application does not meet the requirements of Article 44(1)(c) of the Rules of Procedure of the Court of First Instance.

51 The Commission contends that, in any event, the applicant's argument is not founded in law inasmuch as, first, the applicant maintains that a valid direction to bring the infringement to an end is the essential precondition for publication of the decision imposing fines without disputing that the decision contains such a direction, and second, the applicant asserts that Article 21 of Regulation No 17 provides for a derogation from the principle of the protection of professional secrecy without alleging that the obligation to protect professional secrecy has been breached.

— Findings of the Court

52 In respect of the admissibility of the plea, first, it follows, from the explanations set out in paragraphs 27 to 36 above, that the Commission's arguments that the publication of the version at issue does not stem from the contested decision and that the applicant has no legal interest in challenging the content of that version are unfounded. In advancing these arguments, the Commission misconstrues the reasoning advanced by the applicant, whose argument is specifically that the version at issue contains information which, being covered by the obligation of professional

secrecy under Article 20(2) of Regulation No 17, cannot be published. The publication of the passages at issue, the disclosure of which the applicant objected to on the ground that they contained information covered by the obligation of professional secrecy, does stem from the adoption of the contested decision.

53 Second, in contending that a decision containing a direction to bring the infringement to an end, when that infringement has already ceased, is not one whose publication is mandatory under Article 21 of Regulation No 17, the applicant is not disputing only the lawfulness of the direction set out in Article 2 of the decision imposing fines, but also the interpretation of Article 21 of Regulation No 17 on which the contested decision is based. Taken in that sense, the applicant's ground of challenge cannot be dismissed for having been raised too late. Moreover, it would be not be desirable, for reasons of economy of procedure, to make the admissibility of this plea subject to the precondition that the addressee of the decision imposing fines who wishes to challenge the publication of that decision has to have brought an action against the direction set out therein.

54 Third, the first plea is set out in the application in a sufficiently clear and coherent manner, since it has allowed the Commission to prepare detailed arguments in its defence and the Court considers it is in a position to rule on the pleas. Hence, the manner in which this plea is set out meets the requirements of Article 44(1)(c) of the Rules of Procedure.

55 The applicant's first plea is therefore admissible.

56 In relation to the validity of this plea, the interpretation of Article 21(1) of Regulation No 17 advocated by the applicant that this provision envisages only the publication of decisions containing a direction to bring an infringement to an end cannot, however, be accepted. As is clear from the recitals in the preamble to Regulation No 17 and from Article 83(2)(a) EC, Regulation No 17 is intended to ensure compliance by undertakings with the competition rules and, to that end, to enable the Commission to require undertakings to bring to an end any infringement which it establishes and to impose fines and periodic penalty payments in respect of an infringement. The power to take decisions of such a type necessarily implies a power to establish the infringement in question (Case 7/82 *GVL* v *Commission* [1983] ECR 483, paragraph 23). The Commission can therefore adopt a decision under Article 3 of Regulation No 17 limited to establishing an infringement which has already been terminated, provided it has a legitimate interest in so doing (*GVL* v *Commission*, paragraphs 24 to 28). By the same token, according to settled case-law, the Commission can impose fines on the basis of conduct constituting an infringement which has already ceased (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 175, and Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission* [2005] ECR II-4065, paragraphs 37, 38 and 131). A decision imposing fines taken under Article 15(2) of Regulation No 17 necessarily implies that an infringement has been found under Article 3 of that regulation (see, to that effect, *GVL* v *Commission*, paragraph 23, and *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission*, paragraph 36).

57 It should be added that the supervisory task conferred on the Commission by Articles 81(1) EC and 82 EC not only includes the duty to investigate and punish individual infringements but also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 170). In order that this task may be accomplished, it is essential that economic operators be informed, through the publication of decisions finding infringements and imposing fines, of the conduct that has led the Commission to take punitive action.

58 It follows that 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.

59 The first plea is thus unfounded.

The second plea, alleging a breach of Article 21(2) of Regulation No 17

— Arguments of the parties

60 The applicant relies on the principle of the lawfulness of administrative actions according to which, it contends, the Commission can take individual decisions only pursuant to and in a manner consistent with a provision which constitutes the legal basis of its action. The applicant maintains that, according to Article 21 of Regulation No 17, which is the legal basis for the publication of decisions applying the competition rules, only the 'main content of the decision' may be published. It infers from the relation between Article 20 of Regulation No 17, which is the rule, and Article 21 thereof, which is the exception (see paragraph 48 above), that the obligation to protect professional secrecy covers the decision imposing fines in its entirety and that the latter should not be published. It therefore takes the view that Article 21 of Regulation No 17 cannot provide justification for the publication of the full text of the decision imposing fines.

61 The applicant points out in this connection that, in the present case, the version at issue differs from the original only in so far as the names of the employees of the banks concerned have been deleted and that this does not amount to a reproduction of the 'main content' of the decision imposing fines. It further notes that a large proportion of the information contained in the version at issue was made accessible to the Commission by the applicant's voluntary cooperation.

62 The applicant alleges that the Commission rejected its proposal for publication of the 'main content' of the decision imposing fines, without providing reasons, and that, in so doing, the Commission erred in law by treating the whole decision as its main content.

63 The applicant objects to the line of argument that the publication of the version at issue was necessary to set out the nature, extent, scope and institutionalisation of the cartel, to illustrate its gravity and length as well as the supposed unlawful intentions of the parties concerned, and to show the cartel's alleged capacity to affect intra-Community trade. It disputes that the Commission is entitled to pursue those objectives through unlawful publication of the decision imposing fines, since Article 21 of Regulation No 17 provides expressly only for publication of the main content of the decision. In the alternative, the applicant contends that those objectives could also have been achieved by setting out the 'main content' of that decision.

64 According to the applicant, Articles 20 and 21 of Regulation No 17 deprived the Commission of any discretion with regard to whether it may publish the full text of a decision or reproduce the main content. The applicant acknowledges that the Commission may have freedom of assessment in determining what constitutes the 'main content' of a decision, but points out that no decision in this regard was taken in the present case.

65 Finally, the applicant contends that, if it is the defendant's practice in taking decisions to publish decisions imposing fines in their entirety, that is unlawful and cannot provide justification for the contested decision.

66 The Commission is of the view that this plea is inadmissible. In relation to the substance, the Commission contends that the argument that Article 21(2) of Regulation No 17 prohibits the publication of non-confidential and full versions of decisions, a proposition based exclusively on the contrary inference, unsupported by reasons, that any publication not expressly required of the Commission is unlawful, is misconceived. It argues that Article 21(2) of Regulation No 17 does not constitute a provision aimed at protecting the persons concerned by a decision for publication, but stems from the principle of publicity of legal acts inherent in a State governed by the rule of law. It further asserts that the contested decision states, with reasons, that the publication of the version at issue is 'necessary' and lawful, since that version contains neither business secrets nor other possible confidential information worthy of protection.

— Findings of the Court

67 The second plea is based on the incorrect premiss that any publication of a decision taken pursuant to Regulation No 17 which is not mandatory under Article 21 of that regulation is unlawful.

68 The principle of lawfulness relied on by the applicant in support of its argument 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 (Case 117/83 *Könecke* [1984] ECR 3291, paragraph 11).

69 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'. This principle 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.

70 It should be stated in this context that neither Article 287 EC nor Regulation No 17 explicitly indicates what information, apart from business secrets, is covered by the obligation of professional secrecy. Contrary to the applicant's contention, 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'.

71 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.

72 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 and Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). 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 (Opinion of Judge Kirschner acting as Advocate General in Case T-51/89 *Tetra Pak* v *Commission* [1990] ECR II-309, point 34).

73 It should be added that while the 9th recital in the preamble to Decision 2001/462 refers to Regulation No 45/2001 (see paragraphs 32 and 33 above), the 10th recital states that '[t]his Decision should be without prejudice to the general rules granting or excluding access to Commission documents'. In adopting this decision, the Commission's intention was thus neither to limit nor to extend the circumstances in which the public can have access to documents concerning the application of the competition rules and to information contained in such documents as against what is provided for by those regulations.

74 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.

75 In relation to the publication of decisions taken by the Commission under Regulation No 17, it can be inferred from the above that Article 20 of Regulation No 17 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 or information which is protected under other rules of secondary legislation, such as Regulation No 45/2001. 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.

76 It should next be recalled that Article 21(1) of Regulation No 17 requires the Commission to publish the decisions it takes pursuant to Articles 2, 3, 6, 7 and 8 of the regulation. In the light of the above considerations, Article 21(2) of Regulation No 17 should be construed as limiting that requirement 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. 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 as set out above.

77 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.

78 Moreover, the interest of an undertaking which the Commission has fined for breach of competition law in the details of the offending conduct of which it is accused 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, and in view of the fined undertaking's ability to seek judicial review of such a decision.

79 Thus, the aim of Article 21(2) of Regulation No 17 is not to limit the Commission's freedom to publish, of its own volition, a version of its decision that is fuller than the minimum necessary and also to include information whose publication is not required, in so far as the disclosure of that information is not inconsistent with the protection of professional secrecy.

80 It follows that this plea must be dismissed without the Court having to rule on its admissibility.

The third plea, alleging that the publication of the parts of the decision imposing fines concerning the year 1994 is unlawful, and the sixth plea, alleging a breach of the duty to provide reasons

-- Arguments of the parties

81 In its third plea, the applicant maintains that the publication of the parts of the decision imposing fines which relate to 1994 is unlawful on the ground that, first, the Commission did not have the power to deal with the infringement committed by the applicant in 1994 in Austria, and, second, the operative part of the decision imposing fines contains no determination as to the undertakings' conduct in 1994. The applicant considers that it has a legal interest in bringing proceedings in respect of this plea, because these parts of the decision contain information which concerns the applicant and which is covered by the obligation of professional secrecy.

82 The applicant argues that, in 1994, the applicable law in Austria was not Article 81 EC but Article 53 of the Agreement on the European Economic Area ('the EEA'). Article 56 EEA confers power on the EFTA Surveillance Authority, and not on the Commission, to supervise compliance with Article 53 EEA, where the undertakings concerned achieve more than 33% of their turnover in EFTA, which was the case with the applicant. From this the applicant infers that the Commission could not apply Regulation No 17 to infringements of Article 53 EEA committed in 1994 since, first, it lacked competence in respect of this period, and, second, those points of the account of the facts contained in the decision imposing fines dealing with 1994 have no relevance to the operative part of the decision.

83 The applicant states that the Commission was not entitled to publish the findings of fact concerning 1994, since it obtained the information relating to it on the basis of

Articles 11 and 14 of Regulation No 17 and it was required under Article 287 EC and Article 20 of Regulation No 17 to observe the obligation of professional secrecy. The applicant maintains that the version at issue contains confidential information since it cites many internal documents of the applicant obtained by the Commission under Regulation No 17.

84 In its sixth plea, the applicant argues that the contested decision is in breach of Article 253 EC, since it does not state the reasons for the publication of the passages of the decision imposing fines that concern 1994. It points out that, while its request to have those passages excised is cited on two occasions in the contested decision, the decision does not take a position either on that particular request or on the supporting arguments, and does no more than respond to the argument that only the 'main content' of the decision imposing fines can be published. The applicant points out that this argument should be distinguished from that concerning the information relating to 1994.

85 The Commission disputes the admissibility of the third plea, contending, in the first place, that the grounds of challenge concerning the inapplicability of Regulation No 17 and the Commission's lack of power, which relate to the lawfulness of the decision imposing fines, were raised too late. Further, in relation to the ground of challenge concerning the lack of relevance of the matters relating to 1994, it considers that the applicant has no legal interest in bringing proceedings. The Commission is of the view that the applicant does not have a legal interest in bringing proceedings in respect of the sixth plea either.

86 The Commission maintains that the two pleas are in any event unfounded.

— Findings of the Court

87 As with the second plea, the third plea is based on the incorrect premiss that only information whose publication is required by Article 21 of Regulation No 17 may be published, whereas all other information acquired pursuant to Regulation No 17 is barred from publication.

88 On the contrary, the Commission is free to publish the full text of its decision in so far as it does not contain information falling under the protection of professional secrecy as set out above in the context of the consideration of the second plea.

89 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.

90 In the present case, it cannot in any event be denied that the description of the background to the cartel, including that of the actions taking place in 1994, provides an illustration of the nature and operation of the cartel and thus a useful contribution to understanding the decision imposing fines.

91 In relation to the sixth plea, it follows from the above considerations that the decision to include information concerning 1994 in the version at issue did not require any particular reasoning to support it.

92 Accordingly, the third and sixth pleas are unfounded. These pleas are therefore to be dismissed without having to rule on their admissibility.

The fourth plea, alleging a breach of Regulation No 45/2001

— Arguments of the parties

93 The applicant asserts that in numerous passages the version at issue allows the natural persons who participated on its behalf in meetings, the purpose of which was to restrict competition, to be identified. It maintains that the publication of that information contravenes provisions of Regulation No 45/2001. The applicant contends that it is entitled to rely on this breach of Regulation No 45/2001 on its own account, since it may have to face actions for damages from the persons concerned and is required under employment law to provide assistance to members of its staff.

94 The Commission takes the view that the applicant has no legal interest in bringing proceedings in relation to this plea in the absence of even an alleged breach of its own rights.

— Findings of the Court

95 Regulation No 45/2001 seeks to protect individuals with regard to the processing of personal data. The applicant, which is a legal person, does not belong to the circle of persons which the regulation is intended to protect. It cannot therefore invoke an alleged breach of the rules which that regulation prescribes (see, by analogy, Case 85/82 *Schloh* v *Council* [1983] ECR 2105, paragraph 14; Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraphs 49 and 50; and the Opinion of Advocate General Van Gerven in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, points 55 and 56).

96 The arguments derived by the applicant from its supposed obligations towards its directors and employees under Austrian law cannot invalidate that conclusion given that they consist of mere unsubstantiated contentions. These arguments are therefore not sufficient to demonstrate the existence of the applicant's personal interest in relying on a breach of Regulation No 45/2001.

97 It follows that this plea must be dismissed.

The fifth plea, alleging that the advance publication of the decision imposing fines in German on the Commission's website was unlawful

— Arguments of the parties

98 The applicant states that the Commission declared its intention, in the contested decision, to publish the version at issue on the internet in German. It contends that such advance publication in a single language is contrary to the principle of equality and is in breach of the Communities' linguistic regime. It takes the view that this harms its legitimate interests, since publication of the version at issue in advance only in German has a more detrimental effect on its interests, and at an earlier stage.

99 The Commission considers that the applicant has not substantiated this plea sufficiently and has not explained how the breaches of Community law relied upon adversely affect the applicant.

— Findings of the Court

100 In this plea, the applicant challenges an aspect of the contested decision other than the determination of the content of the version at issue, namely the dissemination of that version, in German, on the internet before being published in the Official Journal in all the official languages of the Union.

101 The dissemination in advance of the decision imposing fines in German on the Commission's website is not, however, capable of altering the applicant's legal position. Therefore, the aspect of the contested decision put at issue by this plea does not constitute a challengeable act. The action is therefore inadmissible in this regard.

102 Furthermore, this plea is in any event unfounded. 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 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.

103 With respect to the obligation to publish the Official Journal in all the official languages, prescribed in Article 5 of Regulation No 1, as last amended by Council Regulation (EC) No 920/2005 of 13 June 2005 (OJ 2005 L 156, p. 3), that obligation cannot be infringed by dissemination which does not take place by means of the Official Journal.

104 Since all the applicant's pleas are to be rejected, this action must be dismissed.

Costs

105 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 applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Pirrung Forwood Papasavvas

Delivered in open court in Luxembourg on 30 May 2006.

E. Coulon J. Pirrung

Registrar President