JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
23 February 1994 *

In Joined Cases T-39/92 and T-40/92,

Groupement des Cartes Bancaires 'CB', an economic interest grouping established under French law, having its registered office in Paris, represented by Alain Georges, of the Paris Bar, and Aloyse May, of the Luxembourg Bar, and also, during the oral procedure, by Hugues Calvet, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand Rue,

and

Europay International SA (formerly Eurocheque International sc), a company incorporated under Belgian law, having its registered office at Waterloo (Belgium), represented by Pierre Van Ommeslaghe, Avocat with a right of audience before the Cour de Cassation of Belgium, with an address for service in Luxembourg at the Chambers of Jean-Claude Wolter, 11 Rue Goethe,

applicants,

v

* Language of the case: French.

Commission of the European Communities, represented by Enrico Traversa, a member of its Legal Service, acting as Agent, assisted by Hervé Lehman, of the Paris Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 92/212/EEC of 25 March 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/30.717-A — Eurocheque: Helsinki Agreement, Official Journal 1992 L 95, p. 50), or, in the alternative, for the annulment or reduction of the fines imposed on the applicants,

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

composed of: R. Schintgen, President, R. García-Valdecasas, H. Kirschner, B. Vesterdorf and K. Lenaerts, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 22 September 1993,

gives the following

Judgment

Facts

The Package Deal Agreement

1 On 31 October 1980 the banks, savings banks and other credit institutions participating in the Eurocheque system concluded the agreement known as 'the Package Deal Agreement on commissions, value dates and central clearing of uniform Eurocheques made out in local currency and the opening-up of the non-banking sector'. The Agreement, concluded for the period from 1 May 1981 to 30 April 1986, was initially applicable to the countries of institutions issuing uniform Eurocheques, that is to say issuing to their customers cheque guarantee cards and cheques that could be used in the Eurocheque system. According to its own terms, the Agreement may be extended to countries of accepting institutions, that is to say institutions which do not issue guarantee cards or cheques that may be used in the Eurocheque system but which cash guaranteed cheques at their counters, in so far as those countries are prepared to open the trading sector to uniform Eurocheques.

2 The Package Deal Agreement, which forms part of the Eurocheque agreements, lays down, in substance, the following principles:

— the trading sector (shops, large stores, service stations, hotels and restaurants) must be officially prepared to accept uniform Eurocheques and must be informed of the guarantee terms;

— uniform Eurocheques must be made out in the currency of the foreign country visited;

— a commission of 1.25% of the amount of the cheque, with no minimum, is applied to all uniform Eurocheques made out abroad in local currency. That commission is no longer charged by the cashier at the time of encashment or by the trader when accepting the cheque, but is paid when the cheque is reimbursed by the clearing house.

3 The instructions in force in the Eurocheque system specify that 'although a national rate of bank charges is applied in respect of the payment of cheques, it must not adversely affect foreign uniform Eurocheques' and that 'the banks of the countries concerned undertake not to charge any special commission to acceptors of uniform Eurocheques'.

4 The Package Deal Agreement was notified to the Commission on 7 July 1982 by an authorized officer of the Deutsche Bank AG, Frankfurt-am-Main, acting as Chairman of the Eurocheque Assembly and of the Eurocheque Working Group, and in the name and on behalf of each of the national groupings of which the two assemblies were composed, in accordance with the authority which he had received for that purpose from those assemblies at their joint meeting on 20 May 1982. According to Form A/B of the notification, the Association Française des Banques (hereinafter 'the AFB') is among the financial institutions which participated in the agreement.

5 By letter of 29 July 1982 the Commission informed the Secretary-General of Eurocheque International that it was constantly receiving complaints from persons who, in particular in France, were obliged to pay to the seller commission on small purchases and whose banks none the less billed them the commission of 1.25% of the amount of the cheque, as prescribed by the Eurocheque agreements.

6 On 24 August 1982 the Secretary-General of Eurocheque International replied to the Commission that the problem of 'wild-cat' commissions and double charges had always been a major concern and that the Package Deal Agreement had been conceived precisely in order to provide a solution to that problem. He added that only the Banques Populaires and the Crédit Mutuel, which issued uniform Eurocheques, applied the Eurocheque agreements in full, no commission being asked of the customer when he withdrew cash or made purchases. The other banks, on the other hand, and principally those belonging to the Groupement Carte Bleue, consented to apply the Package Deal Agreement only in respect of withdrawals at their branches. Traders who had an account at those banks and who paid into them foreign Eurocheques found themselves subject to variable charges, often equivalent to the commission paid on Eurocheques drawn abroad. The Secretary-General stated that he was aware of the situation in France and assured the Commission that Eurocheque International was concentrating all its efforts in the negotiations with the banks concerned with a view to having the Package Deal Agreement applied in its entirety.

7 On 10 December 1984 the Commission adopted Decision 85/77/EEC relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/30.717 — Uniform Eurocheques, Official Journal 1985 L 35, p. 43) declaring the provisions of Article 85(1) inapplicable to the Package Deal Agreement for the period from 7 July 1982 to 30 April 1986.

8 On 25 October 1985, upon the initiative of the Groupement des Cartes Bancaires 'CB' (hereinafter 'the Groupement') which, since it was set up in 1984, has acted as the French national Eurocheque Community in place of the AFB, the uniform rate of the commission billed by the members of the Groupement in respect of payments by CB card was abolished.

9 On 5 May 1986 Eurocheque International requested the Commission to renew the exemption of the Package Deal Agreement. On 10 July 1986 the Commission sent

to Eurocheque International a provisional comfort letter, valid until 30 December 1987, pending a recasting of the Package Deal Agreement.

10 On 16 December 1987 Eurocheque International notified to the Commission the new Package Deal Agreement which was concluded on 5 June 1987, for an indefinite period, and was to enter into force on 1 January 1988. The Agreement maintained the principle of a maximum commission, fixed at 1.60% of the amount of the cheque by the Eurocheque Assembly at its extraordinary meeting on 24 April 1986 and introduced, in addition, a minimum commission, not expressed as a percentage, having the approximate equivalent value of SFR 2 per Eurocheque and applying to all transactions in which the maximum amount of 1.60% represents an amount lower than that equivalent value.

The Helsinki Agreement

11 At the meeting of the Eurocheque Assembly held in Helsinki on 19 and 20 May 1983 there was concluded between the French banks and financial institutions, on the one hand, and the Eurocheque Assembly, on the other hand, an 'agreement on the acceptance by traders in France of Eurocheques drawn on foreign financial institutions'. The Agreement reads as follows:

'The French banks and financial institutions agree with the Eurocheque International Community that traders affiliated to the Groupement Carte Bleue and/or to Eurocard France SA will, as from 1 December 1983, accept foreign Eurocheques made out in French francs for the payment of goods and services, on the same terms as those of the abovementioned organizations; consequently, the Groupement Carte Bleue, on the one hand, and the Crédit Agricole and the Crédit Mutuel, on the other hand, undertake to adopt the following measures:

1. Traders affiliated to the Carte Bleue and Eurocard networks will be informed of the conditions to be observed, when accepting foreign Eurocheques, in order to benefit from the guarantee.

2. Traders affiliated to the Carte Bleue and Eurocard networks shall receive the "ec" window-sticker and will display it in a visible manner in order to inform foreign customers that Eurocheques are accepted.

3. In respect of purchases paid for by Eurocheques, the members of the Groupement Carte Bleue and of Eurocard will charge their affiliated traders a commission which may not be greater than that applicable to payments by Carte Bleue and Eurocard payments.

4. The banks which are members of the Groupement Carte Bleue and of Eurocard will ensure that their affiliated traders do not increase the price of purchases paid for by Eurocheque, even in the case of special offers or sales.

5. If the affiliated trader contravenes the principles set out above, the French banks and financial institutions will take action as soon as possible so as to ensure that they are complied with in future. Where the commission charged has been passed on to the holder of the foreign Eurocheque, the French banks and financial institutions will retrocede the amount to the issuing bank. Where there is recurrence of breaches of the principles, the French banks and financial institutions will adopt identical sanctions to those imposed in respect of Carte Bleue or Eurocard in the same circumstances.

6. During the clearing of foreign Eurocheques drawn in France and in accordance with the provisions of the Package Deal Agreement, a commission of 1.25% of the amount of all the abovementioned cheques will be added and charged via the national clearing houses.

7. All the arrangements will be put into effect forthwith in order that this agreement may enter into force on 1 December 1983 at the latest.

8. Before the end of 1984 the position regarding charges will be reviewed.

9. The French banks and financial institutions will, within the framework of this agreement, adopt, as soon as is technically possible, the procedures for exchange and automatic clearance of Eurocheque data.'

12 On 14 October 1983 the Groupement Carte Bleue informed the Commission that, in order to enable foreign holders of Eurocheques to use this system of payment to better advantage in France, the French banks had recently agreed to offer to the traders affiliated to the Carte Bleue and Eurocard France networks to clear the foreign Eurocheques which they received in payment at the same rate of charges as that applied for transactions effected by those traders through the Carte Bleue, Visa Card or Eurocard, the traders undertaking at the same time not to pass on to the holder the amount of the commission charged. The Groupement Carte Bleue added that the French banks were offering this service to the holders of foreign Eurocheques without any reciprocity being accorded for holders of a Carte Bleue in trading sectors belonging to the Eurocheque system abroad.

13 On 19 December 1984 the Commission informed the AFB that in January 1983 the Crédit Lyonnais had charged a collection commission of 4.60% on the amount of a cheque paid into it and asked the AFB to indicate which of the banks that were members of the AFB generally charged a collection commission and, as a result, applied the Eurocheque agreement in part only.

14 On 11 October 1984 Eurocheque International informed the Commission that 'since the acceptance agreement with the French banks, which entered into force in May 1984, the traders affiliated to the Carte Bleue and Eurocard France networks have undertaken no longer to charge commission in respect of payment by

Eurocheque. On the other hand, there is no formal legal framework for payments by Eurocheque to non-affiliated traders or individuals, who must pay commissions varying from one bank to another for the paying-in of foreign Eurocheques ...'. Eurocheque International stated that it was sensitive to this question and undertook to endeavour, in its negotiations with the French banks, to provide a solution.

15 On 17 October 1984 the AFB replied to the Commission that the French banks had acceded to the Package Deal Agreement solely in respect of 'emergency cash services' offered to foreigners in France. On the other hand, the banks that were members of the AFB, like the other European banks, had not acceded to the other Eurocheque agreements concerning acceptance, in the trading sector, of guaranteed cheques or the paying-in of foreign Eurocheques by individuals for collection. In these cases the customary procedures for the collection of cheques drawn abroad were therefore applied. Although reciprocity was not assured by the German and Benelux banks, which had powerfully developed the Eurocheque system, the French banks that were members of the Groupement Carte Bleue had agreed, on an experimental basis, to open up their trader network to foreign Eurocheques on the same terms as to customers who were Carte Bleue or Visa Card holders. That agreement, which covered almost 300 000 traders in France, fell outside the Package Deal. Those French banks therefore fully complied with the agreements to which they had acceded.

16 On 12 November 1984 the Caisse Nationale de Crédit Agricole stated, in reply to the Commission, that it had always recommended to the Caisses Régionales that they apply charges to traders paying in uniform Eurocheques for collection, and that it did so in order to comply with the principle of charging for the guarantee of payment given to traders which was already in force in respect of payments by card, and in particular by Eurocard. The Eurocheque Community approved, in October 1983, the application of those charges by the French banks to traders, in so far as the following principles were observed: definition of a rate of commission on Eurocheques paid in by traders for collection 'no higher' than that charged for payments by Eurocard or Carte Bleue, and no passing on of that commission to holders of Eurocheques.

17 On 10 February 1985 the Caisse Nationale de Crédit Agricole informed the Commission that the Caisses Régionales had decided to comply with the Package Deal Agreement and that it was all the French banks that were members of the Carte Bleue or Eurocard France networks which had agreed with the Eurocheque Community to apply a system of charges to French traders paying in foreign Eurocheques for collection.

18 After the Commission, in a request for information which it sent on 11 April 1989, had raised the matter of the improper charging of a commission in certain countries, and in particular in France, Eurocheque International (which in 1988 had become Eurocheque International sc, hereinafter 'Eurocheque International') replied, on 7 June 1989, that an internal agreement between the French financial institutions and the Eurocheque Assembly had been adopted at the Assembly's meeting held in Helsinki on 19 and 20 May 1983. It took the form of a decision adopted by the Assembly and recorded in the minutes and was not a formal document signed by the parties.

19 On 17 August 1989 Eurocheque International 'forwarded' the Helsinki Agreement to the Commission.

20 On 16 July 1990 the Groupement formally notified the Helsinki Agreement to the Commission.

The administrative proceedings relating to the Package Deal Agreement

21 In a letter sent to Eurocheque International on 21 December 1989 the Commission found that the renewal of the exemption raised in particular the question of the Helsinki Agreement and announced that, in the absence of proposals from Eurocheque International, the Eurocheque system would be the subject of a Statement of Objections.

22 On 31 July 1990 the Commission sent to Eurocheque International a Statement of Objections relating both to the new Package Deal Agreement and to the Helsinki Agreement.

23 On 24 April 1991 Eurocheque International, referring to a discussion on 21 March 1991, forwarded to the Commission a new draft Package Deal Agreement and declared itself willing to abolish the Helsinki Agreement but pointed out that, in the interests of the consumer, the principle of payment of the full amount of the Eurocheque at the time of its use should be protected.

24 Following further particulars supplied to it by the Director-General for Competition on 4 June 1991 concerning the amendments the Commission wished to see made to the Package Deal Agreement, Eurocheque International replied on 31 July 1991 that the European banks had changed their point of view in the matter of charging on the paying-in of Eurocheques, that they wished to have total freedom vis-à-vis their customers in the matter of charging and that therefore they could not accept the principle that Eurocheques should be free of charge, inasmuch as that principle would impose an interbank agreement on a zero commission applicable to customers.

The administrative proceedings relating to the Helsinki Agreement

25 On 31 July 1990, at the same time as it sent to Eurocheque International a Statement of Objections relating both to the new Package Deal Agreement and to the Helsinki Agreement, the Commission sent to the Groupement a Statement of Objections limited to the Helsinki Agreement. In that statement, the Commission points out, first, that consideration of the request for renewal of the exemption of the Package Deal Agreement, together with various complaints formally submitted to it, have highlighted the problems raised by the terms for acceptance of foreign Eurocheques in the trading sector in France, problems which were the subject of an agreement signed in Helsinki on 19 and 20 May 1983 and not notified to the Commission. The Commission goes on to note that, two days after a meeting at which the representatives of the Directorate-General for Competition had confirmed that a Statement of Objections concerning the Helsinki Agreement had been drawn up and was in the process of being examined by the staff of the Commission, the Groupement advised the Directorate-General, by letter dated 13 July 1990, that it had just notified the Helsinki Agreement to the Commission. The Statement of Objections, which indicates that the Commission is proposing to find that the conditions for the application of Article 85(1) of the Treaty are satisfied with respect to the Helsinki Agreement, declares however that there is no need to examine the question whether or not the agreement satisfies the four conditions prescribed by Article 85(3) for it to be possible to benefit from an exemption, on the ground that, according to Article 4(1) of Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'), no decision in application of Article 85(3) may be taken until the agreement in question has been notified. The Statement of Objections adds that, even assuming that it had been notified, the Helsinki Agreement does not satisfy the four conditions required for the application of Article 85(3), since the decision exempting the 1984 Package Deal Agreement clearly demonstrated, at point 40, that such agreements, applicable between the banks and their customers, could not in any circumstances be regarded as indispensable within the meaning of Article 85(3)(a). The statement adds, for good measure, that such agreements result, as is pointed out at point 43 of the decision of exemption, in the elimination of all competition.

26 After the Groupement, Eurocheque International and the associations of the financial institutions, members of Eurocheque International, had sent to the Commission their replies to the Statement of Objections, a hearing attended by the

representatives of the Commission, of the Member States, of Eurocheque International and of the Groupement took place on 28 November 1990.

27 The Eurocheque Assembly, meeting at Shannon (Ireland) on 9 and 10 May 1991, reaffirmed the principle according to which the banks are free to charge a commission to their trader customers. However, taking note of the repeated objections of the Commission, the Assembly manifested its intention to demonstrate good will by terminating the Helsinki Agreement, whilst contesting its anti-competitive nature. The Assembly charged an ad hoc working group with the task of elaborating a new Package Deal Agreement.

28 On 22 May 1991 the Groupement informed the Commission of the decision of the Eurocheque Assembly to terminate the Helsinki agreements having regard to the opposition demonstrated by the staff of the Commission.

29 On 28 May 1991 the Groupement informed its members by circular letter that the Eurocheque Assembly had decided to terminate the Helsinki agreements at its meeting on 9 and 10 May 1991 and that the acceptance of Eurocheques would thenceforth be totally independent of the financial terms which the institutions of the Groupement applied in respect of the remittance of payments by 'CB' bank cards.

30 On 5 June 1991 Eurocheque International informed the Commission that it was willing to abolish the Helsinki Agreement.

31 On 19 June 1991 the Commission sent to the Groupement alone a supplementary Statement of Objections relating to the Helsinki Agreement. In that regard, the Commission points out, first, that, notwithstanding the notification of the Helsinki Agreement, it did not consider it expedient to interrupt the Statement of Objections process, which falls within the wider context of a Statement of Objections relating to the Eurocheque system in its entirety. It points out next that the Statement of Objections, replying in advance to the notification of the Helsinki Agreement, an eventuality which the Commission had envisaged, had concluded that in any event the conditions laid down in Article 85(3) of the Treaty were not fulfilled. The Commission adds that the notification of the Helsinki Agreement contains nothing liable to alter the legal assessment which it had made with respect to that agreement in the Statement of Objections; on the contrary, certain factual information or certain arguments contained in the notification or put forward subsequently by the Groupement confirmed the objections at which the Commission had arrived. The Commission explains that it was out of a concern that there should be absolute respect for the rights of the parties that it considered it appropriate to supplement the Statement of Objections of 31 July 1990 by considerations relating to the application of Article 85(3) of the Treaty, since the initial Statement of Objections did not reply to the arguments put forward in that respect by the Groupement in its notification.

32 On 20 June 1991 the Commission sent to Eurocheque International a copy of the supplementary Statement of Objections 'for information'.

33 On 11 July 1991 the Groupement submitted to the Commission a reply to the supplementary Statement of Objections.

The contested decision

34 On 25 March 1992 the Commission adopted Decision 92/212/EEC relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/30.717-A — Eurocheque: Helsinki Agreement, Official Journal 1992 L 95, p. 50), the operative part of which is as follows:

Article 1

The Agreement, which was concluded at the Eurocheque Assembly held in Helsinki on 19 and 20 May 1983 between the French financial institutions and the Eurocheque Assembly on the acceptance by traders in France of Eurocheques drawn on foreign financial institutions, and which was in force from 1 December 1983 to 27 May 1991, constituted an infringement of Article 85(1) of the EEC Treaty.

Article 2

The request that the Agreement referred to in Article 1 be exempted pursuant to Article 85(3) of the EEC Treaty for the period from 16 July 1990, the date of its notification, to 27 May 1991, the date of its abolition, is hereby rejected.

Article 3

1. A fine of ECU 5 000 000 is hereby imposed on the Groupement des Cartes Bancaires 'CB' and a fine of ECU 1 000 000 on Eurocheque International sc by reason of the infringement referred to in Article 1.

2. [Omissis]

3. [Omissis]

Article 4

[Omissis]

The decision was notified first on 25 March 1992 and then on 31 March 1992.

Procedure and forms of order sought by the parties

35 It was in those circumstances that, by applications lodged at the Registry of the Court of First Instance on 25 May 1992, the Groupement and Eurocheque International sc brought the present actions (Cases T-39/92 and T-40/92) which they asked to be joined.

36 By order of 29 June 1992 the President of the First Chamber joined Cases T-39/92 and T-40/92 for the purposes of the written procedure, the oral procedure and the judgment.

37 By letter sent to the Registry of the Court on 8 October 1992 Eurocheque International informed the Court that on 1 September 1992 it had merged with Eurocheque International Holdings SA and Eurocard International SA, these three companies having transferred the entirety of their assets and liabilities to a newly created company, Europay International SA (hereinafter 'Europay'), following which they were dissolved. Since their shareholders had directly become shareholders of Europay, that company succeeded to the rights and obligations of Eurocheque International. In its reply lodged on the same day Europay requested that the Court take formal notice of this and of the fact that it adopted, in its name, the proceedings brought by Eurocheque International and all the pleas in law and arguments put forward by that company.

38 Upon hearing the Report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure.

39 The parties presented oral argument and answered questions put to them by the Court at the hearing on 22 September 1993.

40 In Case T-39/92 the applicant claims that the Court should:

(i) annul all the provisions of the Decision which apply to the Groupement;

(ii) alternatively, annul Article 3 of the Decision in so far as it imposes a fine on the Groupement;

(iii) in the further alternative, reduce the amount of the fine imposed on the Groupement to the extent justified by the infringements of Article 15 of Regulation No 17;

(iv) order the Commission to pay the costs.

41 The defendant contends in this case that the Court should:

(i) dismiss the application by the Groupement for the annulment of Commission Decision 92/212/EEC of 25 March 1992;

(ii) order the Groupement to pay the costs.

42 In Case T-40/92 the applicant claims that the Court should:

(i) annul Articles 1, 2 and 3 of the contested decision in so far as they concern the applicant;

(ii) in the alternative, annul Article 3 of the Decision;

(iii) in the further alternative, reduce substantially the amount of the fine imposed on the applicant by Article 3 of the Decision;

(iv) order the defendant to pay the costs.

43 The defendant contends in this case that the Court should:

(i) dismiss the application by Eurocheque International for the annulment of Commission Decision 92/212/EEC of 25 March 1992 and, in the alternative, for a reduction of the amount of the fine imposed on Eurocheque International;

(ii) order Eurocheque International to pay the costs.

The action in Case T-40/92

Arguments of the parties

44 The applicant maintains that the rights of the defence have been infringed because the Commission failed to notify the supplementary Statement of Objections to

Eurocheque International. Points 12, 22, 26, 27 and 28 of that statement contain new objections in relation to those formulated in the initial Statement of Objections which was notified to Eurocheque International. Article 19 of Regulation No 17, in conjunction with Articles 2, 3 and 4 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition, 1963-1964, p. 47, hereinafter 'Regulation No 99/63'), requires the Commission to communicate in advance the objections which it intends to raise not only to the notifying party but to all the parties to the agreement.

45 The defendant, for its part, alleges that the second Statement of Objections cannot be described as a 'supplementary' Statement of Objections, since it does not contain, as compared with the first, any new facts or any change in the legal assessment. It contends, consequently, that the second statement was not obligatory and that it is not open to the applicant to complain that the Commission communicated that statement to Eurocheque International for information without formally notifying it to that company. It adds that, in any event, Eurocheque International had the opportunity of making known its point of view on that supplementary Statement of Objections.

Assessment by the Court

46 The Court finds that the Commission sent to Eurocheque International the supplementary Statement of Objections, in the form of a copy and solely for the purposes of information, without prescribing a period of time for the submission of its observations.

47 It follows from a reading of Article 19(1) of Regulation No 17, in conjunction with Articles 2 and 4 of Regulation No 99/63, that the Commission must communicate the objections which it raises against the undertakings and associations concerned and may adopt in its decisions only those objections on which those undertakings and associations have had the opportunity to make known their views.

48 Similarly, due observance of the rights of the defence, which constitutes a fundamental principle of Community law and which must be respected in all circumstances, in particular in any procedure which may give rise to penalties, even if it is an administrative procedure, requires that the undertakings and associations of undertakings concerned be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (judgment of the Court of Justice in Case 85/76 *Hoffman-La Roche* v *Commission* ECR 461 and judgment of the Court of First Instance in Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *SA Cimenteries CBR and Others* v *Commission*, [1992] ECR II-2667).

49 In this case it must be considered, in the first place, whether the contested decision, in so far as it is addressed to Eurocheque International, is based on facts and objections which the defendant raised for the first time in the supplementary Statement of Objections which was not notified to Eurocheque International.

50 The Court points out, first, that the Decision states, at point 50, that, since 25 October 1985, the Helsinki Agreement constitutes, by reason of its nature, an agreement restrictive of competition in that it establishes the principle of charging commissions and creates, since that date and for every trader affiliated to the Groupement, an indissociable and altogether unjustified link between payment by bank card and payment by Eurocheque.

51 However, in the initial Statement of Objections, notified to Eurocheque International, the Commission had concluded, at point 30, that the Helsinki Agreement constituted 'a price-fixing agreement, and one which moreover is applicable in relations between banks and customers and not only in interbank relations, since, by that agreement, the French banks agree, with the approval of the entire international Eurocheque Community, to apply to their trader customers "a commission of the same amount" as that which they bill to them in respect of payments by their "CB" bank card'. After the Groupement had replied to that statement that 'each bank freely determines, as the result of the abolition since 1985 of the fixing of commissions which the trader is liable to pay to his bank, the amount of the

commission billed to its traders ...', the Commission stated, at point 12 of the supplementary Statement of Objections, that 'even since that date, the agreement continues to be restrictive of competition in this respect, since it establishes an automatic and altogether unjustified link between two fundamentally different means of payment, the Eurocheque and the "CB" bank card'. In so stating, the supplementary Statement of Objections describes the Helsinki Agreement, at least in respect of the period after 25 October 1985, no longer as an agreement fixing a 'commission of the same amount' but as an unjustified mechanism automatically linking the Eurocheque and the bank card.

52 The Court considers therefore that the supplementary Statement of Objections altered the intrinsic nature of the infringement with which Eurocheque International was charged.

53 The Court points out, in the second place, that the contested decision states, at point 51, that 'compared with the Eurocheque system as exempted by the Commission in 1984, the Helsinki Agreement appears to be truly at variance with that system, which was based, *inter alia*, on the principle ... that the payee of a Eurocheque receives the amount thereof in full'.

54 However, in answer to Eurocheque International, which had stated that the Helsinki Agreement reserved to the consumer a fair share of the advantages deriving from it, the Commission pointed out, at point 27 of the supplementary Statement of Objections, that 'to claim that the agreement gives drawers the benefit of a reduction of the costs which they incur is to forget that, under the terms of the Package Deal of 1980, signed by the French Banking Community, the holder was not to be billed for Eurocheques when using them abroad ...'. Similarly, at point 28 of the supplementary Statement of Objections the Helsinki Agreement is described as 'a major derogation from the Package Deal Agreement' from which it is inferred that the former agreement is neither necessary nor indispensable for the attainment of the objectives of the first two conditions laid down in Article 85(3) of the Treaty.

55 The Court considers that, by stating that the Helsinki Agreement is contrary to the Package Deal Agreement, and by concluding from this that it does not satisfy the second and third conditions laid down in Article 85(3), the supplementary Statement of Objections enlarged the scope of the objections directed against the Helsinki Agreement.

56 However, at points 50 and 51 of the Decision, the Helsinki Agreement is regarded as constituting an agreement on the principle of charging a commission, contrary to the Eurocheque system, and thus the objections and arguments formulated at points 12, 27 and 28 of the supplementary Statement of Objections are in substance adopted.

57 In the light of the foregoing, it must be considered whether the applicant had the opportunity of making known its views on those objections before the Commission adopted a final decision. In that regard, it must be asked whether the dispatch to Eurocheque International of a copy of the supplementary Statement of Objections by way of information, without any period of time being granted to that company in order to enable it to submit its observations in accordance with Article 2(4) of Regulation No 99/63, may suffice.

58 The Court considers that Article 2(1) of Regulation No 99/63, which requires the Commission to inform each of the undertakings and associations of undertakings, or a joint agent appointed by them, of the objections raised against them, does not authorize it to replace, with respect to one of the parties to an agreement, a direct Statement of Objections by the dispatch, in the form of a copy and solely for the purposes of information, of the Statement of Objections sent to another party. In the present case it cannot in fact be excluded that the procedure might have had a different result if the Commission had properly notified the supplementary Statement of Objections to Eurocheque International and if it had prescribed a period of time for that company to submit its observations with respect to points 12, 27 and 28 of that statement.

59 Furthermore, the reply given on 31 July 1991 by Eurocheque International to the proposals for the amendment of the Package Deal Agreement which had been submitted to it by the Commission on 4 June 1991 does not constitute the expression of a point of view by Eurocheque International with respect to the facts and objections set out in the supplementary Statement of Objections. It is, therefore, not such as to show that the applicant was able to make known its views on those objections. That letter was concerned exclusively with the said proposals for amendment of the Package Deal Agreement.

60 It follows that the Commission infringed the applicant's rights of defence under Article 19(1) of Regulation No 17 and Articles 2 and 4 of Regulation No 99/63.

61 Consequently, and without there being any need for the Court to consider the other pleas in law relied on by the applicant in support of its application, the decision must be annulled in so far as it finds the existence of an infringement of Article 85(1) of the Treaty on the part of Eurocheque International and imposes on it a fine of ECU 1 000 000.

62 Since the finding of an infringement of Article 85(1) of the Treaty thus no longer exists with respect to the applicant, the action in Case T-40/92, in so far as it relates to the refusal of an exemption, has become devoid of purpose. There is therefore no need to adjudicate on the legality of Article 2 of the Decision with respect to the applicant in so far as that article rejects the request for exemption submitted by the Groupement.

The action in Case T-39/92

63 The applicant relies, essentially, on four pleas in law in support of its application. The first plea, alleging infringement of Article 85(1) of the Treaty, is in two parts. The applicant submits in the first place that the Commission has failed to establish

the existence of a price-fixing agreement. It then complains that the Commission did not correctly define the relevant market. The second plea alleges infringement of Article 85(3) of the Treaty, the third plea infringement of the rights of the defence and the fourth plea infringement of Article 15(2) of Regulation No 17.

First plea in law: infringement of Article 85(1) of the Treaty

The price-fixing agreement

— Arguments of the parties

64 The applicant denies the existence of a price-fixing agreement. It submits in the first place that, contrary to the assertion at point 48 of the Decision, the Helsinki Agreement, considered in the economic and historical context at the material time, had as its sole object the establishment of a ceiling for the collection commission which might be charged by members of the Groupement in respect of payments by foreign Eurocheque but did not as such prescribe the charging of such a commission. The need to establish such a ceiling results from the instructions in force under the Eurocheque system which require the banks not to treat foreign Eurocheques unfavourably, as compared with payments by national cheque, where a collection commission is charged.

65 The applicant goes on to submit that the Helsinki Agreement is not totally at variance with the Package Deal Agreement, as is stated at point 16 of the Decision. It maintains that it is by distorting the terms of the Package Deal Agreement and of the decision exempting that agreement that the Decision states, at point 51, that the Helsinki Agreement is at variance with the Eurocheque system and asserts that that system was based *inter alia* on the principle that the payee of a Eurocheque must receive the amount thereof in full.

66 On the one hand, the applicant considers that the contested decision is based on a confusion between the interbank commission and the remuneration for services rendered by the banks to their customers. It maintains that, although the Package Deal Agreement prohibits a trader from charging to the drawer of a Eurocheque a commission when that cheque is used, in order to ensure that he receives the full amount thereof, it none the less reserves to the accepting bank the right to bill a commission to its trader customers.

67 On the other hand, the applicant maintains that, with the exception of the Banques Populaires and of the Crédit Mutuel, the French banks which did not issue uniform Eurocheques did not accede to the provisions of the Package Deal Agreement relating to the opening up of the non-banking sector. In that connection, it points out that, as early as 1983, the French banks and Eurocheque International informed the Commission of this and the Commission took note of it at point 22 of the decision of exemption by mentioning that 'some institutions, however, apply the Eurocheque agreements only in part'. The applicant adds that, by expressly referring to the Helsinki Agreement, without excluding it from the scope of the exemption and without making the benefit of the exemption subject to the revocation or amendment of that agreement, the decision exempting the Package Deal Agreement necessarily entailed the exemption of the Helsinki Agreement.

68 Finally, the applicant complains that the Commission misjudged the historical context of the evolution of the systems of payment in France, which was characterized by the replacement of non-guaranteed cheques by payment and withdrawal cards, and concluded that the Helsinki Agreement constituted the second component of a more fundamental agreement which was designed to eliminate the Eurocheque, the other component being the prohibition on the issue of Eurocheques for domestic use. The applicant adds that, far from having contributed to hampering the development of Eurocheques in France, the Helsinki Agreement had beneficial effects with respect to the acceptance of foreign Eurocheques in French businesses, the number of those cheques having increased appreciably since 1984.

69 In that regard, the Groupement maintains that the Commission infringed the principles laid down by the Court of Justice and by the Court of First Instance by undertaking no assessment of the effects of the Helsinki Agreement on competition (see the judgments of the Court of Justice in Case 56/65 *Société Technique Minière* [1966] ECR 337, and in Case 42/84 *Remia and Others* v *Commission*

[1985] ECR 2545 and the judgment of the Court of First Instance in Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931). By systematically comparing the situation resulting from the implementation of the Helsinki Agreement with that which would have prevailed had the Package Deal Agreement been applied, the Commission did not appraise correctly the effects of the Helsinki Agreement on competition and thus could not establish the anti-competitive nature of that agreement.

70 The Commission contends, in the first place, that the use of the future indicative 'percevront' ('will charge') in paragraph 3 of the Helsinki Agreement clearly constitutes the affirmation of an obligation to bill a commission to traders. Pointing out that the agreement that the affiliated traders are to accept foreign Eurocheques on the same terms as those of the Groupement, the defendant contends that the Helsinki Agreement does not relate solely to the principle of charging a commission but also to the amount of the commission. At the time of the Helsinki Agreement the terms applied by the Groupement were identical for all of its members. It was only later, namely as from 25 October 1985, that, after the uniform rates of charge applied by the members of the Groupement had been abolished, the Helsinki Agreement became an agreement relating no longer to a single commission, but to a commission varying according to the practices of the various banking establishments with regard to payment by bank card.

71 The Commission contends, secondly, that the principle of the receipt by the payee of a Eurocheque of the full amount thereof, as it results from the Package Deal Agreement, does not, admittedly, exclude the possibility of charging a commission to the drawer of the Eurocheque, but the principle that the payee of a Eurocheque should receive the full amount thereof was the reason for which the Package Deal Agreement was exempted. It adds however that, in any event, the illegality of the Helsinki Agreement has to do not with the fact that it does not respect the 'free-of-charge principle' but with the fact that it constitutes an agreement relating to the prices applied to customers of the banking institutions.

72 The Commission points out, thirdly, that the French banks had acceded to the Package Deal Agreement. According to the very terms of Form A/B of notification, dated 7 July 1982, 'all the financial institutions represented by each of the

international groupings accede to the agreement', that is to say practically all the financial institutions of each of the countries of the national groupings, of which the AFB is one.

73 The Commission points out, fourthly, that the reference to hampering the development of national Eurocheques in France must be understood as part of an explanation of the national context of the agreement complained of but not, as such, as constituting an objection intended to define as a restrictive agreement the prohibition, addressed to the members of the Groupement, of the issue of Eurocheques for domestic use.

74 The Commission states, fifthly, that, until the Helsinki Agreement itself was notified, it had at its disposal only partial information on the terms of the Agreement and rejects the Groupement's allegation that the mention, in the decision of exemption, of the fact that the Package Deal Agreement was applied only in part by the members of the Groupement which had opened up their trader network to the Eurocheque extended to the Helsinki Agreement the benefit of the exemption granted to the Package Deal Agreement.

75 The Commission maintains, finally, that, notwithstanding the progressive increase in the number of Eurocheques accepted in France between 1984 and 1990, the anti-competitive nature of the agreement continues to exist. It contests the evidential value of the argument based on that progressive increase, since that increase cannot be compared to that which would have been recorded in the absence of the Helsinki Agreement. The defendant contends that the effect of the Helsinki Agreement was to make payments by Eurocheque less attractive for French traders than would have been the case had they continued to receive the full payment of the amount of the Eurocheque in accordance with the Package Deal Agreement.

— Assessment by the Court

76 It must be borne in mind *in limine* that, in a judgment delivered on 30 January 1985 (Case 123/83 *BNIC* v *Clair* [1985] ECR 391), the Court of Justice held

that an agreement concluded between two groups of traders must be regarded as 'an agreement between undertakings or associations of undertakings'. In this case membership of the association entails, by virtue of the document constituting the association, the adhesion of its members to the decisions adopted by the managing bodies of the Groupement.

77 It follows that the Helsinki Agreement must be regarded as an agreement, within the meaning of Article 85(1) of the Treaty, concluded between the two groupings of economic operators constituted by the Groupement des Cartes Bancaires 'CB' and Eurocheque International.

78 In order to establish whether the Helsinki Agreement constitutes a price-fixing agreement for the purposes of Article 85(1)(a) of the Treaty, it is necessary to determine the scope of the terms of the Helsinki Agreement.

79 The Court finds that the opening sentence of the Helsinki Agreement stipulates that the traders affiliated to the Groupement Carte Bleue and/or to Eurocard France SA 'will ... accept' foreign Eurocheques made out in France for the payment of goods and services 'on the same terms' as those that they apply to payment by Carte Bleue and Eurocard, whereas, according to the terms of paragraph 3 of the Agreement, the French banks and financial institutions which are members of the Groupement 'will charge' those same traders, in respect of purchases paid for by Eurocheque, a commission which 'may not be greater' than that charged to them in respect of payments by card.

80 It should be pointed out that, contrary to what appears to be the Commission's view, the opening sentence of the Agreement, in that it requires the 'same terms' to be applied, concerns the relationship between the traders affiliated to the Groupement and their customers, whilst paragraph 3 of the Agreement is concerned with

the relationship between banks and traders. Consequently, it cannot follow from the combination of these two elements of the Agreement that the object of the Agreement is to fix the amount of the commission which the banks will charge to traders who present for collection foreign Eurocheques made out on their premises in payment for goods and services.

81 Furthermore, if, by the expression 'same terms', the opening sentence of the Agreement referred, as the Commission claims, to the amount of the commission charged, paragraph 3 of the Agreement would be superfluous, and even contradictory, in that it prescribes a ceiling for that commission. If the 'same terms' refer to an amount, it would be superfluous to specify a ceiling and contradictory to permit, by the fixing of such a ceiling, the charging of a commission lower than the amount referred to by those 'same terms'. As a result, the opening sentence of the Agreement, if it is not to deprive paragraph 3 of its substance, cannot be interpreted as constituting an agreement on the amount of the commission, as is maintained at point 49 of the contested decision.

82 That analysis is borne out by the letter sent on 13 November 1984 by the Caisse Nationale du Crédit Agricole to the Commission. According to that letter the Caisses Régionales of the Crédit Agricole applied to traders paying in Eurocheques for collection by them a commission which was approved in October 1983 by the Eurocheque Community and the rate of which was 'no higher' than that charged on payments by card.

83 The Court finds, furthermore, that, notwithstanding the questions put in that respect at the hearing, the defendant put forward nothing that could establish that the members of the Groupement exhausted the margin available to them under paragraph 3 of the Helsinki Agreement and, as a general rule, applied to their trader customers, in respect of payments by Eurocheque, commissions equivalent to those which they billed for payments by 'CB' bank cards, as is stated at point 47 of the Decision. Thus, in answer to a question put to him by the Court, the representative of the Commission explained that the very purpose of imposing a ceiling on commissions, which was intended to prevent the charging of excessively high commissions, makes the charging by the members of the Groupement

of commissions lower than the ceiling established by the Helsinki Agreement unlikely, or indeed impossible. The Court considers that, in the absence of any beginnings of proof, that explanation is not of such a nature as to provide a basis for the defendant's assertion.

84 It follows that the obligation imposed by the Helsinki Agreement on the members of the Groupement to bill to the traders affiliated to the Groupement a commission on the collection of Eurocheques may not be regarded as an agreement fixing an identical price to be observed in contracts with third parties, as envisaged in the case-law of the Court of Justice (see the judgment in *BNIC*, cited above, in Case 243/83 *SA Binon and CIE* v *SA Agence et Messageries de la Presse* [1985] ECR 2015 and in Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117), contrary to what is stated at point 49 of the Decision.

85 However, the Court considers that the members of the Groupement, by subscribing to the obligation to charge traders affiliated to them a commission on the collection of Eurocheques drawn on a foreign bank, which is distinct from the interbank commission paid to the members of the Groupement by the drawee bank under the Package Deal Agreement, mutually deprived themselves of the freedom to content themselves with the said interbank commission as remuneration for the Eurocheque collection service rendered to the trader.

86 It follows that the Helsinki Agreement had as its object to restrict to an appreciable extent the freedom of conduct of the members of the Groupement and therefore constitutes an agreement on the charging of a commission, contrary, as such, to Article 85(1)(a) of the Treaty. Consequently, the Commission, referring to its Decision 87/13/EEC of 11 December 1986 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/261-A — Association Belge des Banques, Official Journal 1987 L 7, p. 27), rightly found at point 50 of the contested Decision that the Helsinki Agreement constituted an agreement on the principle of charging a commission and that it was, by its nature, restrictive of competition.

87 Since the Helsinki Agreement has as its object to restrict competition, it is unnecessary to take into consideration the specific effects of the agreement (judgments of the Court of Justice in Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, in *BNIC*, cited above, in Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405 and in Case C-277/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45 (Summary Publication)).

88 As regards the fact that certain banks are said to have declined to charge the commission at issue, it should be observed, moreover and in any event, that, by maintaining in its pleadings that the commission at issue derives its justification from the need to remunerate the service rendered to the trader and that it reflects a concern to prevent any discrimination against the Eurocheque as compared with the ordinary cheque, the applicant acknowledges that the members of the Groupement, in concluding the Helsinki Agreement, had as their objective to make compulsory and effective the remuneration of the Eurocheque collection service rendered by the banks to their trader customers. This contradicts the statement that the members of the Groupement did not in fact comply with their obligation under the Helsinki Agreement to impose on their affiliated traders a collection commission in respect of payments by Eurocheque.

89 As regards the statement, at the end of point 50 of the Decision, that the Helsinki Agreement, combined with the prohibition imposed on the French banks by the Protocol of 31 July 1984 on issuing Eurocheques for domestic use has impeded the development of Eurocheques within France as a domestic means of payment, the Court considers that the mere mention of the Helsinki Agreement as an element of an alleged global strategy put into operation by the Groupement to eliminate simultaneously the issue of Eurocheques in France and the use of foreign Eurocheques in France was not intended to extend the condemnation of the Agreement, at point 50 of the Decision, to Eurocheques within France as a domestic means of payment. That consideration is one which is designed to place the price-fixing agreement in its context and is not necessary for the purpose of substantiating the finding of the existence of that infringement.

90 Furthermore, as regards points 16 and 51 of the Decision, the Court considers that it is of no relevance to the outcome of the present proceedings to know whether or

not the terms of the Package Deal Agreement tolerate the charging to traders of a commission remunerating the Eurocheque collection service. Even supposing that the Package Deal Agreement does tolerate the charging of such a commission, the very fact of imposing this by way of agreement infringes Article 85(1)(a) of the Treaty.

91 Finally, the Court considers that the mere mention of the Helsinki Agreement in the grounds of the decision exempting the Package Deal Agreement could not have had the effect of extending to the Helsinki Agreement the benefit of the exemption granted to the Package Deal Agreement. The operative part of the decision exempting the Package Deal Agreement does not refer to the Helsinki Agreement. The sole purpose of the reference contained in the grounds of that decision to the situation in France resulting from the Helsinki Agreement was to indicate that that situation did not constitute an obstacle to the principle of granting an exemption to the Package Deal Agreement.

92 It follows from all the foregoing considerations that the first part of the plea, based on the absence of a price-fixing agreement, is well founded in so far as the Decision states, at point 49, that the Helsinki Agreement is an agreement on the amount of commission charged and that, for the rest, that part of the plea must be rejected.

The definition of the relevant market

— Arguments of the parties

93 The Groupement points out, in the first place, that point 8 of the contested decision refers, for the first time, to the market 'for all international means of payment to French traders'. By basing its refusal to grant an exemption on the low degree of competition found to exist on the market for all international means of payment to French traders, the Commission deprived the applicant of the possibility of putting forward its views on the definition and characteristics of the market by reference to which the Commission appraised the impairment of competition with which the applicant is charged.

94 The applicant states that the appropriate definition of the relevant market constitutes a necessary and prior condition for any judgment on alleged anti-competitive conduct (see judgment of the Court of Justice in Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215 and the judgment of the Court of First Instance in Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403).

95 In this case it criticizes the Decision, in the first place, for referring to three distinct markets in order to define the market on which the alleged infringement took place: the market for Eurocheques issued by banks established in France, the market for Eurocheques made out in French francs by holders of Eurocheque cards not issued by banks established in France to the 500 000 French traders belonging to the Groupement's card payment system and the market for all international means of payment to French traders.

96 The applicant considers that that definition of the market 'at three levels', for which there is no justification, constitutes an infringement of Article 85 of the Treaty. If the relevant market were to be that for international means of payment used in France, the alleged infringement, which relates only to foreign Eurocheques given to French traders, could not have any appreciable effect on that market by reason of the fact that the volume of foreign Eurocheques given to French traders is trifling in comparison with the volume of all the means of payment to them.

97 Furthermore, the Groupement charges the Commission with having failed to analyse the substitutability of foreign Eurocheques made out to French traders by other means of payment, in so far as such an analysis would have led it to take the view that foreign Eurocheques made out in France did not constitute a specific market.

98 It maintains, in the second place, that, if the relevant market is that for foreign Eurocheques made out to French traders, all the objections raised at points 32, 50, 59 and 82 of the Decision, which are concerned with a restriction of competition between Eurocheques and payments by card, reach beyond the market as defined in the Decision. It adds that if that market has to be adopted as the relevant one, the objections formulated at points 50, 59, 60 to 65 and 66 of the Decision also reach beyond the market thus defined since Eurocheques issued by the French institutions as a domestic means of payment do not form part of that market.

99 The defendant considers that the relevant market is that for international means of payment used for payment to French traders and that, within that market, it is necessary to distinguish a sub-market constituted by Eurocheques made out in France by holders of Eurocheque cards not issued by banks established in France to traders affiliated to the Groupement. The Commission cannot be charged with not having taken as the relevant market the market for Eurocheques alone.

100 The defendant notes, finally, that the sole purpose of the reference to an impediment to the development of Eurocheques within France as a domestic means of payment is to explain the national context of the Helsinki Agreement and that reference does not, as such, constitute a separate objection.

— Assessment by the Court

101 The Court points out that point 8 of the Decision defines the relevant market as 'that for Eurocheques drawn abroad, and more specifically that for Eurocheques made out in French francs to the 500 000 French traders belonging to the card

payment system of the Groupement by holders of Eurocheque cards not issued by banks established in France and, secondarily, that for all international means of payment to French traders'. At point 76 the Decision states that the first level at which the impairment of competition by the Helsinki Agreement should be assessed is, in this case, 'the directly relevant market, that is to say that of foreign Eurocheques drawn in the trading sector in France'. The fact that the Decision covers only the market for foreign Eurocheques drawn in the trading sector in France is borne out by points 50 and 56. At point 50 the Decision states that the Helsinki Agreement 'had the effect of rendering the use of Eurocheques less attractive for French traders'. At point 56 it highlights the fact that the Helsinki Agreement concerns cheques drawn in a Member State by nationals of another Member State and has a particularly appreciable effect on intra-Community trade by reason of the fact that 'France is the principal accepting country' of Eurocheques in the Community.

102 It is true that the Commission acknowledges, at point 77 of the Decision, that 'a secondary, alternative level at which to assess competition could be that of all international means of payment used by French traders'. However, by stressing in the same context that 'competition between these various means of payment is generally limited for factual reasons', the Decision explains why, in this case, the impairment of competition has been assessed at the first level, namely that of the market for foreign Eurocheques drawn in the trading sector in France.

103 It follows from the very heading of the Helsinki Agreement that it governs 'the acceptance by traders in France of Eurocheques drawn on foreign financial institutions'. By reason of its volume, the market for foreign Eurocheques drawn in the trading sector in France, the sole market covered by the Helsinki Agreement, constitutes a specific, sufficiently homogeneous, market which is distinct from that of the other international means of payment, on which the members of the Groupement compete.

104 It follows that the Commission was right in finding, at point 76 of the Decision, that the market directly concerned by the Helsinki Agreement is that for Eurocheques drawn in the trading sector in France.

105 It follows from all the foregoing considerations that the second part of the plea, based on erroneous definition of the market, must be rejected.

Second plea in law: infringement of Article 85(3) of the Treaty

Arguments of the parties

106 The applicant maintains that the Commission has infringed Article 85(3) of the Treaty by refusing to grant to it the exemption requested for the Helsinki Agreement. It states that the Commission has infringed each of the four conditions for the application of that provision and has distorted the facts in the case.

107 In particular, the applicant submits, as regards the third condition, relating to the indispensable nature of the restriction of competition, that it was by starting from the erroneous premiss that the French banks acceded to the Package Deal Agreement that the Commission wrongly took the view, at point 72 of the Decision, that the Helsinki Agreement was not of such a nature.

108 The Commission replies that the Helsinki Agreement satisfies none of the four conditions for the grant of an exemption. As regards in particular the third condition, it points out that it stated at point 72 of the Decision that the restriction of competition resulting, for the members of the Groupement, from the obligation to charge a commission to traders accepting Eurocheques is not indispensable to the attainment of the objectives of the Package Deal Agreement for the reason, precisely, that the latter precludes the charging of a commission to the payee of a Eurocheque.

Assessment by the Court

109 The review undertaken by the Court of the complex economic appraisals made by the Commission when it makes use of the discretion conferred on it by Article 85(3) of the Treaty, with regard to each of the four conditions laid down in that provision, is necessarily limited to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers (see the judgments of the Court of Justice in *Remia*, cited above, and in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487).

110 Having regard to the concurrent nature of the conditions for the grant of the exemption (see the judgments of the Court of Justice in *Consten and Grundig*, cited above, and in Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19), the contested decision, in so far as it refuses the benefit of the exemption, can be annulled only if the review by the Court reveals that the Commission has failed to fulfil its obligations with respect to each of those four conditions.

111 Under Article 85(3) of the Treaty, an exemption may be granted only if the agreement imposes on the undertakings concerned only restrictions of competition which are indispensable for the attainment of the objectives referred to in that paragraph.

112 In this case it is necessary to consider whether the Commission was right in taking the view that the restrictions of competition resulting from the Helsinki Agreement were not indispensable for the purpose of promoting the acceptance of foreign Eurocheques in France.

113 The Court considers that, even supposing that the Helsinki Agreement was necessary in order to oblige the traders affiliated to the Groupement to accept foreign Eurocheques made out in French francs for the payment of goods and services, it was not indispensable to require the members of the Groupement to charge to their trader customers a commission in respect of payments by foreign Eurocheque. As remuneration for the service rendered, the members of the Groupement could, like the French banks not belonging to the Groupement, have contented themselves with the interbank commission paid to them, in pursuance of the Package Deal Agreement, by the drawee bank, instead of depriving themselves, by way of agreement, of the freedom to refrain from charging to the traders affiliated to them a commission in respect of payments by foreign Eurocheque.

114 It follows that in this case the applicant has not established that the restrictions of competition resulting from the Helsinki Agreement did not go beyond what was strictly necessary for the attainment of the objectives of the Package Deal Agreement (see in particular the judgments of the Court of Justice in Case 258/78 *Nungesser and Eisele* v *Commission* (1982] ECR 2015 and in *Verband der Sachversicherer*, cited above; the judgment of the Court of First Instance in Case T-66/89 *Publishers Association* v *Commission* [1992] ECR II-1995). The Court therefore considers that the Decision rightly rejected, at point 72, the applicant's request for exemption on the ground that the Helsinki Agreement could not be seen as an indispensable restriction for the attainment of the objectives of the Package Deal Agreement.

115 It follows that the plea based on infringement of Article 85(3) of the Treaty must be rejected. There is therefore no need to examine the pleas relating to the other conditions for exemption.

Third plea in law: infringement of the rights of the defence

Arguments of the parties

116 The applicant submits, in the first place, that the Commission infringed the rights of the defence by formulating, at points 8 and 50 of the Decision, new objections in relation to those which had been formulated in the Statement of Objections. Point 8 of the Decision refers, for the first time, to the market 'for all international means of payment to French traders'. This change in the definition of the relevant

market deprived the applicant of the possibility of putting forward its submissions in defence with respect to this new definition of the market by reference to which the impairment of competition complained of was appraised. Point 50, for its part, by stating that the Helsinki Agreement 'has impeded the development of Eurocheques within France as a domestic means of payment', introduced a new objection as compared with those set out at points 32 and 33 of the Statement of Objections, which had defined the relevant market as being that for foreign Eurocheques given in payment in France and had considered that the Agreement produced perverse effects between French banks and foreign banks and between French traders and foreign traders.

117 The applicant goes on to complain that the Commission deprived the Groupement of its right to a fair hearing, by alleging the existence of a conflict of interests between the Groupement and Eurocheque International and by asserting, without adducing evidence, that the Helsinki Agreement clearly had an anti-competitive object, because it was desired, and indeed demanded, by the French banking community in its entirety.

118 The applicant further considers that the Commission, by taking it as established that the French banks were not complying with the Package Deal Agreement, and in particular with the principle that Eurocheques should be free of charge, persisted in its refusal to reply to the arguments of the Groupement and refrained from examining the decisive arguments which might have led it to grant an exemption. The applicant sees in this a breach of the obligation to state reasons. It maintains that the same is true as regards the definition of the relevant market, or rather of the relevant markets.

119 The applicant further criticizes the Commission for having adopted the Decision relating to the Helsinki Agreement before it adopted a decision relating to the request for renewal of the exemption of the Package Deal Agreement. In that respect it points out that the Commission states that 'the Helsinki Agreement is totally at variance with the Package Deal Agreement, which governs the use of Eurocheques abroad', whereas it has not yet ruled on the Package Deal Agreement. In so doing, the Commission deprived the Groupement of the elements necessary for its defence in the present proceedings.

120 Finally, the Groupement complains that the Commission misused and exceeded its powers by using the procedure relating to the Helsinki Agreement for the purposes, on the one hand, of compelling Eurocheque International to accept substantial amendments to the Package Deal Agreement and, on the other hand, of imposing the Eurocheque as a privileged means of payment in the Community.

121 The defendant denies that it infringed the applicant's right of defence. It points out, in the first place, that points 80 and 50 of the Decision do not formulate new objections and that it was entitled to clarify, in the Decision, the definition of the relevant market with respect in particular to the factors that emerged from the administrative proceedings. The defendant goes on to deny that it had not been objective. On the one hand, it cannot be criticized for having allowed the parties, which had differing interests, to put forward their own submissions and arguments and for having stressed the points which it regarded as essential, in the event the failure by the Groupement to comply with the Package Deal Agreement as regards the non-banking sector. On the other hand, it replied adequately to all the arguments submitted during the administrative proceedings. Since the fundamental part of the contested Decision is based on the existence of an agreement on the prices to be applied to the customers of the banking institutions, the question of the conflict between the Package Deal Agreement and the Helsinki Agreement remains, in any event, of no significance for the purposes of the appraisal of the Helsinki Agreement.

Assessment by the Court

122 The Court finds, in this case, that it follows from its appraisals with respect to the establishment of the infringement of Article 85(1) of the Treaty in the form set out by the Commission in the contested decision, that the Commission took sufficient account of the arguments of the Groupement relating to the facts and legal circumstances which are of essential importance in the history and context of the present case and that there is therefore no infringement of the obligation to state reasons.

123 The Court finds, furthermore, that it follows both from the content of the administrative proceedings and from the grounds of the Decision that the sole objective of the proceedings culminating in the contested decision was to condemn and prescribe a penalty for the obligation imposed on the members of the Groupement, in breach of Article 85(1) of the Treaty, to charge to traders affiliated to them a commission on collection of foreign Eurocheques.

124 As regards the complaint based on the introduction of new objections, it is sufficient to point out that the mere mention, in the Decision, of impeding the development of Eurocheques as a domestic means of payment is not intended to extend the condemnation of the agreement, mentioned in the last sentence of point 50, to French Eurocheques. Similarly, as regards point 8 of the Decision, the Court points out that the mention of the market for all international means of payment to French traders is not intended to modify the definition of the relevant market adopted by the Decision in relation to that adopted in the Statement of Objections, namely the market for Eurocheques drawn in the trading sector in France. Consequently, points 50 and 8 of the Decision cannot be described as constituting new objections.

125 As regards the complaint based on the disjoinder of the procedure relating to the Helsinki Agreement from that relating to the renewal of the exemption of the Package Deal Agreement, the Court considers that the interests of good administration require that the Commission be able to make a determination with respect to an agreement which has been duly notified to it without having to wait the outcome of the investigation relating, as in this case, to an agreement which is severable from the notified agreement. It follows that by giving a decision on the Helsinki Agreement the Commission did not infringe the rights of the defence.

126 It follows that the plea based on infringement of the rights of the defence must be rejected.

Fourth plea in law: infringement of Article 15(2) of Regulation No 17

Arguments of the parties

127 The applicant seeks, in the alternative, the annulment of Article 3 of the operative part of the Decision in so far as it imposes a fine on the applicant and, in the further alternative, a reduction in the amount of the fine.

128 The Groupement complains, in the first place, that the Commission infringed Article 15(2) of Regulation No 17 by imposing on it, as an association of undertakings endowed with a legal personality distinct from that of its members, a fine exceeding the limit of ECU 1 000 000. In that regard, it maintains that, as an association of undertakings, it does not carry out any of the activities characteristic of those pursued by the undertakings and that, therefore, the fine imposed on it may not exceed ECU 1 000 000. According to the applicant, participation in an infringement must be established individually, since the mere fact that an undertaking belongs to an association of undertakings does not give rise to an irrebuttable inference that that undertaking participated in an infringement committed by the association. By basing its decision on such an inference the Commission was seriously in breach of the principle of the individual nature of penalties and of the elementary rights of the defence.

129 The applicant adds that the fixing of the fine imposed on the Groupement on the basis of the profits realized by third parties which were not involved in the administrative proceedings constitutes a breach of the principle of the individual nature of penalties which forms an integral part of Community law.

130 Furthermore, the Commission took no account of the mitigation of the gravity of the infringement as the result of the abolition, in 1985, of the uniform rating of commissions charged in respect of payments by 'CB' bank card.

131 Finally, the applicant disputes the existence of aggravating factors and submits that it is contrary to the fundamental principles of law to rely on an infringement which has not been established, namely the impediment of the development of the Eurocheque as a domestic means of payment in France, as an aggravating factor of another infringement. Similarly, the applicant considers that the Groupement or the French banks cannot be charged with having concealed important information from the Commission or with not having dealt honestly with it.

132 The Commission replies, first, that the provisions of Article 15(2) of Regulation No 17 enable it to impose a fine equivalent to 10% of the turnover of each of the members of an association of undertakings which has infringed the provisions of Article 85(1) of the Treaty. It maintains that it is in fact the undertakings which are members of the association which take the decision of the association and which thus participate in the infringement through the association. The interpretation advocated by the applicant would have the effect of depriving Article 85(1) of the Treaty and Article 15 of Regulation No 17 of their substance and their force, for then it would be sufficient for undertakings achieving a very high turnover and resolved to infringe Article 85(1) to form an association and then to cause decisions to be taken by that association which are contrary to the provisions of that article in order to prevent the Commission from being able to impose a fine in excess of ECU 1 000 000, no matter how grave the infringement committed and no matter the size of undertakings benefiting from the infringement.

133 The defendant goes on to state, that in order to determine the amount of the fine, it made an approximate estimate of the profit obtained by the French banks from the application of the Helsinki Agreement and that that estimate constituted only one of the factors taken into account for the purpose of fixing the fine, since the Decision established no direct link between that estimate and the amount of the fine.

134 As regards the gravity of the infringement, the Commission considers, on the one hand, that the Helsinki Agreement, as a price-fixing agreement applicable in relations with customers, constitutes a particularly serious infringement and states, on

the other hand, that it took into account, for the purpose of assessing the gravity of the infringement, the mitigation resulting from the abolition of the uniform rating of commissions noted at point 50 of the Decision, mitigation which is expressly mentioned under that point, to which point 78 of the Decision refers through a reference to points 46 et seq. Similarly, the Commission took into account the fact that this was the first case of a fine imposed in the banking sector.

135 On the other hand, the Commission contends that it was justified in regarding as an aggravating factor the lack of cooperation from the parties, but that the impediment of the development of Eurocheques in France as a domestic means of payment was recorded only for the purpose of describing the context of the agreement. It was not an element of the infringement that was penalized by the fine imposed by the Decision.

Assessment by the Court

136 The Court considers that the use of the general term 'infringement' in Article 15(2) of Regulation No 17, inasmuch as it covers without distinction agreements, concerted practices and decisions of associations of undertakings, suggests that the ceilings specified by that provision apply in the same manner to agreements and concerted practices, and also to decisions of associations of undertakings. It follows that the ceiling of 10% of turnover must be calculated by reference to the turnover of each of the undertakings which were parties to those agreements and concerted practices or of the undertakings, as a whole, which were members of the said associations of undertakings, at least where, by virtue of its internal rules, the association is able to bind its members.

137 The soundness of this analysis is borne out by the fact that, in fixing the amount of fines, account may be taken, *inter alia*, of the influence which the undertaking was able to exert on the market, in particular by reason of its size and economic power of which the undertaking's turnover gives an indication (judgment of the Court of

Justice in Joined Cases 100/83 to 103/83 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraphs 120 and 121) and by reason of the dissuasive effect which those fines must have (judgment of the Court of First Instance in Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 309). The influence which an association of undertakings has been able to exert on the market does not depend on its own 'turnover', which discloses neither its size nor its economic power, but on the turnover of its members, which constitutes an indication of its size and economic power.

138 In this case, it is apparent from Articles 11 and 12 of the act constituting the Groupement that the latter can bind its members, and Article 9 of the act provides that the members of the Groupement are jointly and severally and indefinitely liable in respect of the commitments of the Groupement towards third parties and that the creditors of the Groupement may pursue a member for the payment of debts only after unsuccessfully submitting a formal demand for payment to the Groupement. As regards the obligations of each member towards the others, the burden of joint and several liability is shared, by virtue of the act of constitution, according to the number of transactions effected by means of the Groupement's cards, including the payment transactions submitted for clearance by traders.

139 As regards the argument based on breach of the principle of the individual nature of penalties, the Court considers that it follows from its findings concerning the price-fixing agreement that the infringement was committed by the association of undertakings constituted by the Groupement and that therefore the Commission rightly imposed the fine on the Groupement. In that respect, it must be pointed out that it is not open to an association of undertakings which has committed an infringement to complain that the Commission infringed that principle by taking into consideration the turnover of its members in order to determine the upper limit of the fine and thus by making the members of the association bear the financial burden constituted by the fine. The fact that their turnover is taken into account in determining the upper limit of the fine in no way means that a fine has been imposed on them, or even, in itself, that the association in question is under an obligation to pass on to its members the burden of the fine. Even supposing that the internal rules of the association give rise to such an obligation, this is of no relevance from the point of view of the rules of Community law on competition.

140 In this case it is not alleged that the fine imposed exceeds 10% of the total turnover of the members of the said association of undertakings.

141 It follows that the amount of the fine imposed by the Decision does not exceed the upper limit fixed by Article 15(2) of Regulation No 17.

142 It is apparent from a reading of points 78, 49 and 50 of the contested decision, taken together, that it was by classifying the Helsinki Agreement in turn as an agreement on the amount of a commission and as an agreement on the principle of charging a commission that the Commission imposed on the Groupement a fine of ECU 5 000 000. However, it is only the agreement on the principle of charging a commission, referred to at point 50 of the Decision, which the Court has found to be proved against the Groupement. That being so, it falls to the Court to consider, in the exercise of its unlimited jurisdiction, whether the fine imposed on the Groupement should be reduced.

143 It is apparent from the case-law of the Court of Justice that the amount of fines must be graduated according to the circumstances and the gravity of the infringement (judgment of the Court of Justice in Case 183/83 *Krupp* v *Commission* [1985] ECR 3609) and that, for the purposes of fixing the amount of the fine, the gravity of the infringement is to be appraised by taking into account in particular the nature of the restrictions on competition (judgments of the Court of Justice in Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661 and in Case 45/69 *Boehringer* v *Commission* [1970] ECR 769).

144 It should be borne in mind, for the purposes of appraising the intrinsic gravity of the infringement, that the impairment of competition complained of at point 50 of

the Decision is confined to the fact that by the Helsinki Agreement there was imposed on the members of the Groupement an obligation to charge to the traders affiliated to them a commission remunerating the service of collection of payments by Eurocheque. However, paragraph 3 of the agreement leaves to the members of the Groupement every scope for imposing, in respect of payments by Eurocheque, lower collection commissions for traders than those which they impose in respect of payments by card. Since the commission billed in respect of payments by Eurocheques may be lower than that billed for payments by card, it must be considered that a possibility of competition continued to exist with respect to traders since they could choose the bank applying the lowest commission. In that respect, the Court points out that the Commission adduced no evidence that might establish that the members of the Groupement exhausted the margin available to them by virtue of paragraph 3 of the Helsinki Agreement.

145 The Court further notes that the Commission explains, at point 80 of the Decision, that the amount of the fines was fixed in relation to the profit derived from the agreement by the members of the Groupement over a period of six years. However, it follows from the considerations set out earlier in this judgment that the infringement found against the Groupement does not relate to the fixing of the amount of the commission, so that the Commission's estimate for the purposes of determining the amount of the fine is no longer relevant.

146 The Court considers, moreover, that the Commission rightly accorded to the Groupement the benefit of mitigating factors at points 88, 89 and 90 of the Decision.

147 In the light of all these considerations, the Court considers that the fine of ECU 5 000 000 imposed on the Groupement is not appropriate in relation to the nature and intrinsic gravity of the infringement found at point 50 of the Decision, and, in the exercise of its unlimited jurisdiction, sets at ECU 2 000 000 the amount of the fine imposed on the Groupement.

Costs

148 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

149 Since the Commission has been unsuccessful in Case T-40/92 and the applicant has asked for costs, the Commission must be ordered to bear its own costs and to pay those incurred by the applicant Europay.

150 Since the Groupement has been unsuccessful in part in Case T-39/92 and since it has applied for an order for costs against the defendant, the Court considers it equitable to order that the applicant bear one-half of its own costs and that the Commission bear its own costs and pay one-half of the costs of the Groupement.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1) Annuls Articles 1 and 3 of Commission Decision 92/212/EEC of 25 March 1992 relating to a proceeding pursuant to Article 85 of the

Treaty (IV/30.717-A — Eurocheque: Helsinki Agreement) in so far as they refer to Eurocheque International;

2) Sets the amount of the fine imposed on the Groupement des Cartes Bancaires 'CB' in Article 3 of the Decision at ECU 2 000 000;

3) For the rest, dismisses the application of the Groupement des Cartes Bancaires 'CB';

4) Orders the Commission to bear its own costs and to pay the costs incurred by Europay and one-half of the costs incurred by the Groupement. The Groupement shall bear one-half of its own costs.

Schintgen García-Valdecasas Kirschner

Vesterdorf Lenaerts

Delivered in open court in Luxembourg on 23 February 1994.

H. Jung R. Schintgen

Registrar President