In Case 172/80,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Amtsgericht [Local Court] Rosenheim for a preliminary ruling in the action pending before that court between

GERHARD ZÜCHNER, Rosenheim,

and

BAYERISCHE VEREINSBANK AG, Munich,

on the interpretation of Articles 85 and 86 of the EEC Treaty,

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore, Lord Mackenzie Stuart and T. Koopmans, (Presidents of Chambers), A. O'Keeffe, G. Bosco, A. Touffait, O. Due and U. Everling, Judges,

Advocate General: Sir Gordon Slynn
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

Mr Züchner, the plaintiff in the main action, has an account with the Bayerische Vereinsbank AG, the defendant in the main action, at Rosenheim in the Federal Republic of Germany. On 17 July 1979 he drew a cheque on the defendant bank in the amount of DM 10 000 in favour of a payee resident in Italy. For this a "service charge" of DM 15, representing

0.15% of the sum transferred, was debited to his account by the defendant.

Mr Züchner sued the Bayerische Vereinsbank AG before the Amtsgericht Rosenheim for repayment of the charge. He maintains, *inter alia*, that the imposition of the "service charge" is incompatible with Article 67 of the EEC Treaty because it introduces discrimination between transfers of capital within the country and transfers abroad, and with the competition rules in the Treaty because it is a practice followed by all the banks, or most of them, both in Germany and in the other Community countries and is liable to affect trade between Member States.

The Amtsgericht considered that Article 67 of the EEC Treaty was not relevant to a decision in the case, being a provision which binds only the Member States and has no direct effect as regards citizens of the European Economic Community. It allowed that that was not so, however, in the case of Articles 85 and 86 of the EEC Treaty because they are also binding on citizens of the common market. By an order dated 14 July 1980, therefore, it stayed the proceedings and requested a ruling from the Court of Justice on the following question:

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

The order making the reference was lodged at the Court Registry on 29 July 1980.

An appeal by the Bayerische Vereinsbank AG against the order, on the ground that as the sum of DM 15 had in the meantime been reimbursed the plaintiff no longer had an interest in the reference for a preliminary ruling, was dismissed by the Landgericht [Regional Court] Traunstein. The latter held that in the present instance the plaintiff still had an interest in obtaining confirmation that his action for recovery was well-founded as the defendant could at any time ask him to pay transfer charges for transactions such as those which were the subject-matter of the action.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by Mr Züchner, the Bayerische Vereinsbank AG, represented by Gleiss, Lutz, Hootz, Hirsch & Partners of the Stuttgart Bar, and by the Commission of the European Communities, represented by Götz zur Hausen, a member of its Legal Department, acting as Agent.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. However, it asked the parties to the main action and the Commission to state during the oral procedure "on what basis a charge of 0.15% on transfers of sums similar in magnitude to that which is the subject-matter of the action in question from one Member State to another may generally be considered as the minimum necessary to cover the intrinsic costs of such transactions". The Court also decided to assign the case to the First Chamber in application of Article 95 (1) and (2) of the Rules of Procedure.

By an order of 26 March 1981 the First Chamber decided pursuant to Article 95 (4) of the Rules of Procedure to refer the case to the full Court.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

Mr *Züchner* considers that as the Court has a duty to interpret Community law in such a manner as to enable the court hearing the main action to apply that law it should examine in the course of the present proceedings not only the scope of the provisions expressly referred to by the court making the reference but also that of other articles of the Treaty which may have been infringed by the bank's imposition of a transfer charge.

He is of the opinion that the prohibition of discrimination in Article 67 of the Treaty is not necessarily directed exclusively towards Member States alone. He maintains, further, that the charge imposed by the banks for transfers abroad is not justified by any higher costs involved in such transfers and that it may thus be found to be contrary to Article 30 of the Treaty in so far as, being applied equally to payments for goods and services, it constitutes an obstacle to the free movement of goods and services within the Community. Lastly, he observes that the compatibility of the charge in question with Community law might likewise be examined in the light of Articles 13 and 95 of the EEC Treaty.

As regards Article 85 of the Treaty, the subject of the question which has been referred to the Court for a preliminary ruling, Mr Züchner points out that he relied on that article before the national court principally in order to counter the defendant's allegation that there were not Community legal provisions applicable to agreements made under private law. He adds that the fact that the contested charge is imposed at the same rate in other Member States, and by all the banks in the Federal Republic of Germany, may amount to an indication that there is a concerted practice.

The *Bayerische Vereinsbank AG* submits that the question which has been referred to the Court for a preliminary ruling is open to different interpretations.

If the intention is understood to be to establish the existence of an infringement of Article 85 of the Treaty where the substantive requirements laid down in the rules are met, it must be conceded that under those conditions the existence of an infringement is clear and as a result the need to interpret the EEC Treaty does not arise.

If, by contrast, the question is understood as asking whether the service charge of 0.15% is being imposed on the basis of a concerted practice within the meaning of Article 85 the reply to that question requires consideration of the facts of the case, which the Court of Justice has no jurisdiction to effect. In so far as it may be relevant the Bayerische Vereinsbank AG states that there is no concerted practice whatsoever between the banks regarding the imposition and amount of the transfer charge.

The question which has been submitted for a preliminary ruling may also be understood as asking whether the imposition of the transfer charge *ipso facto* contravenes Article 85 or Article 86 of the EEC Treaty.

As regards Article 85 it should be observed that the transfer charge

amounts to payment required by the bank of its customers as the price of a service (the transfer of money abroad) which it performs for them. That is merely a normal exchange of service and consideration for the service. Such an exchange cannot amount to a concerted practice, any more than its object or effect is to prevent competition in trade between Member States.

As to Article 86, it should be emphasized that even an undertaking which has a dominant position on the market is fully entitled to require payment in return for a service it performs for its own customers.

In brief, the order making the reference might be interpreted as raising the question whether the transfer charge may lawfully be made by a bank where the movement of capital and payments between States is concerned even when the decision to make the charge has been taken in concert with other banks within the meaning of Article 85 of the EEC Treaty.

Even if, for the sake of argument, the basis on which the transfer charge was to be made and its amount had been the subject of an agreement with other banks within the meaning of Article 85 the customer would be asked to pay the charge in his capacity as a third person not party to the agreement, on the basis of an independent contract. Such a contract is legally distinct from the agreement and may quite simply be detached from it. According to the case-law of the Court of Justice any elements which are severable from a contract which is incompatible with Article 85 (1) are not affected by the nullity referred to in paragraph (2) of the same article. That must apply even more clearly in the case of a second contract which is legally independent. That contract, not being caught by the prohibition in Article 85 of the Treaty, must be assessed not in the light of Community law but in the light of national law.

The Bayerische Vereinsbank AG then considers, by way of precaution, the question whether the imposition of a transfer charge may amount to an infringement of Article 67 of the EEC Treaty, although it considers that the power which the Court has to clarify the substance of a question which is incorrectly framed does not go as far as to replace an ambiguous question with a completely different question.

It observes, in the first place, that Article 67 is addressed solely to Member States and their institutions and not to the nationals of Member States. That article lays down a provision which, owing to its form and basic content, can be followed only by the Member States.

It observes, further, that the purpose of Article 67 is solely to provide for liberalization of movements of capital, not of the circulation of payments, whereas the circulation of cheques and other means of transfer are precisely movements of payments.

It points out that according to the wording of Article 69 of the EEC Treaty in conjunction with Article 67 thereof the Member States have a duty to adopt specific measures to eliminate restrictions on the movement of capital only in accordance with directives adopted by the Council and that there is no Council directive requiring the States to eliminate in addition "obstacles" in private law to the circulation of capital (or payments).

Lastly, it observes that the calculation of transfer charges for orders for payment to a foreign account does not constitute discrimination, for transfers to a foreign account differ in many respects (the necessity of maintaining funds with foreign banks, the need to use specialist agents, higher costs of communication,

more complex procedure for dealing with cheques presented from abroad) from those made to an account at home and those differences entail expenses which are appreciably greater than those involved in the domestic circulation of payments.

As the service charge is imposed on all orders for payment to a foreign account there is also no discrimination based on the nationality of the holder of the account or on that of the payee.

The *Commission of the European Communities* observes that neither the actual question submitted for a preliminary ruling nor the reasons given in the order making the reference refer to the objective context in which the question has arisen. The question which has been put to the Court appears to have meaning only if there is assumed to exist a concerted practice the aim of which is the application by the banks of uniform charges for effecting transfers to other Member States of the Community. It is only on the assumption that such a practice exists that the question may be asked whether it falls within the prohibition enunciated in Article 85 (1) of the Treaty.

Moreover, the national court has omitted to give any indication of how widespread that practice is in relation to the number of banks which are party to it or to the amount levied by way of transfer charge. If the Court wishes to give a reply to the national court without proceeding to make its own inquiries, which it is not in any case entitled to do, it will have to re-formulate the question on the basis of suppositions.

It will then be for the court which has made the reference to decide on the basis of the interpretation supplied by the Court whether in this case there is in fact conduct which is prohibited by Article 85 (1) of the EEC Treaty.

The Commission states that at present there are no proceedings instituted by it under Article 3 of Regulation No 17 of the Council in relation to transfer charges and that investigations carried out in the past on charges levied on payment of travellers' cheques and Eurocheques have not led to the institution of formal proceedings in application of that article.

It observes, however, that the rules governing competition are without doubt equally applicable to the banking sector, as it stated long ago in its second report on competition policy.

For the purpose of replying to the question which has been submitted the Commission wonders whether the concept of a concerted practice in Article 85 (1) may extend to a practice such as may be supposed to exist in the present instance. In that regard it submits the following observations:

(a) Merchant banks are undertakings within the meaning of Article 85 (1) of the Treaty.

(b) A concerted practice exists when those concerned knowingly substitute practical cooperation for the risks of competition thereby creating a situation which does not correspond to normal market conditions. It suffices for those concerned to inform each other of the amount of the charges actually imposed by them or contemplated for the future; for the object or effect of such contacts is to influence the level of the charges imposed by the competitor or, at least, to eliminate uncertainty on the part of the competitor as to the level of charges imposed by the first party. In practice the contact

between undertakings may take various forms which the Commission does not consider it necessary to examine here in the absence of information on the subject in the order making the reference.

(c) The actual or proposed restriction affects competition between the various banks in regard to the provision of services for the benefit of their customers. Transferring a sum of money in favour of a third person constitutes the provision of services. Competition in the provision of services is equally subject to the competition rules of the Treaty. Competition in prices is wholly excluded if the banks concerned all impose the same charges for a given transfer.

(d) In order to decide whether the restriction on competition is appreciable it is principally necessary to determine which banks, and how many of them, are involved and what the volume of transfers concerned is in relation to the number and the total amount of transfers carried out to all the other Member States.

(e) A concerted practice governing the charges imposed in respect of sums of money transferred in other Member States is certainly liable to affect trade between Member States.

The expression "trade" used in Article 85 (1) must be interpreted widely; it applies equally to monetary transactions, which are a form of economic transaction.

The Commission thus shows that the reply to the question will differ depending on certain factors which have not been specified in the order making the reference. Accordingly it suggests that the reply to the Amtsgericht Rosenheim should be as follows:

"There may be a concerted practice prohibited by Article 85 (1) of the Treaty when the object or effect of a practical cooperation between banks is the imposition of identical charges on transfers to other Member States of the Community."

III — Oral procedure

Oral argument was presented at the sitting on 6 May 1981 by the Bayerische Vereinsbank AG, represented by Martin Hirsch of the Stuttgart Bar, and by the Commission of the European Communities, represented by Mr Götz zur Hausen, a member of its Legal Department, acting as Agent.

The Advocate General delivered his opinion at the sitting on 3 June 1981.

Decision

1 By an order dated 14 July 1980 which was received at the Court on 29 July 1980 the Amtsgericht [Local Court] Rosenheim referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of Articles 85 and 86 of the Treaty, in order to determine the scope of those provisions in connexion with a service charge

imposed by a banking undertaking established in the Federal Republic of Germany on the transfer of a sum of money by means of a cheque from one Member State to another.

2 From the file forwarded by the national court it appears that the holder of a bank account with the Bayerische Vereinsbank in Rosenheim, Federal Republic of Germany, drew a cheque on the bank on 17 July 1979 in the amount of DM 10 000 in favour of a payee resident in Italy. The bank debited his account in respect of the transfer with a "service charge" (Bearbeitungsgebühr) of DM 15, representing 0.15% of the sum transferred.

3 The holder of the account considered that the imposition of such a charge ran counter to the provisions of the EEC Treaty and sued the bank before the Amtsgericht Rosenheim for repayment of the charge.

4 He maintained, *inter alia*, that the imposition of the charge was incompatible with Articles 85 and 86 of the Treaty because it was part of a concerted practice followed by all or most banks both in the Federal Republic of Germany and in other Community States, which was contrary to the rules on competition and capable of affecting trade between the Member States.

5 In order to clarify that last point, in particular, the national court decided to refer the following question to the Court of Justice for a preliminary ruling pursuant to Article 177 of the Treaty:

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

6 The defendant in the main action raised the initial objection in the course of the oral procedure that the question of interpretation raised by the national court was without purpose because the Treaty provisions on competition did not apply, at least to a great extent, to banking undertakings. It maintained

that by reason of the special nature of the services provided by such undertakings and the vital role which they play in transfers of capital they must be considered as undertakings "entrusted with the operation of services of general economic interest" within the meaning of Article 90 (2) and thus are not subject, pursuant to that provision, to the rules on competition in Articles 85 and 86 of the Treaty. It also relied in support of its argument on the provisions in Article 104 et seq. of the Treaty concerning "Economic policy".

7 Although the transfer of customers' funds from one Member State to another normally performed by banks is an operation which falls within the special task of banks, particularly in connexion with international movements of capital, that is not sufficient to make them undertakings within the meaning of Article 90 (2) of the Treaty unless it can be established that in performing such transfers the banks are operating a service of general economic interest with which they have been entrusted by a measure adopted by the public authorities.

8 As to Article 104 et seq. of the Treaty, those provisions in no way have the effect of exempting banks from the competition rules of the Treaty. They appear in Chapter 2 of Title II of the Treaty, which concerns "Balance of payments", and are restricted to stipulating that there must be coordination between the Member States on economic policy, and to that end they provide for collaboration between the appropriate national administrative departments and the central banks of the Member States in order to attain the objectives of the Treaty.

9 In the light of all those considerations the objection raised by the defendant in the main proceedings must therefore be dismissed.

10 The question of interpretation was raised by the national court with reference to the debiting of a uniform service charge of 0.15% on the relevant transactions. The question arose with regard to both Article 85 and Article 86 of the Treaty. In view of the fact that the order submitting the reference considers only the existence of a concerted practice as a possible infringement of Community rules on competition and having regard to the

fact that Article 86 deals with the abuse of a dominant position and does not cover the existence of concerted practices, to which solely the provisions of Article 85 apply, examination of the question which has been referred to the Court must be restricted to the latter article.

11 According to Article 85 (1) of the Treaty: "The following shall be prohibited as incompatible with the common market: all agreements between undertakings decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction of distortion of competition within the common market".

12 As the Court has stated, in particular in its judgment of 14 July 1972 (Case 48/69 *Imperial Chemical Industries Ltd* v *Commission* [1972] ECR 619) a concerted practice within the meaning of Article 85 (1) of the Treaty is a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.

13 The Court also stated, in its judgment of 16 December 1975 (Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie* v *Commission* [1975] ECR 1663, at p. 1942) that the criteria of coordination and cooperation necessary for the existence of a concerted practice in no way require the working out of an actual "plan" but must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each trader must determine independently the policy which he intends to adopt on the common market and the conditions which he intends to offer to his customers.

14 Although it is correct to say that this requirement of independence does not deprive traders of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contract between such traders, the object or effect of which is to create conditions of competition which do not correspond to the

normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market.

15 The applicant in the main proceedings is of the opinion that in this case there is a concerted practice consisting in the debiting by all or most banks within the common market, or at least in the Federal Republic of Germany, of a uniform service charge for transfers of sums of a similar amount to other Member States.

16 The defendant in the main proceedings has not denied that, for transfers of funds of this nature a charge at the same rate is imposed by other banks, both in the Federal Republic of Germany and in other Member States. It has however pointed out that this similarity of conduct is not the result of an agreement or concerted practice between those banks, the object or effect of which is to produce results prohibited by Article 85 of the Treaty. It has explained that the justification for imposing the charge lies in the costs involved in such transfers owing in particular to the complex nature of the exchange transactions involved, and it has observed, in addition, that the charge uniformly levied in respect of every transfer above a certain amount represents only a partial contribution towards the total cost of the transfers usually effected.

17 The fact that the charge in question is justified by the costs involved in all transfers abroad normally effected by banks on behalf of their customers, and that it therefore represents partial reimbursement of such costs, debited uniformly to all those who make use of such service, does not exclude the possibility that parallel conduct in that sphere may, regardless of the motive, result in coordination between banks which amounts to a concerted practice within the meaning of Article 85 of the Treaty.

18 Such a practice is capable, precisely because of the fact that it covers international transactions, of affecting "trade between Member States" within the meaning of the above-mentioned article, the concept of "trade" used in that article having a wide scope which includes monetary transactions.

19 Moreover, it would fall within the prohibition in Article 85 (1) of the Treaty if it were established that its object or effect was to affect significantly conditions of competition in the market in monetary transfers by banks from one Member State to another.

20 That would be the case, in particular, if a concerted practice enabled the banks participating in it to congeal conditions in their present state thus depriving their customers of any genuine opportunity to take advantage of services on more favourable terms which would be offered to them under normal conditions of competition.

21 That is a question of fact which only the court adjudicating on the substance of the case has jurisdiction to decide. In doing so, it must consider whether between the banks conducting themselves in like manner there are contacts or, at least, exchanges of information on the subject of, *inter alia*, the rate of the charges actually imposed for comparable transfers which have been carried out or are planned for the future and whether, regard being had to the conditions of the market in question, the rate of charge uniformly imposed is no different from that which would have resulted from the free play of competition. Consideration must also be given to the number and importance in the market in monetary transactions between Member States of the banks participating in such a practice, and the volume of transfers on which the charge in question is imposed as compared with the total volume of transfers made by the banks from one member country to another.

22 On all those grounds, the reply to the question which has been referred to the Court must be that parallel conduct in the debiting of a uniform bank charge on transfers by banks from one Member State to another of sums from their customers' funds amounts to a concerted practice prohibited by Article 85 (1) of the Treaty if it is established by the national court that such parallel conduct exhibits the features of coordination and cooperation characteristic of such a practice and if that practice is capable of significantly affecting conditions of competition in the market for the services connected with such transfers.

Costs

The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As this case is, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Amtsgericht Rosenheim by an order dated 14 July 1980, hereby rules:

Parallel conduct in the debiting of a uniform bank charge on transfers by banks from one Member State to another of sums from their customers' funds amounts to a concerted practice prohibited by Article 85 (1) of the Treaty if it is established by the national court that such parallel conduct exhibits the features of coordination and cooperation characteristic of such a practice and if that practice is capable of significantly affecting conditions of competition in the market for the services connected with such transfers.

Mertens de Wilmars Pescatore Mackenzie Stuart Koopmans O'Keeffe

Bosco Touffait Due Everling

Delivered in open court in Luxembourg on 14 July 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President