

Joined Cases T-125/03 R and T-253/03 R

Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd

v

Commission of the European Communities

(Interim measures — Competition — Commission's powers of investigation —
Protection of confidentiality — Communications between lawyers and
clients — Limits)

Order of the President of the Court of First Instance, 30 October 2003 . . . II - 4777

Summary of the Order

1. *Procedure — Intervention — Interim measures — Interested persons — Application for suspension of operation of a Commission decision rejecting a request for protection of the confidentiality of documents copied during an investigation based on Article 14 of Regulation No 17 — Dispute relating to the protection of the confidentiality of correspondence with lawyers and in-house lawyers — Application to intervene by associations of lawyers and in-house lawyers — Admissible (Statute of the Court of Justice, Art. 40, second para.)*

2. *Interim measures — Conditions of admissibility — Admissibility of the main action — Lack of relevance — Limits*
(Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Article 104(1))
 3. *Acts of the institutions — Decision — Validity — Decision to carry out an investigation based on Article 14 of Regulation No 17 — Circumstances of law and of fact concerning the conduct of the investigation procedure — Circumstances not affecting the validity of the decision*
(Art. 230 EC; Council Regulation No 17, Art. 14(3))
 4. *Interim measures — Suspension of operation — Conditions for granting — Prima facie case — Prima facie harm to the rights of the defence during an investigation under Regulation No 17 — Notes drafted with a view to consulting a lawyer or correspondence with a salaried in-house lawyer*
(Arts 242 EC and 243 EC; Council Regulation No 17, Art. 14)
 5. *Competition — Administrative procedure — Commission's powers of investigation — Refusal by the undertaking to produce correspondence with its lawyer, in reliance on its confidentiality — Commission's powers*
(Council Regulation No 17, Art. 14)
 6. *Interim measures — Suspension of operation — Conditions for granting — Serious and irreparable harm — Concept — Application for suspension of the operation of a Commission decision rejecting a request for protection of the confidentiality of documents copied during an investigation based on Article 14 of Regulation No 17*
(Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))
 7. *Interim measures — Suspension of operation — Conditions for granting — Balancing of all the interests involved — Concept — Application for suspension of the operation of a Commission decision rejecting a request for protection of the confidentiality of documents copied during an investigation based on Article 14 of Regulation No 17 — Balancing the applicants' interest in the non-disclosure of the information contained therein and the general interest of the Commission in observance of the competition rules*
(Arts 242 EC and 243 EC)
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1. Under the second paragraph of Article 40 of the Statute of the Court of Justice, which, pursuant to the first paragraph of Article 53 of that Statute, is applicable to the Court of First Instance, the right of an individual to intervene is subject to the condition that he is able to establish an interest in the result of the case. Representative associations whose object it is to protect their members in cases raising questions of principle liable to affect those members are allowed to intervene.

Accordingly, associations of lawyers and of in-house lawyers representing

the interests of their members and whose object is the defence of those interests have the right to intervene in interim proceedings which directly raise questions of principle relating, first, to the confidentiality of correspondence with lawyers and in-house lawyers and, second, to the conditions in which the judge hearing an application for interim measures may order interim measures in respect of the documents which the Commission intends to read pursuant to Article 14(3) of Regulation No 17, but which according to the undertakings are protected by professional privilege. The definition of those conditions is liable to impinge directly on the interests of those members in that they may limit or extend the provisional legal protection applicable, in particular, to documents originating from lawyers and in-house lawyers and regarded by those associations as covered by professional privilege.

(see paras 43, 45-46, 50, 52-53)

derived is manifestly inadmissible, it may be necessary to establish certain grounds for the conclusion that such an action is *prima facie* admissible.

(see para. 56)

3. According to a general principle of Community law, the legality of a measure must be assessed in the light of the circumstances of law and of fact existing at the time when the decision was adopted, so that the validity of a decision cannot be affected by acts subsequent to its adoption. Accordingly, in connection with an investigation based on Article 14 of Regulation No 17, an undertaking cannot plead the illegality of the investigation procedures as a ground for annulment of the measure on the basis of which the Commission carried out that investigation.

(see paras 68-69)

2. The admissibility of the action before the court adjudicating on the substance should not, in principle, be examined in proceedings relating to an application for interim measures so as not to prejudge the case in the main proceedings. However, where it is contended that the main action from which the application for interim measures is
4. Regulation No 17 must be interpreted as protecting the confidentiality of written communications between lawyers and clients provided, first, that such communications are made for the purposes and in the interests of the client's rights of defence and, second, that they emanate from independent

lawyers, i.e. lawyers who are not bound to the client by a relationship of employment.

That principle of protection of written communications between lawyer and client must be regarded as extending also to the internal notes which are confined to reporting the text or the content of those communications.

A plea seeking to demonstrate, first, that documents drafted with a view to consulting a lawyer and for the purposes of the rights of the defence and, second, correspondence with a lawyer permanently employed by an undertaking are also covered by professional privilege raises very important and complex questions of principle. Such a plea therefore requires a detailed examination in the main proceedings. At the interim measures stage, that plea therefore does not appear to be manifestly unfounded and satisfies the '*prima facie* case' condition.

(see paras 95-98, 114, 119-120, 130)

on the ground that it is entitled to protection of the confidentiality of information, to produce, among the business records demanded by the Commission, written communications between itself and its lawyer, it must nevertheless provide the Commission's agents with relevant material of such a nature as to demonstrate that the communications fulfil the conditions for being granted legal protection, although it is not bound to reveal the contents of the communications in question. Where the Commission is not satisfied that such evidence has been supplied, it is for the latter to order, pursuant to Article 14(3) of Regulation No 17, production of the communications in question. It is then open to the undertaking subject to the investigation to lodge an application for annulment of the Commission's decision, together where appropriate with an application for interim measures, under Articles 242 EC and 243 EC.

(see para. 132)

6. The urgency of an application for interim measures must be assessed in relation to the necessity to give interim judgment in order to prevent serious and irreparable harm being occasioned to the party seeking the interim measure.

5. Where an undertaking which is the subject of an investigation under Article 14 of Regulation No 17 refuses,

An application for interim measures seeking suspension of the operation of

a Commission decision in which the Commission indicates that it is going to read documents which were copied during an investigation based on Article 14(3) of Regulation No 17 and placed in a sealed envelope, and which an undertaking claims are protected by professional privilege, must be regarded as urgent.

In effect, if the Commission were to read those documents and if the Community Court should subsequently annul that decision, it would be impossible in practice for the Commission to draw all the inferences from that judgment, since its officials would already have become aware of the contents of the documents. In that sense, the fact that the Commission was aware of the information in those documents would as such constitute a substantial and irreversible breach of the applicants' right to respect of the confidentiality protecting those documents.

person must be able, without constraint, to consult a lawyer. That requirement, which is formulated in the public interest of the proper administration of justice and respect for lawfulness, necessarily presupposes that a client has been free to consult his lawyer without fear that any confidences which he may impart may subsequently be disclosed to a third party. Consequently, the reduction of professional privilege to a mere guarantee that the information entrusted by a litigant will not be used against him dilutes the essence of that right, since it is the disclosure, albeit provisional, of such information that might be capable of causing irremediable harm to the confidence which that litigant placed, in confiding in his lawyer, in the fact that it would never be disclosed.

(see paras 159, 163-164, 167)

Furthermore, even though, in the event that the decision is annulled, the information in those documents could not be used against the undertaking, that would have no impact on the serious and irreparable harm which would result from their mere disclosure, since the purpose of professional privilege is not only to protect a person's private interest in not having his rights of defence irretrievably affected but also to protect the requirement that every

7. Where, on an application for interim measures, the judge before whom the applicant claims that it will sustain serious and irreparable harm weighs up the various interests involved, he must consider whether the annulment of the contested decision by the court dealing with the main application would make it possible to reverse the situation that would have been brought about in the absence of interim measures and, con-

versely, whether suspension of the operation of that decision would be such as to prevent its being fully effective in the event of the main application being dismissed.

Therefore, in the context of the examination of an application for interim measures seeking suspension of the operation of a Commission decision in which the Commission indicates that it is going to read documents copied during an investigation based on Article 14(3) of Regulation No 17 and placed in a sealed envelope, and which an undertaking claims are protected by professional privilege, it is necessary to weigh up, first, that undertaking's interest in documents not being disclosed and, second, the general interest and the Commission's interest in the Treaty competition rules being observed.

An undertaking's interest in the documents which it claims to be protected by professional privilege not being disclosed must be evaluated by reference to the circumstances of each case and, in particular, to the nature and content of the documents concerned. Furthermore, given that it is established that an undertaking's professional privilege and its rights of defence would be likely to sustain serious and irreparable harm should the Commission read certain documents, considerations of administrative efficiency and of resource allocation, in spite of their importance, can in principle prevail over the rights of the defence only if the Commission pleads very special circumstances justifying such harm.

(see paras 180-182, 186)