JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

17 September 2007 *

In Joined Cases T-125/03 and T-253/03,

Akzo Nobel Chemicals Ltd, established in Hersham, Walton on Thames, Surrey (United Kingdom),

Akcros Chemicals Ltd, established in Hersham, Walton on Thames, Surrey,

represented by C. Swaak, M. Mollica and M. van der Woude, lawyers,

applicants,

supported by

The Council of the Bars and Law Societies of the European Union (CCBE), established in Brussels (Belgium), represented by J. Flynn QC,

* Language of the case: English.

by

Algemene Raad van de Nederlandse Orde van Advocaten, established in The Hague (Netherlands), represented by O. Brouwer and C. Schillemans, lawyers,

by

European Company Lawyers Association (ECLA), established in Brussels, represented by M. Dolmans, K. Nordlander, lawyers, and J. Temple Lang, solicitor,

by

American Corporate Counsel Association (ACCA) — European Chapter, established in Paris (France), represented by G. Berrisch, lawyer, and D. Hull, solicitor,

and by

International Bar Association (IBA), established in London (United Kingdom), represented by J. Buhart, lawyer,

interveners,

Commission of the European Communities, represented initially by R. Wainwright and C. Ingen-Housz, and subsequently by F. Castillo de la Torre and X. Lewis, acting as Agents,

defendant,

APPLICATION, first, for the annulment of Commission decision C(2003) 559/4 of 10 February 2003 and, so far as necessary, of Commission decision C(2003) 85/4 of 30 January 2003 ordering Akzo Nobel Chemicals Ltd, Akcros Chemicals Ltd and Akcros Chemicals and their respective subsidiaries to submit to an investigation on the basis of Article 14(3) of Regulation No 17 of 6 February 1962, First Council Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87) (Case COMP/E-1/38.589) and for an order requiring the Commission to return certain documents seized in the course of the investigation in question and not to use their contents (Case T-125/03) and, second, for the annulment of Commission decision C(2003) 1533 final of 8 May 2003 rejecting a request for the protection of those documents on grounds of legal professional privilege protecting communications between lawyers and their clients (Case T-253/03),

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

composed of J.D. Cooke, President, R. García-Valdecasas, I. Labucka, and M. Prek and V. Ciucă, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 28 June 2007,

gives the following

Judgment

Facts and procedure

1 On 10 February 2003 the Commission adopted decision C(2003) 559/4, amending its decision C(2003) 85/4 of 30 January 2003, whereby the Commission ordered, inter alia, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd and their respective subsidiaries to submit to an investigation on the basis of Article 14(3) of Regulation No 17 of 6 February 1962, First Council Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), aimed at seeking evidence of possible anti-competitive practices (together 'the decision ordering the investigation').

2 On 12 and 13 February 2003, Commission officials, assisted by representatives of the Office of Fair Trading ('OFT', the British competition authority), carried out an investigation on the basis of the decision ordering the investigation at the applicants' premises in Eccles, Manchester (United Kingdom). During the investigation the Commission officials took copies of a considerable number of documents.

3 In the course of those operations the applicants' representatives informed the Commission officials that certain documents were likely to be covered by the protection of confidentiality of communications between lawyers and their clients ('legal professional privilege' or 'LPP').

4 The Commission officials then informed the applicants' representatives that it was necessary for them to examine briefly the documents in question so that they could form their own opinion as to whether the documents should be privileged. Following a long discussion, and after the Commission officials and the OFT officials had reminded the applicants' representatives of the consequences of obstructing investigations, it was decided that the leader of the investigating team would briefly examine the documents in question, with a representative of the applicants at her side.

5 During the examination of the documents in question, a dispute arose in relation to five documents which were ultimately treated in two different ways by the Commission.

6 The first of those documents is a two-page typewritten memorandum dated 16 February 2000 from the general manager of Akcros Chemicals to one of his superiors. According to the applicants, this memorandum contains information gathered by the general manager in the course of internal discussions with other employees. The information was gathered for the purpose of obtaining outside legal advice in connection with the competition law compliance programme put in place by Akzo Nobel. The second document is a second copy of the memorandum, bearing manuscript notes referring to contacts with a lawyer of the applicants, including, in particular, mention of his name.

7 After obtaining the applicants' observations concerning those first two documents, the Commission officials were not in a position to reach a final conclusion on the spot as to whether the documents should be privileged. They therefore took copies of them and placed them in a sealed envelope which they took away on completion of the investigation. The applicants identified the two documents as 'Set A'.

8 The third document which gave rise to a dispute consists of a number of handwritten notes made by Akcros Chemicals' general manager, which are said by the applicants to have been written during discussions with employees and used for the purpose of preparing the typewritten memorandum of Set A. Finally, the last two documents in issue are two e-mails, exchanged between Akcros Chemicals' general manager and Mr S., Akzo Nobel's coordinator for competition law. The latter is enrolled as an Advocaat of the Netherlands Bar and, at the material time, was a member of Akzo Nobel's legal department and was therefore employed by that undertaking on a permanent basis.

9 After examining the last three documents and obtaining the applicants' observations, the head of the investigating team took the view that they were definitely not privileged. Consequently, she took copies of them and placed the copies with the rest of the file, without isolating them in a sealed envelope. The applicants identified the three documents as 'Set B'.

10 On 17 February 2003 the applicants sent the Commission a letter setting out the reasons why, in their view, the documents in Set A and Set B were protected by LPP.

11 By letter of 1 April 2003, the Commission informed the applicants that the arguments set forth in their letter of 17 February 2003 were insufficient to show that the documents in question were covered by LPP. However, the Commission pointed out that the applicants could submit observations on those provisional conclusions within two weeks, after which the Commission would adopt a final decision.

12 By application lodged at the Registry of the Court of First Instance on 11 April 2003, the applicants brought an action under the fourth paragraph of Article 230 EC seeking, first, the annulment of the decision of 10 February 2003 and, so far as necessary, the decision of 30 January 2003 and, second, the return of the disputed documents (Case T-125/03).

13 On 17 April 2003 the applicants informed the Commission that they had lodged their application in Case T-125/03. They also stated that the observations which they had been asked to submit on 1 April 2003 were contained in that application. On the same day the applicants lodged an application on the basis of Articles 242 EC and 243 EC for, in particular, suspension of the operation of the decision of 10 February 2003 (Case T-125/03 R).

14 On 8 May 2003 the Commission adopted decision C(2003) 1533 final concerning a claim of legal privilege in the context of an investigation pursuant to Article 14(3) of Regulation No 17 ('the rejection decision of 8 May 2003'). In Article 1 of that decision the Commission rejects the applicants' request for the return of the documents in Set A and Set B and for confirmation by the Commission that all copies of those documents in its possession had been destroyed. In Article 2 of the decision the Commission gives notice of its intention to open the sealed envelope containing the documents of Set A and to add them to the file. The Commission states, however, that it will not undertake this before expiry of the time-limit for bringing an action against the decision.

15 By application lodged at the Registry of the Court of First Instance on 4 July 2003, the applicants brought an action under the fourth paragraph of Article 230 EC for the annulment of the rejection decision of 8 May 2003 (Case T-253/03). By separate document received on 11 July 2003 the applicants lodged an application for interim relief seeking, in particular, suspension of the operation of that decision (Case T-253/03 R).

16 By applications lodged on 30 July, 7 August and 11 and 18 August 2003 respectively, the Council of the Bars and Law Societies of the European Union (CCBE), the Algemene Raad van de Nederlandse Orde van Advocaten ('General Council of the Netherlands Bar') and the European Company Lawyers Association (ECLA) applied to intervene in Cases T-125/03 and T-253/03 in support of the form of order sought by the applicants. These associations were granted leave to intervene by two orders of the President of the Fifth Chamber of 4 November 2003.

17 By separate document lodged at the Court Registry on 1 August 2003, the Commission raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance, against the application lodged in Case T-125/03.

18 On 8 September 2003, in connection with the applications for interim relief in Cases T-125/03 R and T-253/03 R and at the request of the President of the Court of First Instance, the Commission sent the President, under confidential cover, a copy of the Set B documents and the sealed envelope containing the Set A documents.

19 The application for interim relief in Case T-125/03 R was dismissed by order of the President of 30 October 2003 (Cases T-125/03 R and T-253/03 R *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2003] ECR II-4771), while the application for interim relief in Case T-253/03 R was granted in part. Accordingly, operation of the provisions of the rejection decision of 8 May 2003 whereby the Commission decided to open the sealed envelope containing the Set A documents

was suspended. The President ordered those documents to be kept by the Court Registry pending the Court's decision in the main action. Similarly, the President took formal note of the Commission's statement that it would not permit third parties access to the Set B documents pending judgment in the main action in Case T-253/03.

20 By applications lodged on 17 October and 26 November 2003, and 25 November 2003, respectively, the European Council on Legal Affairs and the Section on Business Law of the International Bar Association applied to intervene in Cases T-125/03 and T-253/03 in support of the form of order sought by the applicants. The applications were dismissed by orders of the Court of 28 May 2004.

21 On 13 November 2003 the Commission lodged an application for priority treatment under Article 55(2) of the Rules of Procedure of the Court of First Instance. It repeated this request on 8 October 2004.

22 By application lodged on 25 November 2003, the American Corporate Counsel Association — European Chapter (ACCA) applied to intervene in Case T-253/03 in support of the form of order sought by the applicants. The ACCA was granted leave to intervene by order of the President of the Fifth Chamber of 10 March 2004.

23 By order of the Court of First Instance of 5 March 2004 the objection of inadmissibility raised by the Commission in Case T-125/03 was joined with the substance of the case under Article 114(4) of the Rules of Procedure.

24 By order of 27 September 2004 in Case C-7/04 P(R) *Commission* v *Akzo and Akcros* [2004] ECR I-8739, the President of the Court of Justice, on appeal by the Commission, annulled the operative part of the order of the President of the Court of First Instance of 30 October 2003 in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* whereby the operation of the rejection decision of 8 May 2003 was suspended and it was decided that the Set A documents should be kept by the Registry of the Court of First Instance. However, formal note was taken of the Commission's statement that it would not allow third parties to have access to the Set A documents until judgment is given in the main action in Case T-253/03.

25 Following the order of the President of the Court of Justice in *Commission* v *Akzo and Akcros*, the Registry of the Court of First Instance returned the sealed envelope containing the Set A documents to the Commission by letter of 15 October 2004.

26 On 20 February 2006 the International Bar Association (IBA) lodged applications to intervene in Cases T-125/03 and T-253/03 in support of the form of order sought by the applicants. The IBA was given leave to intervene by two orders of the President of the First Chamber of 26 February 2007.

27 Pursuant to Article 14 of the Rules of Procedure, on the proposal of the First Chamber, the Court, after hearing the parties pursuant to Article 51 of the Rules, decided on 19 April 2007 to refer the cases to the First Chamber (Extended Composition).

28 By order of the President of the First Chamber (Extended Composition) of 20 April 2007, Cases T-125/03 and T-253/03 were joined for the purposes of the oral procedure and the judgment in accordance with Article 50 of the Rules of Procedure.

29 By order of the First Chamber (Extended Composition) of 25 April 2007 the Court, on the basis of the first paragraph of Article 24 of the Statute of the Court of Justice and Article 65(b), Article 66(1) and the second subparagraph of Article 67(3) of the Rules of Procedure of the Court of First Instance, requested the Commission to produce the documents constituting Sets A and B. The Commission complied with that request within the prescribed period.

30 Upon hearing the report of the Judge-Rapporteur, the First Chamber of the Court (Extended Composition) decided to open the oral procedure.

31 The parties presented oral argument and their answers to the oral questions put by the Court at the hearing on 28 June 2007.

Forms of order sought

32 In Case T-125/03 the applicants claim that the Court should:

— dismiss the objection of inadmissibility raised by the Commission;

— annul the decision of 10 February 2003 and, so far as necessary, the decision of 30 January 2003, in so far as they have been interpreted by the Commission as legitimising and/or constituting the basis of its action of seizing and/or reviewing and/or reading the disputed documents;

— order the Commission to return the disputed documents and not to use their contents in any way;

— order the Commission to pay the costs.

33 In Case T-125/03 the CCBE, the ECLA and the IBA submit that the Court should:

— annul the decision of 10 February 2003;

— order the Commission to pay the costs.

34 The Netherlands Bar Association also supports the form of order sought by the applicants in Case T-125/03.

35 The Commission, for its part, contends in Case T-125/03 that the Court should:

— dismiss the action as inadmissible;

— alternatively, dismiss the action as unfounded;

— order the applicants to pay the costs.

36 In Case T-253/03 the applicants claim that the Court should:

— annul the rejection decision of 8 May 2003;

— order the Commission to pay the costs.

37 In Case T-253/03 the CCBE, the ECLA, the ACCA and the IBA submit that the Court should:

— annul the rejection decision of 8 May 2003;

— order the Commission to pay the costs.

38 The Netherlands Bar Association also supports the form of order sought by the applicants in Case T-253/03.

39 The Commission, for its part, contends in Case T-253/03 that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Admissibility of the action in Case T-125/03

Arguments of the parties

40 The Commission contends that the application in Case T-125/03 is inadmissible, because the act challenged in that case, namely the decision ordering the investigation, is not the act which produced the legal effects constituting the subject-matter of the present proceedings. It observes that an action for annulment is admissible only if, first, the contested act produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9) and, second, if the applicant has an interest in the annulment of that act (Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraph 32). To determine whether an act or decision produces such legal effects, it is necessary to look to its substance (Case T-251/00 *Lagardère and Canal+* v *Commission* [2002] ECR II-4825, paragraphs 63 and 64). In the present case, however, the decision ordering the investigation has no direct connection with the subject-matter of the present proceedings. The seizure of the documents at issue is in fact clearly separable from the decision ordering the investigation, which is only the legal basis thereof.

41 The Commission observes that, in the circumstances of the case, the action which directly affected the applicants' legal position is the subject of a procedure which is separate from that ordering the investigation, that is, the specific procedure concerning LPP established in Case 155/79 *AM & S* v *Commission* [1982] ECR 1575. In the context of that procedure, seizure of the documents at issue was only a preparatory act to the rejection decision of 8 May 2003 in which the Commission finally addressed the specific issue of whether the documents were legally privileged. In itself, the action of seizure does not therefore constitute a challengeable act. In any case, even accepting that the decision ordering the investigation could have been challenged initially, the subsequent adoption of the rejection decision of 8 May 2003 made the application pointless. Furthermore, the Commission submits that, even without a specific procedure for reviewing the legality of procedural acts performed in the course of an investigation, their potential irregularity may be raised in an action against the final decision finding a breach of the competition rules.

42 The applicants reply that annulment of the decision ordering the investigation is likely to have legal consequences for them, including, in particular, that of rendering illegal the Commission's possession and use of the documents seized. They accept that the decision is not specifically directed at those documents and that, in fact, it is the Commission's subsequent seizure and review of the documents, and not the decision, which adversely affected their legal situation. They claim in any event that, where, before adopting an ad hoc act likely to be challengeable, concerning a request for LPP, the Commission ascertains their content, the legal position of the undertaking in question is immediately and irreversibly affected. Then the challengeable act cannot be anything but the decision ordering the investigation.

43 The applicants submit that, in the present case, they did not have to wait until the possible adoption of a subsequent ad hoc decision by the Commission rejecting protection of the disputed documents under LPP before bringing the matter before

the Community Courts. That decision, whatever it may be, cannot be considered to be the act affecting their legal position, which already occurred when the Commission read the documents which are the subject of the dispute. Furthermore, contrary to what it claims, the Commission did not provide any guarantee to the applicants, on completion of the investigation, that a decision on the confidentiality of the documents would be taken within a reasonable timeframe. The applicants further maintain that they should not also have to wait until the adoption of a possible final decision by the Commission imposing a penalty before bringing the matter before the Community judicature. They must be able to protect their right to confidentiality even if the case is not closed by a decision finding an infringement or a decision to stop the investigation. Similarly, an action against a decision imposing a penalty is not sufficient to provide adequate protection of their legal position.

44 The applicants also submit that the Commission's seizure of the disputed documents and examination of their contents cannot by themselves be considered to have altered their legal position, since those acts of disclosure are only the implementation of the decision ordering the investigation and are not separable from it. The applicants also dispute the Commission's argument that the action of seizing the documents in question was only a preparatory act to the rejection decision of 8 May 2003. There is therefore no doubt that, at least in connection with the Set B documents, during the investigation the Commission decided unilaterally that they were not protected by LPP, and ordered the applicants to produce them and ascertained their contents. The rejection decision of 8 May 2003 could have been the challengeable act in the present case only if the Commission had put the two sets of documents in a sealed envelope without examining them beforehand. In the present case, by contrast, the rejection decision merely confirmed the Commission's decision ordering the disclosure of the Set B documents.

Findings of the Court

45 According to settled case-law, only measures which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment under Article 230 EC (Case 60/81 *IBM* v *Commission*, paragraph 9, and Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 28). In principle, a provisional measure intended to pave the way for the final decision is not therefore a challengeable act. However, according to case-law, acts adopted in the course of the preparatory proceedings which were themselves the culmination of a special procedure distinct from that intended to permit the Commission to take a decision on the substance of the case and which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position, also constitute challengeable acts (*IBM* v *Commission*, paragraphs 10 and 11, and Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* v *Commission* [2006] ECR II-1601, paragraph 65).

46 Where an undertaking relies on LPP for the purpose of opposing the seizure of a document in the course of an investigation pursuant to Article 14 of Regulation No 17, the decision whereby the Commission rejects that request produces legal effects for that undertaking, by bringing about a distinct change in its legal position. That decision in effect withholds from the undertaking the protection provided by Community law and is definitive in nature and independent of any final decision making a finding of an infringement of the competition rules (see, to that effect, *AM & S*, paragraphs 27 and 29 to 32; see also, by analogy, Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraphs 18 to 20).

47 In that regard, the Court would point out that the opportunity which the undertaking has to bring an action against a final decision establishing that the

competition rules have been infringed does not provide it with an adequate degree of protection of its rights. First, it is possible that the administrative procedure will not result in a decision finding that an infringement has been committed. Second, if an action is brought against that decision, it will not in any event provide the undertaking with the means of preventing the irreversible consequences which would result from improper disclosure of documents protected under legal professional privilege (see, by analogy, *AKZO Chemie* v *Commission*, paragraph 20).

48 It follows that the Commission's decision rejecting a request for protection of a specific document under LPP — and ordering, where appropriate, the production of the document in question — brings to an end a special procedure distinct from that enabling the Commission to rule on the existence of an infringement of the competition rules and thus constitutes an act capable of being challenged by an action for annulment, coupled, if need be, with a request for interim relief, seeking, inter alia, to suspend its operation until the Court has ruled on the action in the main proceedings.

49 By the same token, where the Commission, during an investigation, seizes a document in respect of which LPP is claimed and places it on the investigation file without putting it in a sealed envelope and without having taken a formal rejection decision, that physical act necessarily entails a tacit decision by the Commission to reject the protection claimed by the undertaking (see, by analogy, *AKZO Chemie* v *Commission*, paragraph 17), and allows the Commission to examine the document in question immediately (see paragraph 86 below). That tacit decision should therefore be open to challenge by an action for annulment.

50 In the present case, as regards, first of all, the Set A documents, it must be pointed out that during the investigation at the applicants' premises the Commission officials were not in a position to reach a final conclusion as to whether the documents should be privileged and merely took copies of them and placed them in a sealed envelope which they took away with them (see paragraph 7 above). Only in

the rejection decision of 8 May 2003 did the Commission finally refuse the applicants' request for protection of the documents under legal professional privilege. In that decision the Commission also gave notice of its intention to open the sealed envelope containing the documents in question and to add them to the file after expiry of the time-limit for bringing an action against that decision (see paragraph 14 above). It is not disputed, moreover, that the Commission took the rejection decision without opening the sealed envelope and, therefore, without examining the contents of the Set A documents.

51 As regards, secondly, the Set B documents, unlike those in Set A, it must be pointed out that at the time of the investigation the Commission considered that they were clearly not protected by LPP, notwithstanding the claim made by the applicants to this end. Consequently, it made copies and added them to the file without placing them in a sealed envelope (see paragraph 9 above). Protection under LPP in respect of the Set B documents was therefore rejected at the time of the investigation. It was at that moment, moreover, that the Commission was able to examine the contents of those documents.

52 In the light of the above, the Court concludes that, for the purpose of the present cases, the measures which produced binding legal effects affecting the applicants' interests by bringing about a distinct change in their legal position were, as regards the Set B documents, the tacit rejection decision expressed through the physical act of seizing and placing those documents on the file without placing them in a sealed envelope, and, as regards the Set A documents, the formal decision of 8 May 2003 rejecting the claim for protection under legal professional privilege. Those two decisions are thus open to challenge by action for annulment.

53 Similarly, in its decision of 8 May 2003, the Commission finally rejected, also as regards the Set B documents, the applicants' claim to protection under legal professional privilege (see paragraph 14 above). By so doing, the Commission

fulfilled its duty to adopt a formal decision rejecting the claim for protection of those documents under LPP and thereby finally brought to an end the distinct special procedure provided in that regard. That decision is thus not merely confirmatory in relation to the Set B documents. As a result, the Court concludes that the applicants were entitled to challenge that decision as regards the Set B documents as well. In addition, it should be noted that the Commission did not challenge the admissibility of the action brought by the applicants in Case T-253/03 against the rejection decision of 8 May 2003 in relation to those documents.

54 On the other hand, the Court holds that the decision ordering the investigation — the contested measure in Case T-125/03 — did not produce the legal effects claimed by the applicants in their action for annulment.

55 In that regard, the Court would point out that the lawfulness of an act must be determined in the light of the matters of law and fact existing at the time when the decision was adopted and that acts subsequent to a decision cannot therefore affect its validity (see Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 16, and Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraph 49). Thus, it is settled case-law that, in the context of an investigation based on Article 14 of Regulation No 17, an undertaking cannot plead unlawfulness of the investigation procedures to support claims for annulment of the measure on the basis of which the Commission carries out that investigation (see, to that effect, *Dow Benelux* v *Commission*, paragraph 49, and Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 413). Accordingly, the use made of a decision ordering an investigation has no effect on the lawfulness of the decision ordering the inspection (Case T-339/04 *France Télécom* v *Commission* [2007] ECR II-521, paragraph 54, and Case T-340/04 *France Télécom* v *Commission* [2007] ECR II-573, paragraph 126).

56 In the present case, it is clear that the acts and decisions disputed by the applicants occurred after adoption of the decision ordering the inspection. That decision merely authorises the Commission to enter the applicants' premises and to take copies of the relevant business records. It does not contain any reference to the documents in Sets A and B and does not refer to the issue of legal professional privilege. As the applicants accept, moreover, it was the subsequent seizure and inspection of those documents by the Commission which changed their legal position, and not that decision (see paragraph 42 above). However, as has been held, those measures constitute a distinct, special procedure aimed specifically at the issue of the application of legal professional privilege to specific documents (see paragraphs 45 to 48 above).

57 In the light of the foregoing, the Court holds that the action brought in Case T-125/03 against the decision ordering the investigation must be rejected as inadmissible. It is therefore appropriate to examine the substance of the action in Case T-253/03.

The substance in Case T-253/03

58 The applicants submit that the Commission breached the principle of legal professional privilege and, in doing so, violated the EC Treaty and Regulation No 17. They rely on three particular pleas in support of their action. The first plea is that the procedures relating to the application of LPP were infringed. The second is that LPP was unjustifiably refused in relation to the five documents in question. The third is that the fundamental rights which form the basis of LPP were violated.

The first plea, alleging breach of the procedures relating to the application of the principle of LPP

Arguments of the parties

59 The applicants maintain that the Commission breached the procedure relating to the application of the principle of LPP, violated Article 242 EC and the applicants' right of access to the Community Courts, and breached the principle of equal treatment.

60 They observe that, in the *AM & S* judgment, the Court of Justice set out the procedure to be followed by the Commission in cases where an undertaking subject to an investigation under Article 14 of Regulation No 17 refuses to produce certain business records by relying on LPP. The procedure consists of three steps. First, the undertaking must provide the Commission officials with relevant material of such a nature as to demonstrate that the documents fulfil the conditions for LPP, although it is not bound to reveal the contents of the documents in question. Second, if the Commission considers that such evidence has not been supplied, it must order, pursuant to Article 14(3) of Regulation No 17, production of the documents in question. The applicants concede that, alternatively, in accordance with the rationale behind the *AM & S* judgment, the Commission may, in the course of an investigation, take copies of the documents in question and place them in a sealed envelope. Third, and finally, if the undertaking concerned continues to plead the privilege of confidentiality, it is for the Community judicature to settle the dispute.

61 The applicants consider that two fundamental points must be noted. First, the Court of Justice did not intend to permit the Commission to examine the contents of a

document to determine whether LPP applies. Second, it is for the Community judicature alone to determine disputes concerning the application of LPP. The applicants also observe that merely reading, at the time of the investigation procedure, the documents for which LPP is claimed is contrary to the very substance of the principle of LPP. That principle is immediately and irremediably violated as soon as there is disclosure of the contents of a privileged document (Opinions of Advocates General Warner and Sir Gordon Slynn in *AM & S*, respectively pp. 1619, 1638 and 1639, and pp. 1642 and 1662). Instead of a cursory examination, the Commission, in the case of doubt, ought to place copies of the documents concerned in a sealed envelope, without first looking at them, with a view to subsequent resolution of the dispute.

62 According to the applicants, however, the Commission did not follow any of the three procedural steps laid down in the *AM & S* judgment.

63 With regard to the first step, the applicants submit that the Commission forced them to reveal the contents of the documents in question although they had claimed that they were covered by LPP. Following disclosure of those documents, long discussions ensued between the applicants' in-house counsel and the Commission as to the procedure to be followed for examining those documents. The Commission informed the applicants that any further delay in the handing over and examination of the documents would amount to obstruction of the investigation and could constitute a criminal offence under section 65 of the UK Competition Act, which is punishable by a term of imprisonment and a fine. It was only under strong protest that the applicants handed the Set B documents to the Commission for examination. Furthermore, during the investigation the Commission inspectors read and described to each other the contents of the Set A and Set B documents for several minutes at a time.

64 With regard to the second step of the procedure, the applicants submit that, as the Commission considered that the information and arguments adduced were not sufficient to demonstrate that the disputed documents were covered by LPP, it ought to have adopted a decision ordering them to produce those documents, before actually removing them from the premises. However, it did not do so. So far as the Set A documents are concerned, the Commission placed them in a sealed envelope and took them to Brussels. According to the applicants, although the sealed envelope procedure does not in itself breach the substance of LPP, it does not accord with the procedure established by the Court of Justice in *AM & S*. With regard to the Set B documents, the Commission rejected the applicants' proposal that they could be placed in a sealed envelope and added them to the other documents seized, depriving the applicants of any opportunity to show that they should be protected under the principle of LPP.

65 With regard to the third step, the applicants maintain that the Commission manifestly breached the procedure set down in *AM & S* by deciding unilaterally, in the rejection decision of 8 May 2003, that the disputed documents were not protected by LPP. By conferring upon itself the right to decide at first instance, the Commission deprived the Community judicature of the opportunity to settle the dispute at a time when the protection of LPP was not yet compromised.

66 The CCBE submits that the procedure established by the Court in *AM & S* is designed to ensure that, if the Commission and the undertaking under investigation are unable to resolve a dispute as to the privileged status of a communication, the Court should rule and, before it does so, the Commission should not read the document. The Commission is not entitled to take a cursory look at the documents either, there being a risk that this may disclose their contents. The CCBE accepts that claims of LPP should not give the undertaking an opportunity to conceal or destroy documents, but does not, however, consider it satisfactory that the Commission inspectors should take copies and take them away with them, albeit in a sealed envelope. If the documents are to be retained by the Commission, they should

at least be sent directly to one of the Commission's hearing officers, whose terms of reference should be widened to provide an assurance that those documents will not be accessible to anyone from the Directorate-General for Competition. The CCBE is inclined, in any event, to the view that documents should be lodged with the Registry of the Court of First Instance or entrusted to a neutral third party.

67 The Netherlands Bar Association submits that principle of LPP has the object of preventing not only the use of privileged documents, but also their disclosure. A mere cursory look at a document could entail a breach of that principle. The ECLA observes that, in the *AM & S* judgment, the Court of Justice developed a procedure based on the principle of confidentiality which prohibits disclosure of the privileged document. The proportionate approach consists in placing the documents under seals and having them examined by an independent third party, such as the hearing officer. It is for the Court in any case to decide the privilege issue. Finally, the ACCA submits that the task of settling disputes concerning the applicability of LPP should be entrusted to an independent arbitrator.

68 The Commission stresses that, although the Court of Justice set out in the *AM & S* case a specific procedure to resolve disputes concerning LPP, it did not attach an absolute value to that procedure. The judgment does not require the Commission to refrain from copying documents and subsequently requesting them from the undertaking whenever that principle is relied on. In *AM & S* the initial investigation was based on Article 14(2) of Regulation No 17 — allowing the undertaking to refuse to produce the documents — and not, as in the present case, on Article 14(3), which requires the undertaking to submit to the investigation. In reality, the only principle laid down by that judgment is that the Commission must adopt a reasoned decision on whether or not the documents at issue are covered by LPP in order to give the undertaking an opportunity to have the case decided by the Community judicature.

69 The Commission currently adopts the following procedure: when there can be no doubt that LPP applies to a document, based on a cursory look at the general layout of the document, heading, title and other characteristics and relevant explanations provided by the undertaking, it is set aside; when, on the basis of the cursory look, there can be no doubt that the document cannot be covered by LPP, it is copied and added to the investigation file; finally, when the cursory look gives rise to doubt as to the issue of LPP, no examination is carried out, the assessment is postponed and a copy of the document is placed in a sealed envelope to be taken away by the Commission.

70 According to the Commission, a cursory look on the spot at a document has no other purpose than to ascertain whether LPP cannot be ruled out, any doubt being construed in favour of the undertaking concerned by leading automatically to the sealed envelope procedure. The Commission's ability to form a preliminary opinion as to the existence of doubt regarding the applicability of LPP has the advantage of reducing the risk of unfounded claims of privilege and is in line with the *AM & S* judgment. The sealed envelope procedure also obviates the risk of documents being destroyed by the undertaking. The Commission observes further that, in the majority of Member States, the competition authorities deal with the issue of LPP in the context of on-the-spot inspections in the same way.

71 The Commission adds that the procedure described above cannot affect the procedural rights of the undertakings concerned. Even if it were shown that the undertaking's rights of defence were adversely affected as a result of reading potentially privileged documents, such harm could easily be remedied. In fact the Commission would be unable to use documents protected by LPP to prove an infringement.

72 In the present case, the Commission contends that it strictly followed a legitimate and proportionate procedure for determining, in accordance with the *AM & S* case-

law, whether the disputed documents were protected, and that the applicants' procedural rights were fully respected. It states that it was agreed with the applicants that the Commission's case team leader would examine the file, with a representative of the applicants sitting next to her. If LPP were claimed for a particular document, the applicants had to make the claim, basing it on the document itself. The Commission considers furthermore that the applicants' production, at the reply stage, of minutes of the investigation drawn up by their lawyers, without explaining the delay, is a violation of Article 48(1) of the Rules of Procedure.

73 With regard to the Set A documents, the Commission observes that a doubt arose from a cursory look at them, in particular because of the presence of a handwritten note referring to the name of an external lawyer on the first page of one of the documents. As none of the explanations given on the spot by the applicants was sufficient to remove the doubt, the Commission officials put the documents into a sealed envelope. So far as the Set B documents are concerned, the Commission inspector considered, on the basis of a cursory look at those documents and the information given by the undertaking and on the basis of uncontested case-law, that there was not the slightest doubt that they were not covered by LPP. Consequently the Commission officials made copies and added them to the investigation file.

74 The Commission also maintains that a cursory look is not the same as reading a document. Although the leader of the investigation team was able to take a cursory look at the Set A documents during the investigation, it is wrong to claim that the Commission officials read them before putting them in an envelope. With regard to the Set B documents, it was only after the investigation that the Commission read them and acquired knowledge of their contents. The Commission also denies the applicants' suggestion that their final consent to hand over the Set B documents was obtained by the threat of criminal sanctions. These allegations are manifestly untrue in so far as the alleged refusal related to the entire file. In any case, informing an

undertaking that its failure to cooperate could entail the application of national law and, possibly, criminal sanctions is in accordance with Regulation No 17.

75 The Commission observes that the applicants were informed of their rights at the outset of the investigation and were thereafter at all times in a position to have access to the Court of First Instance. In the case of the Set A documents, the applicants knew from the beginning that the procedure would lead to the adoption of a challengeable decision. With regard to the Set B documents, the Commission left open the possibility for the applicants to challenge the assessment conducted on the spot by one of its officials.

Findings of the Court

76 It should be pointed out at the outset that Regulation No 17 confers on the Commission wide powers of investigation and of examination in order to uncover infringements of Articles 81 EC and 82 EC. According to, in particular, Articles 11 and 14 of that regulation, the Commission may obtain information and undertake the necessary examinations for the purpose of proceedings in respect of infringements of the rules governing competition (from 1 May 2004, the Commission's powers of investigation in this area are set out, in particular, in Articles 17 to 22 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1)). Article 14(1) of Regulation No 17, in particular, empowers the Commission to require production of business records, that is to say, documents concerning the market activities of the undertaking. As the Court of Justice has pointed out, written communications between lawyer and client fall, in so far as they have a bearing on such activities, within the category of documents referred to in Articles 11 and 14 of Regulation No 17 (*AM & S*, paragraph 16). The Court also held that it is for the Commission itself, and not the undertaking concerned or a third party, whether an expert or an arbitrator, to decide whether or not a document must be produced to it (*AM & S*, paragraph 17).

77 However, the Court held that Regulation No 17 does not exclude the possible recognition, subject to certain conditions, of certain business records as confidential in character. It thus stated that Community law, which derives from not only the economic but also the legal interconnection between the Member States, must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular as regards certain communications between lawyer and client. That confidentiality serves the requirement, the importance of which is recognised in all of the Member States, that every person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it. Similarly, the Court considered that the protection of the confidentiality of written communications between lawyer and client is an essential corollary to the full exercise of the rights of the defence (*AM & S*, paragraphs 18 and 23).

78 The Court therefore concludes that Regulation No 17 must be interpreted as protecting the confidentiality of written communications between lawyer and client, subject to certain conditions (*AM & S*, paragraph 22).

79 As regards the procedure to be followed when applying that protection, the Court held that if an undertaking which is the subject of an investigation under Article 14 of Regulation No 17 refuses, by claiming protection under LPP, to produce, as part of the business records demanded by the Commission, written communications between itself and its lawyer, it must nevertheless provide the Commission officials with relevant material which demonstrates that the communications fulfil the conditions for the grant of legal protection, while not being bound to disclose their contents. The Court went on to state that, where the Commission considers that such evidence has not been provided, it must, pursuant to Article 14(3) of Regulation No 17, order production of the communications in question and, if necessary, impose on the undertaking fines or periodic penalty payments under that regulation as a penalty for the undertaking's refusal either to supply such additional evidence as the Commission considers necessary or to produce the documents whose confidentiality, in the Commission's view, is not protected in law (*AM & S*, paragraphs 29 to 31). The undertaking under investigation may subsequently bring an action for the annulment of such a Commission decision, where appropriate,

coupled with a request for interim relief pursuant to Articles 242 EC and 243 EC (see, to that effect, *AM & S*, paragraph 32).

80 It is apparent, therefore, that the mere fact that an undertaking claims that a document is protected by legal professional privilege is not sufficient to prevent the Commission from reading that document if the undertaking produces no relevant material of such a kind as to prove that it is actually protected by LPP. The undertaking concerned may, in particular, inform the Commission of the author of the document and for whom it was intended, explain the respective duties and responsibilities of each, and refer to the objective and the context in which the document was drawn up. Similarly, it may also mention the context in which the document was found, the way in which it was filed and any related documents.

81 In a significant number of cases, a mere cursory look by the Commission officials at the general layout, heading, title or other superficial features of the document will enable them to confirm the accuracy of the reasons invoked by the undertaking and to determine whether the document at issue was confidential, when deciding whether to put it aside. Nevertheless, on certain occasions, there would be a risk that, even with a cursory look at the document, in spite of the superficial nature of their examination, the Commission officials would gain access to information covered by legal professional privilege. That may be so, in particular, if the confidentiality of the document in question is not clear from external indications.

82 As stated in paragraph 79 above, it is clear from *AM & S* that the undertaking concerned is not bound to reveal their contents when presenting the Commission officials with relevant material of such a nature as to demonstrate that the documents fulfil the conditions for being granted legal protection (paragraph 29 of the judgment). Accordingly, the Court concludes that an undertaking subject to an

investigation under Article 14(3) of Regulation No 17 is entitled to refuse to allow the Commission officials to take even a cursory look at one or more specific documents which it claims to be covered by LPP, provided that the undertaking considers that such a cursory look is impossible without revealing the content of those documents and that it gives the Commission officials appropriate reasons for its view.

83 Where, in the course of an investigation under Article 14(3) of Regulation No 17, the Commission considers that the material presented by the undertaking is not of such a nature as to prove that the documents in question are confidential, in particular where that undertaking refuses to give the Commission officials a cursory look at a document, the Commission officials may place a copy of the document or documents in question in a sealed envelope and then remove it with a view to a subsequent resolution of the dispute. This procedure enables risks of a breach of legal professional privilege to be avoided while at the same time enabling the Commission to retain a certain control over the documents forming the subject-matter of the investigation and avoiding the risk that the documents will subsequently disappear or be manipulated.

84 Use of the sealed envelope procedure cannot, moreover, be considered to be at odds with the requirement set out in paragraph 31 of *AM & S* that, in the case of a dispute with the undertaking concerned as to whether a particular document is confidential, the Commission must adopt a decision ordering that document to be produced. The reason for such a requirement lies in the specific context of the judgment in *AM & S*, in particular the fact that the initial decision ordering an inspection at the premises of the undertaking in question was not a formal decision under Article 14(3) of Regulation No 17 (Opinion of Advocate General Warner in *AM & S*, p. 1624) and the undertaking in question was therefore entitled, as it in fact did, to refuse to produce the documents requested by the Commission.

85 In any event, the Court would point out that where the Commission is not satisfied with the material and explanations provided by the representatives of the

undertaking for the purposes of proving that the document concerned is covered by LPP, the Commission must not read the contents of the document before it has adopted a decision allowing the undertaking concerned to refer the matter to the Court of First Instance, and, if appropriate, to make an application for interim relief (see, to that effect, *AM & S*, paragraph 32).

86 Having regard to the particular nature of the principle of LPP, the purpose of which is both to guarantee the full exercise of individuals' rights of defence and to safeguard the requirement that any person must be able, without constraint, to consult his lawyer (see paragraph 77 above), the Court considers that the fact that the Commission reads the content of a confidential document is in itself a breach of this principle. Contrary to what the Commission seems to submit, the protection of LPP therefore goes beyond the requirement that information provided by an undertaking to its lawyer or the content of the advice given by that lawyer cannot be used against it in a decision which penalises a breach of the competition rules.

87 First, that protection seeks to safeguard the public interest in the proper administration of justice in ensuring that a client is free to consult his lawyer without fear that any confidences which he imparts may subsequently be disclosed. Secondly, its purpose is to avoid the harm which may be caused to the undertaking's rights of the defence as a result of the Commission reading the contents of a confidential document and improperly adding it to the investigation file. Therefore, even if that document is not used as evidence in a decision imposing a penalty under the competition rules, the undertaking may suffer harm which cannot be made good or can only be made good with great difficulty. Information covered by LPP might be used by the Commission, directly or indirectly, in order to obtain new information or new evidence without the undertaking in question always being able to identify or prevent such information or evidence from being used against it. Moreover, harm which the undertaking concerned would suffer as a result of disclosure to third parties of information covered by LPP could not be made good, for example if that information were used in a statement of objections in the course of the Commission's administrative procedure. The mere fact that the Commission cannot

use privileged documents as evidence in a decision imposing a penalty is thus not sufficient to make good or eliminate the harm which resulted from the Commission's reading the content of the documents.

88 Protection under LPP also requires the Commission, once it has adopted its decision rejecting a request under that head, not to read the content of the documents in question until it has given the undertaking concerned the opportunity to refer the matter to the Court of First Instance. In that regard, the Commission is bound to wait until the time-limit for bringing an action against the rejection decision has expired before reading the contents of those documents. In any event, to the extent that such an action does not have suspensory effect, it is for the undertaking concerned to bring an application for interim relief seeking suspension of operation of the decision rejecting the request for LPP (see, to that effect, *AM & S*, paragraph 32).

89 Furthermore, as regards the Commission's claims regarding the possibility that undertakings may abuse the above procedure by making requests, merely as delaying tactics, for protection under LPP which are clearly unfounded, or by opposing, without objective justification, any cursory look at the documents during an investigation, the Court would point out that the Commission has the means, where appropriate, to discourage and penalise such conduct. In fact, such conduct may be penalised under Article 23(1) of Regulation No 1/2003 (and previously under Article 15(1) of Regulation No 17) or be taken into account as aggravating circumstances when calculating any fine imposed in the context of a decision imposing a penalty under the competition rules.

90 Finally, it must be observed, as the Court of Justice pointed out in *AM & S*, that the principle of LPP does not prevent a lawyer's client from disclosing the written communications between them if he considers that it is in his interests to do so (paragraph 28 of the judgment).

91 It is in the light of these considerations and principles that the applicants' complaints should be examined.

92 As a preliminary point, the Court must reject the Commission's claim that the fact that the applicants, at the stage of the reply, presented minutes of the investigation drawn up by their lawyers, infringes Article 48(1) of the Rules of Procedure (see paragraph 72 above). Contrary to the Commission's claims, the applicants explained why they had not produced those minutes beforehand, namely because they were confidential and because they needed to dispute the arguments advanced by the Commission in its defence (see, in particular, paragraphs 21 to 26 of the reply). Moreover, production of those minutes followed the Commission's presentation, in the defence, of the record of the inspection drawn up by its officials. Finally, where the parties disagree on the facts set out in the application and the defence, it is in the reply and the rejoinder that they must put forward evidence in support of their respective presentations of the facts.

93 As regards the complaints raised by the applicants, first of all, they submit that during the investigation the Commission forced them to divulge the contents of the documents at issue, even though they had claimed that they were covered by LPP. In particular, they complain that the Commission officials examined those documents on the spot, in spite of protests on the part of their representatives.

94 It is clear both from the Annex to the report of the inspection drawn up by the Commission officials and the non-confidential version of the minutes of the inspection drawn up by the applicants' lawyers that, during the investigation, the Commission officials and the applicants' representatives had long discussions on how to examine the documents at issue. During those discussions, the applicants strongly opposed a cursory look at the documents by the Commission officials,

claiming inter alia that at least some of those documents might not appear on their face to be covered by LPP, as they did not necessarily refer to outside lawyers or to their confidential nature. The applicants submitted, however, that those documents had been prepared for the purposes of seeking legal advice or contained legal advice, and maintained that cursory examination would not enable a determination to be made as to their confidentiality without at the same time revealing their contents. It is also apparent from the report and the minutes mentioned above that the Commission insisted on taking a cursory look at those documents and that the applicants' representatives only agreed to this after the Commission and the OFT officials informed them that refusal to allow them to do so would be tantamount to obstructing the investigation, an action which would be punishable by administrative and criminal penalties.

95 In those circumstances, the Court considers that the Commission forced the applicants to accept the cursory look at the disputed documents, even though, as regards the two copies of the typewritten memorandum in Set A and the handwritten notes in Set B, the applicants' representatives claimed, and provided supporting justification, that such an examination would require the contents of those documents to be disclosed. The Court would point out that a cursory look at the documents was unlikely to allow the Commission officials to assess whether they were confidential without at the same time giving them the opportunity to read their content. Accordingly, the Court concludes that the Commission infringed the procedure for protection under LPP in this regard.

96 Secondly, the applicants maintain that the Commission, by making copies of the documents in Set A and putting them in a sealed envelope, did not follow the procedure laid down by the Court in *AM & S* to the letter, and claim that the Commission ought to have adopted a formal decision ordering those documents to be produced. This complaint cannot however be upheld. In fact, as the Court has already held, the use of the sealed envelope procedure in circumstances such as

those in the present case does not infringe the procedure laid down in that judgment (see paragraph 84 above). Furthermore, it is apparent from the report and the minutes mentioned above that, during the investigation, the applicants' representatives repeatedly requested the Commission officials to use the sealed envelope procedure for the disputed documents.

97 Thirdly, the applicants complain that the Commission rejected their claim for protection of the documents in Set B under LPP at the time of the investigation. The Court would point out in this regard that, during the inspection, the applicants in fact claimed such protection and advanced a number of arguments in support of that claim, including, in particular, the fact that the documents in question had been drawn up for the purposes of seeking legal advice or that they contained such legal advice. In those circumstances, the Court concludes that, as the Commission was not satisfied with the explanations provided by the applicants, it should, before reading the contents of the documents in question, have adopted a formal decision rejecting the request for protection under LPP, allowing the applicants to bring the matter effectively before the Court of First Instance (see paragraph 85 above).

98 However, the Commission did not give the applicants an opportunity to bring the matter effectively before the Court in order to prevent the Commission from reading the contents of the documents in Set B. It must be borne in mind that the Commission officials concluded during the investigation that the documents in Set B were clearly not covered by LPP and that they made copies of them and added them to the investigation file without placing them in a sealed envelope. At that same time, therefore, the Commission was able to read the contents of the documents in full (see paragraph 51 above). Accordingly, the Court concludes that the Commission infringed the procedure for protection under LPP in this regard.

99 Fourthly, the applicants maintain that, by the rejection decision of 8 May 2003, the Commission breached the procedure laid down in *AM & S* by deciding unilaterally

that the disputed documents were not covered by LPP. It must be pointed out, however, that, contrary to what the applicants claim, the mere fact that the Commission adopts a decision rejecting a claim for confidentiality does not undermine the procedure applying to such protection, inasmuch as the Commission does not read the documents in question before giving the undertaking concerned the opportunity to bring the matter effectively before the Court of First Instance, and, if appropriate, to apply for interim relief to challenge the rejection decision (see paragraph 85 above).

100 However, in the present case, as regards the documents in Set B, even if they are covered by the rejection decision of 8 May 2003, it is not disputed that the Commission had read their contents well before adopting the decision. On the other hand, in relation to the documents in Set A, it must be borne in mind that the Commission made copies of them during the investigation and placed them in a sealed envelope. It then adopted a preliminary decision at the applicants' request, without opening the sealed envelope or examining its contents, a decision which it sent to them by letter of 1 April 2003. On 8 May 2003 the Commission finally adopted a decision rejecting the claim to protection, still without reading the contents of the documents in Set A. It was only after the annulment of the order of the President of the Court of First Instance in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* by the order of the President of the Court of Justice in *Commission* v *Akzo and Akcros* in the interim relief cases that the Commission finally read the documents in Set A. In those circumstances, the Court concludes that the adoption of the rejection decision of 8 May 2003 did not infringe the procedure applying to protection under LPP.

101 In the light of the foregoing, the Court holds that the Commission infringed the procedure for protection under LPP, first, by forcing the applicants to allow a cursory look at the documents in Set A and the manuscript notes in Set B, and, secondly, by reading the documents in Set B without having given the applicants the opportunity to contest the rejection of their claim to protection in respect of those documents before the Court of First Instance. However, the Court rejects the first plea as regards the applicants' complaints relating to the cursory look at the e-mails

in Set B, the use of the sealed envelope procedure in respect of the documents in Set A, and the adoption of the rejection decision of 8 May 2003.

The second plea in law, alleging unjustified rejection of the claim to protection of LPP for the documents at issue

102 The applicants maintain that the five documents at issue are covered by LPP. The documents in Set A and the handwritten notes in Set B should in fact be viewed as the written basis of an oral communication between client and outside counsel, made for the purpose of obtaining legal advice, while the e-mails in Set B are communications between lawyer and client for the purposes and in the interest of the latter's rights of defence.

103 The Commission argues that, in the light of the criteria laid down in the case-law, the five documents at issue are clearly not covered by LPP.

The two copies of the typewritten memorandum in Set A

— Arguments of the parties

104 The applicants observe that Set A contains two separate copies of a typewritten two-page memorandum from the General Manager of Akcros Chemicals to his superior,

the Sub-Business Unit Manager ('the SBU Manager'), dated 16 February 2000. The two copies are identical, apart from the fact that one copy has the following handwritten notes on the first page:

'— given to [SBU manager] 2/16/00

— returned by [SBU manager] 2/17/2000

— discussed with [X, outside counsel of the applicants] 2/22/00 by tel.'

105 The applicants submit that the document has to be examined in the context of the internal competition law compliance programme put in place by the Akzo Nobel group of companies on the advice of, and in coordination with, outside counsel. In the context of that programme, the applicants' employees and management identify potential questions relating to competition law in their respective fields of responsibility which they then put to outside counsel, who provides legal advice in reply.

106 Therefore, according to the applicants, that memorandum contains information gathered by the General Manager of Akcros Chemicals on the basis of internal discussions which he had with other employees, for the purpose of seeking legal advice regarding the compliance programme. That document is thus the direct result of — and inseparable from — the effort made by the applicants to identify potential competition law compliance issues and seek legal advice from outside counsel.

107 The sequence of events corroborates this version of the facts. After receiving the letter of 28 January 2000 from the Chairman of the Board of Management of Akzo Nobel concerning the draft compliance programme, the General Manager of Akcros Chemicals spoke with his employees about matters of competition law compliance. During these discussions, he took notes (the Set B handwritten notes). On Wednesday 16 February 2000, the copies of the Set A memorandum were given to the SBU Manager by the General Manager. On Thursday 17 February 2000, the SBU Manager returned them to the General Manager. On Tuesday 22 February 2000, the memorandum served as a basis for the discussion with Mr X, the applicants' outside counsel.

108 The applicants maintain that the two criteria identified by the Court of Justice in *AM & S* as being common to the laws of the various Member States in the context of protection under LPP, namely that the relevant communications are made for the purposes of and in the interests of the client's rights of defence and that those communications involve independent lawyers, are satisfied in the present case. The applicants explain that they do not claim that the mere fact that the document at issue was created in the context of the compliance programme is sufficient to guarantee the confidentiality of that document. However, by denying the possibility that such a programme can provide the context within which legally privileged communications are produced, the Commission overlooks fundamental aspects of its own competition law enforcement regime. Thus, first, in the light of the abolition of the notification scheme under Article 81(3) EC, if documents produced in the context of a self-assessment exercise could be divulged, the undertaking would be prevented from establishing freely and without fear, with the aid of external or internal counsel, whether its practices are in compliance with competition law. Secondly, due to the nature of a leniency application and to the requirement to undertake a fact-finding exercise and gather material evidence, documents produced in the context of a self-assessment exercise must be considered to be covered by LPP.

109 The applicants also dispute the Commission's view that there is no indication in the typewritten memorandum linking the observations of the General Manager to the seeking of legal advice from external counsel and that it has not been established

that such legal advice was indeed sought and given. They thus assert that the handwritten notes on the first page of one of the two copies of the memorandum incontestably demonstrate that that document served as a vehicle for seeking legal advice from that lawyer. Similarly, an internal report from the lawyer of 22 February 2000 and the time sheet filled in by him on that day confirm that legal advice was sought and given. Later that day, the General Manager faxed additional information to the outside counsel, referring to their earlier telephone conversation. The applicants also contend that *AM & S* and the order in Case T-30/89 *Hilti* v *Commission* [1990] ECR II-163, published in extracts, at no point state that there must be an indication in the privileged communication establishing a connection with the seeking of legal advice or that the communications were prepared for the sole purpose of seeking such advice.

110 According to the applicants, the only particularity here, as compared with the classical situation contemplated in *AM & S*, is that the information was transmitted to the outside counsel orally on the basis of the memorandum drawn up by the General Manager. The applicants maintain that, had the General Manager reported the result of his fact-finding efforts in a memorandum to outside counsel with a copy to his superior, the Commission would certainly have acknowledged the application of the protection of LPP to that document. However, as the order in *Hilti* v *Commission* demonstrates, application of LPP does not depend on both the form and substance of the document.

111 The CCBE submits that the documents drawn up for the purpose of seeking legal advice are covered by the principle of LPP and that account must be taken of the 'dominant' purpose for which a communication was made. In order for a document to be protected, however, it is not sufficient for an undertaking to declare that it has been prepared in the context of a competition law compliance programme, even if that programme was put together with help of outside counsel and carried out under his supervision. In this case, the fact that it is not possible to tell from the outward form of the Set A documents that they were prepared for the purposes of seeking

legal advice cannot be a determinative test. The Netherlands Bar Association, the ECLA, the ACCA and the IBA each submit that preparatory documents drawn up for the purpose of seeking legal advice must be regarded as protected by LPP.

112 The Commission observes that, according to the judgment in *AM & S* (paragraphs 21 to 23) and the order in *Hilti* v *Commission* (paragraph 18), LPP covers only written communications between lawyer and client which are made for the purposes of and in the interests of the client's rights of defence, and internal notes which do no more than report the text or the content of those communications.

113 In the present case, according to the Commission, the documents at issue do not fall within the category of written communications between lawyer and client and do not report the contents of such communications. The observations contained in the memorandum at issue reflect internal discussions that the General Manager had with other employees in the context of the compliance programme, not discussions that he had with an external lawyer.

114 The Commission is opposed to extension of the material scope of LPP to include documents made for the purpose of seeking legal advice. Such extension finds no basis either in the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) or in the constitutional traditions common to the Member States. In actual fact, *AM & S* establishes a high level of protection in Community law, more extensive than that provided in a large number of Member States, since *AM & S* covers documents kept at the premises of the client and may also encompass documents exchanged with an external lawyer before any proceedings have been started against the client.

115 In any event, the Commission also disputes the applicants' view that the memorandum, the two typewritten copies of which constitute the Set A documents, was prepared for the purpose of seeking legal advice. There is no indication in the typed memorandum linking the observations of the General Manager of Akcros to the seeking of legal advice by an outside lawyer. The manuscript reference, in one of the copies of the memorandum, to the name of an outside lawyer, establishes at most that a conversation regarding the memorandum occurred. The fact that the handwritten name of the outside lawyer was added after completion of the memorandum, and to only one of the two copies, suggests that the memorandum was not prepared for the purpose of seeking legal advice. Similarly, apart from an abstract of the time sheets of Mr X and a reference to an alleged note drawn up by him of the contents of the conversation which he had with the General Manager, the applicants have not produced any documents proving that legal advice was actually sought and given.

116 As regards the applicants' reliance on Akzo Nobel's compliance programme, the Commission expresses doubts as to its probative value. The Set A documents make no mention of that programme. In any event, the fact that a document was drawn up in the context of a compliance programme is not sufficient evidence that that document is confidential. Such a programme is a process of internal assessment comprising contacts between members of staff and for the purposes of ascertaining whether the undertaking is complying with competition law and has a pedagogical, disciplinary and supervisory dimension, and thus is not limited to protection of the rights of the defence. To allow an undertaking to invoke protection of a document on the sole ground that, in the absence of the compliance programme and guidance from an outside lawyer that document would never have been drawn up, could lead to all manner of abuse.

— Findings of the Court

117 It must be pointed out at the outset that, according to the judgment in *AM & S*, Regulation No 17 falls to be interpreted as protecting the confidentiality of

communications between lawyer and client provided that (i) such communications are made for the purposes of the exercise of the client's rights of defence and (ii) they emanate from independent lawyers (paragraphs 21, 22 and 27 of the judgment). As far as the first of those two conditions is concerned, such protection must, if it is to be effective, be recognised as covering as a matter of law all written communications exchanged after the initiation of the administrative procedure under the regulation which may lead to a decision on the application of Articles 81 EC and 82 EC or to a decision imposing a pecuniary sanction on the undertaking. That protection can also extend to earlier written communications which have a relationship to the subject-matter of that procedure (*AM & S*, paragraph 23). In the order in *Hilti* v *Commission*, it was held that LPP must, in view of its purpose, be regarded as extending also to the internal notes circulated within an undertaking which are confined to reporting the text or the content of communications with independent lawyers containing legal advice (paragraphs 13 and 16 to 18 of the order).

118 In the present case, the Court finds that the Set A documents do not by themselves constitute written communications with an independent lawyer or an internal note reporting the content of a communication with such a lawyer. Nor do the applicants submit that those documents were prepared in order to be sent physically to an independent lawyer. Accordingly, it must be held that those documents do not formally come within the categories of documents expressly identified in the abovementioned case-law.

119 The applicants claim, nevertheless, that those documents must be recognised as being covered by LPP, since, in their view, they were prepared in order to seek legal advice. According to the applicants, those documents were drawn up, for the particular purpose of a conference call with a lawyer with the aim of obtaining legal advice.

120 In that regard, it must be pointed out that the principle of the protection of the confidentiality of written communications between lawyer and client is an essential

corollary to the effective exercise of the rights of the defence (*AM & S*, paragraph 23) (see paragraph 77 above). According to settled case-law, observance of the right to be heard is, in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed, a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings (Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraph 9, and Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 39). Therefore, it is necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures, including, in particular, investigations which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable (Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 15).

121 Similarly, it must be pointed out that LPP meets the need to ensure that every person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it (*AM & S*, paragraph 18). That principle is thus closely linked to the concept of the lawyer's role as collaborating in the administration of justice by the courts (*AM & S*, paragraph 24) (see paragraph 77 above).

122 However, so that a person may be able effectively to consult a lawyer without constraint, and so that the latter may effectively perform his role as collaborating in the administration of justice by the courts and providing legal assistance for the purpose of the effective exercise of the rights of the defence, it may be necessary, in certain circumstances, for the client to prepare working documents or summaries, in particular as a means of gathering information which will be useful, or essential, to that lawyer for an understanding of the context, nature and scope of the facts for which his assistance is sought. Preparation of such documents may be particularly necessary in matters involving a large amount of complex information, as is often the case with procedures imposing penalties for breaches of Articles 81 EC and 82 EC. In those circumstances, the Court holds that the fact that the Commission reads

such documents during an investigation may well prejudice the rights of the defence of the undertaking under investigation and the public interest in ensuring that every client is able to consult his lawyer without constraint.

123 Accordingly, the Court concludes that such preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, may none the less be covered by LPP, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence. On the other hand, the mere fact that a document has been discussed with a lawyer is not sufficient to give it such protection.

124 It must be borne in mind that protection under LPP is an exception to the Commission's powers of investigation, which are essential to enable it to discover, bring to an end and penalise infringements of the competition rules. Such infringements are often carefully concealed and usually very harmful to the proper functioning of the common market. For this reason, the possibility of treating a preparatory document as covered by LPP must be construed restrictively. It is for the undertaking relying on this protection to prove that the documents in question were drawn up with the sole aim of seeking legal advice from a lawyer. This should be unambiguously clear from the content of the documents themselves or the context in which those documents were prepared and found.

125 It is therefore necessary, in the present case, to determine whether the applicants have proved that the memorandum of 16 February 2000 of the General Manager of Akcros Chemicals, the two copies of which make up the Set A documents, was prepared exclusively for the purposes of seeking legal advice from a lawyer in exercise of the rights of the defence.

126 The applicants maintain in this respect, first of all, that the memorandum was drawn up in connection with their competition law compliance programme, put in place and coordinated by a law firm, for the purposes of identifying potential problems of competition law and seeking legal advice. They go on to state that the memorandum contains information gathered by the General Manager of Akcros Chemicals on the basis of internal discussions with other employees in order to obtain legal advice on the programme. They contend, finally, that a number of factors prove that the purpose of the memorandum was to seek legal advice and that that advice was in fact requested and provided.

127 In relation, first of all, to the reference to the applicants' competition law compliance programme, it must be pointed out that the fact that a document was drawn up under such a programme is not sufficient in itself for that document to benefit from protection under LPP. Such programmes often encompass in scope duties and cover information which goes beyond the exercise of the rights of the defence. In particular, the fact that an outside lawyer has put together and/or coordinated a compliance programme cannot automatically confer protection under LPP on all the documents drawn up under that programme or in relation to it.

128 As regards, first, the handwritten notes on one of the two copies of the memorandum and referring to a telephone call with an outside lawyer, second, the time sheet filled in by the latter confirming that conversation, third, the fact that the lawyer allegedly prepared an internal note dealing with this, and fourth, the fact that the General Manager of Akcros Chemicals faxed further information to the lawyer, the Court considers that those various factors merely show that the content of the memorandum at issue was discussed on the telephone by the General Manager of Akcros Chemicals and the lawyer. These factors are not, however, in themselves proof that the memorandum was drawn up for the purpose — and, a fortiori, for the exclusive purpose — of seeking legal advice.

129 In that regard, it must be borne in mind that the memorandum was not addressed to the lawyer, but to one of the immediate superiors of the Akcros Chemicals' General Manager, namely the SBU Manager. It is in fact apparent from the first sentence of that document that it was prepared at the latter's request. In fact, the memorandum was in response to a question from the SBU Manager as to whether any activities in one of the applicants' divisions for which the General Manager of Akcros Chemicals was responsible were contrary to the competition rules. The memorandum describes a number of activities and practices which could attract the application of these rules. By way of conclusion, the General Manager of Akcros Chemicals makes two recommendations to his immediate superior and asks for his agreement.

130 It must be pointed out that the memorandum makes no mention of seeking legal advice or a legal consultation. Thus, no mention is made of the need to assess whether certain practices were in conformity with competition law or of the possibility of submitting an application for leniency. Finally, neither of the two recommendations put forward in the memorandum concerns the necessity or appropriateness of seeking legal advice on the conduct examined or on any follow-up action to be taken.

131 Furthermore, even if the gathering of the information in question might in fact be part of the implementation of the applicants' compliance programme, the preparation of the memorandum is clearly not in line with the methodology laid down in that programme. As is apparent from the letter of 28 January 2000 from the Chairman of the Board of Management of Akzo Nobel, sent to, amongst others, the SBU Manager, that compliance programme required that any information or question concerning conduct likely to infringe competition law had to be sent orally and directly to the applicants' outside counsel, except in cases concerning the United States or Canada.

132 In those circumstances, the Court considers that it is not apparent either from the content of the document or the factors and explanations put forward by the

applicants, whether taken individually or as a whole, that the memorandum at issue was drawn up by the General Manager of Akcros Chemicals exclusively for the purposes of seeking legal advice. By contrast, the Court considers that the most plausible explanation is that the memorandum was drawn up by the General Manager of Akcros Chemicals with the primary purpose of seeking the agreement of his immediate superior on the recommendations he put forward regarding the conduct he identified. This interpretation is also confirmed by the Set B handwritten notes. In fact, the General Manager of Akcros Chemicals expressly stated in those notes that his superior, the SBU Manager, could have a different view as to the strategy to be adopted regarding some of the situations identified in the memorandum. This explains why the Managing Director of Akcros Chemicals drew up a memorandum for the attention of his superior, presenting to him the conduct identified, putting forward recommendations as to the action to be taken and asking for his agreement.

133 By the same token, the sequence of events, as presented by the applicants, does not contradict this version of the facts. In fact, on 16 February 2000, the General Manager of Akcros Chemicals sent the SBU Manager the memorandum at issue. On 17 February 2000, the memorandum was returned to him by the SBU Manager. It was only subsequently, on 22 February 2000, that the General Manager of Akcros Chemicals discussed the content of the memorandum with the lawyer. However, as has been stated above, that subsequent consultation with the lawyer does not suffice to prove that the memorandum at issue was drawn up for the exclusive purpose of seeking legal advice (see paragraph 123 above).

134 In the light of the foregoing, the Court concludes that the applicants have not proved that the memorandum of 16 February 2000 from the General Manager of Akcros Chemicals was drawn up for the exclusive purpose of seeking legal advice from a lawyer in exercising rights of defence.

135 Consequently, the Court concludes that the Commission did not err in considering that the two copies of the memorandum constituting the Set A documents were not protected under LPP.

The handwritten notes in Set B

— Arguments of the parties

136 The applicants state that the first document in Set B consists of handwritten notes by the General Manager of Akcros Chemicals, taken during his discussions with lower-level employees and used for the purpose of preparing the typewritten memorandum constituting the Set A documents. The applicants, supported by the CCBE, submit that if the protection of LPP is accepted for the Set A documents, it should be extended to those preparatory notes.

137 The Commission contends that the handwritten notes cannot be protected under LPP, as they were made in preparation of documents which are not covered by that principle.

— Findings of the Court

138 It is clear from the analysis of the Set B handwritten notes that, as the applicants contend, they were made with the main aim of preparing the memorandum, the two copies of which make up the Set A documents. However, since the Court concluded that the memorandum is not protected under LPP, it must also conclude that those notes are not covered by such protection either.

139 Furthermore, it must be pointed out that the handwritten notes do not constitute a communication with a lawyer and do not report the text or the content of communications with a lawyer containing legal advice. The applicants have also not proved that the manuscript notes were made exclusively for the purpose of seeking legal advice from a lawyer in the exercise of rights of the defence.

140 Accordingly, the Court finds that the Commission did not err in refusing to accord the Set B manuscript notes the protection under LPP claimed by the applicants.

The e-mails exchanged with a member of the applicants' legal department, forming part of the Set B documents

— Arguments of the parties

141 The applicants point out that the two other documents constituting Set B concern e-mail correspondence exchanged between the General Manager of Akcros Chemicals and Mr S., a member of the legal department of Akzo Nobel. That e-mail correspondence should be considered to be protected from disclosure under LPP.

142 In that regard, the applicants put forward two arguments. They submit, principally, that communications with in-house lawyers who are members of the Bar or Law Society of a Member State — and, in any event, communications with in-house lawyers who are members of the Netherlands Bar, such as Mr S. in the present case

— must be protected under the principles laid down in *AM & S*. In the alternative, they claim that, if the *AM & S* judgment is to be interpreted as precluding such protection, it would then be necessary to widen the personal scope of the protection, such as stems from that judgment, and to accord the documents in question the protection claimed.

143 With regard, first of all, to their main argument, the applicants submit that, contrary to the Commission's narrow interpretation of the judgment in *AM & S*, communications emanating from in-house lawyers, in particular those who are members of a Bar or Law Society, are covered by LPP. They admit that in that judgment, the Court of Justice limited that protection to 'independent' lawyers, a group that did not, according to the Court of Justice, include lawyers 'employed' by their clients. However, the relevant element laid down in *AM & S* is that of the independence of the lawyer. The applicants consider that it is not appropriate to attribute the notion of independence only to outside lawyers. In-house lawyers do not appear to be any less under an obligation not to participate in illegal activities, withhold information or obstruct the administration of justice. That is even more true in jurisdictions where in-house lawyers can be admitted to the Bar or Law Society and where, as such, they have a position of independence vis-à-vis their employers.

144 The applicants submit that Mr S. is a member of the Netherlands Bar and is the reference point of the Akzo Nobel competition law compliance programme. While at Akzo Nobel, he has acted only as a legal adviser and has not held any management position. His membership of the Netherlands Bar makes him subject to the professional and ethical rules of that body and gives him a particular level of independence. Under Netherlands law, Mr S. is also covered by the agreement on employment conditions which he concluded with his employer, under which the management of the Akzo Nobel Group of companies has agreed that the obligation of independence and compliance with the Bar rules under Netherlands law prevails over loyalty to the group. Consequently, for the purpose of the principle of LPP, correspondence between Mr S. and the General Manager of Akcros Chemicals is identical to correspondence between that company and an outside lawyer. Mr S.

should therefore not be seen solely as in-house counsel, but rather as a qualified independent lawyer, who is a member of the Netherlands Bar and practises as an in-house lawyer within an undertaking.

145 In addition, the applicants assert that, in the correspondence at issue, Mr S. was giving legal advice on how to deal with certain issues that had arisen in the context of Akzo Nobel's competition law compliance programme. That legal advice was based, in turn, on the advice of the applicants' outside lawyer.

146 The CCBE submits that, in the context of applying protection of LPP, a distinction should be made not between legal advisers who are employed and those who are not employed by the company to which they give advice, but between those who are and those who are not subject to professional obligations, compliance with which is supervised by the Bar or Law Society in the Member State concerned. This solution gives full effect to the principles underlying the judgment in *AM & S*, namely the criteria of independence and of being subject to official professional discipline. The CCBE takes the view that Mr S., notwithstanding his employed status, meets all the criteria of independence required by that judgment.

147 The ECLA argues that, in its judgment in *AM & S*, the Court did not specifically hold that an employed lawyer could never be considered 'independent'. A company must have the right to obtain legal advice from the lawyer of its choice without thereby creating evidence against itself, provided that the lawyer is properly qualified and subject to appropriate rules of ethics and discipline. Moreover, Member States' labour laws protect internal advisers against dismissal for failure to follow an order contrary to professional ethical rules.

148 The Netherlands Bar Association states that, in its judgment in *AM & S*, the Court of Justice did not categorically refuse to extend protection of LPP to communications emanating from all in-house counsel. According to that judgment, such protection is closely related to the lawyer's independent status. Lawyers admitted to the Netherlands Bar who are employed in a company are just as independent of their client/employer as other lawyers and have the same status, rights and obligations as the latter, including the privilege of LPP, and the same sanctions can be imposed upon them.

149 The Netherlands Bar Association observes that in 1996 a new regulation was adopted expressly allowing Advocaten to be employed by companies. The independence of lawyers in employment is guaranteed by the conclusion of an agreement on their conditions of employment, in combination with the disciplinary and ethical rules stemming from their membership of the Netherlands Bar. That agreement governing their conditions of employment contains a number of strict requirements, which are such as to reinforce the independence of the lawyer vis-à-vis his employer. In addition, that agreement obliges the employer to allow the employed lawyer to comply with the disciplinary and ethical rules for practising his profession. The Netherlands Bar Association concludes that the principles that form the basis of the judgment in *AM & S* require the application of LPP to Mr S.

150 The Commission contends that the e-mails at issue neither contain any communication or any intention to communicate with an independent lawyer, nor are limited to reporting the text or the content of written communications with an independent lawyer for the purpose and in the interests of the applicants' rights of defence. The core issue which arises is therefore whether they should be protected precisely because they involve an internal communication with a member of the applicants' legal department. However, contrary to what the applicants seem to claim, the Court of Justice explicitly ruled in *AM & S* that communications between an undertaking and its in-house lawyer are not covered by the principle of LPP.

151 As regards their alternative argument, the applicants put forward, in essence, five reasons why they consider that, if the judgment in *AM & S* is to be interpreted as wholly excluding in-house lawyers from the protection of LPP, it would be appropriate to extend the personal scope of that protection beyond that laid down in the case-law.

152 First of all, the applicants submit that, since *AM & S*, certain Member States have expanded the scope of the protection of LPP and have developed new possibilities for in-house lawyers to be admitted to their national Bar or Law Societies. According to the applicants, the majority of Member States presently accept that in-house lawyers are covered by that protection.

153 The ECLA points out, on the basis of a comparative examination of legislation, that most Member States' laws now recognise the independence of in-house lawyers and legal privilege for their communications. The ACCA points out that, since 1982, there has been an increasing trend among Member States to recognise in-house lawyer privilege. The CCBE observes, however, that LPP is not recognised for in-house lawyers in France, Italy, Luxembourg, Finland, Austria and Sweden. However, for the CCBE, the key question is whether, in each Member State, salaried in-house lawyers are regulated or non-regulated professionals, since the obligation to protect professional privilege is generally linked to membership of a Bar or Law Society. In some countries, however, lawyers admitted to a Bar or Law Society are prohibited absolutely from employment — such as in Belgium and Greece — whereas in others, in particular Denmark, Germany, Ireland, the Netherlands, Portugal, Spain and the United Kingdom, it is permitted.

154 The Commission observes that, at the time of the judgment in *AM & S*, certain Member States already accorded a special status to in-house lawyers. The situation

is not different today. Thus, it is not contested that the benefit of LPP is not granted to in-house lawyers in France, Italy, Luxembourg, Finland and Austria. It further contends that the conclusions drawn by the ECLA in its report do not have the unequivocal value which it claims they have.

155 As regards the question of in-house lawyers' membership of a Bar or Law Society, the Commission contends that, while in certain Member States it is possible to be employed and to be a member of a Bar or Law Society (notably in the United Kingdom and Spain) and in others it is possible for employed lawyers to be members of the Bar or Law Society subject to certain conditions (notably in Germany and the Netherlands), the fact remains that, in a considerable number of Member States, employment and membership of the Bar or Law Society are incompatible (for example, in Italy, France, Lithuania, Latvia, the Czech Republic, Hungary, Sweden and Austria). This latter group of States does not confer LPP on documents exchanged with employed lawyers. Finally, in Finland, practice of the profession of independent lawyer does not require membership of a Bar or Law Society. The Commission concludes that, in their great majority, the Member States do not grant LPP to in-house lawyers, even where they can be members of a Bar or Law Society. In any event, turning the developments observed in certain Member States into a principle of Community law would create a situation of legal uncertainty.

156 Secondly, the applicants submit that, since the judgment in *AM & S*, Community competition law has undergone a series of fundamental reforms, the effects of which warrant a re-evaluation of the applicability of the principle of LPP to in-house lawyers, particularly those who are members of their national Bars or Law Societies. Consequently, in the context of the modernisation of Community competition law, both Regulation No 1/2003 and the Commission's Notice on immunity from fines and the reduction of fines in cartel cases (OJ 2002 C 45, p. 3) impose increasing responsibilities on undertakings to perform self-assessments of their compliance with those rules. Even if those self-assessments are usually performed under the guidance in principle of outside lawyers, in-house lawyers play a central role in

them, which would be impeded by the non-recognition of the protection in question.

157 The Commission contends, however, that the replacement of Regulation No 17 by Regulation No 1/2003, which requires from undertakings a greater self-assessment as to whether their agreements are compatible with the conditions of Article 81(3) EC, does not appear relevant in the present case, since the issue of LPP would barely arise in that connection.

158 Thirdly, the applicants submit that the differential treatment, for the purpose of applying LPP, of external lawyers and in-house lawyers admitted to the national Bar or Law Society is arbitrary and thus contrary to the principle of equal treatment and raises issues of freedom of establishment and the freedom to provide services. The ACCA also supports this argument, adding that the *AM & S* ruling also discriminates against non-Community lawyers, since such protection is only accorded to lawyers who are entitled to practise in a Member State (paragraph 25 of the judgment).

159 The Commission takes the view that the fundamental principle whereby undertakings have a right to a fair trial and, in particular, to consult freely with a lawyer of their choice is not unduly restricted by the limitations defined in the judgment in *AM & S* with regard to in-house lawyers. The Commission further argues that the ACCA raises a new issue which was not raised by the applicants, which is therefore inadmissible and, in any event, not the subject-matter of the present proceedings.

160 Fourthly, the applicants refer to Case T-92/98 *Interporc* v *Commission* [1999] ECR II-3521, confirmed by the Court of Justice in Case C-41/00 P *Interporc* v

Commission [2003] ECR I-2125, in which it was held that the correspondence between the lawyers in the legal service of the Commission and the latter was protected by LPP. However, there is no difference between the independence of the members of the Commission's legal service from the institution and the independence of an in-house lawyer admitted to the Bar or Law Society from his employer.

161 The Commission rejects this analogy. The protection afforded in the *Interporc* judgments to communications emanating from members of its legal service stems from the public interest precluding disclosure of documents drawn up for the purposes of specific court proceedings.

162 Fifthly and finally, the applicants argue that the communication between Mr S. and the General Manager of Akcros Chemicals constitutes correspondence between two persons established, respectively, in the Netherlands and the United Kingdom. According to Netherlands law, Mr S.'s correspondence benefits from protection of LPP under Article 51 of the Netherlands Law on competition. Such protection is also afforded in the United Kingdom. Community law should therefore not be more stringent than these two national laws.

163 The CCBE submits that, since there is no Community harmonisation of the rules organising the legal profession, the personal scope of the Community concept of LPP should be governed by national law. The ECLA argues that since a lawyer's status, rights and obligations are governed by national law, the Commission has no right to ignore the protection conferred by this law, pursuant to the principle of national procedural autonomy. Finally, the Netherlands Bar Association supports this argument and confirms that, under Netherlands competition law, in relation to inspections, the protection applies to all lawyers admitted to the Netherlands Bar, regardless of whether or not they are employed.

164 The Commission contests that it must be bound by national rules on LPP. This would be contrary to the primacy of Regulation No 1/2003 — and previously, Regulation No 17 — and the ruling in *AM & S*, which took pains to develop a Community concept of LPP. In addition, the Commission asserts that since its investigatory powers extend to the whole European Union, the scope of that protection cannot be determined on the basis of legislation and of rules of the Bars or Law Societies of the Member States. This would create huge legal and practical difficulties. The Commission maintains, in any event, that the right to protection of LPP in the Netherlands is far more limited than the applicants and interveners claim.

— Findings of the Court

165 The Set B documents contain, in addition to the manuscript notes already examined, e-mail correspondance of May and June 2000 exchanged between the General Manager of Akcros Chemicals and Mr S., an Advocaat on the roll of the Netherlands Bar, who at the material time was a member of the legal department of Akzo Nobel, in which capacity he coordinated competition-law matters.

166 As regards, first of all, the applicants' principal argument, it must be pointed out that in its judgment in *AM & S*, the Court of Justice expressly held that the protection accorded to LPP under Community law, in the application of Regulation No 17, only applies to the extent that the lawyer is independent, that is to say, not bound to his client by a relationship of employment (paragraphs 21, 22 and 27 of the judgment). The requirement as to the position and status as an independent lawyer, which must be met by the legal adviser from whom the written communications which may be protected emanate, is based on a concept of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of the administration of justice, such legal assistance as the client needs (*AM & S*, paragraph 24).

167 It follows that the Court expressly excluded communications with in-house lawyers, that is, legal advisers bound to their clients by a relationship of employment, from protection under LPP. It must also be pointed out that the Court reached a conscious decision on that exception, given that the issue had been debated at length during the proceeding and that Advocate General Sir Gordon Slynn had expressly proposed in his Opinion for that judgment that where a lawyer bound by an employment contract remains a member of the profession and subject to its discipline and ethics, he should be treated in the same way as independent lawyers (Opinion of Advocate General Sir Gordon Slynn in *AM & S*, p. 1655).

168 The Court therefore concludes that, contrary to what the applicants and certain interveners submit, the Court in its judgment in *AM & S* defined the concept of independent lawyer in negative terms in that it stipulated that such a lawyer should not be bound to his client by a relationship of employment (see paragraph 166 above), rather than positively, on the basis of membership of a Bar or Law Society or being subject to professional discipline and ethics. The Court thus laid down the test of legal advice provided 'in full independence' (*AM & S*, paragraph 24), which it identifies as that provided by a lawyer who, structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice.

169 Accordingly, this Court rejects the applicants' principal argument and holds that the correspondence exchanged between a lawyer bound to Akzo Nobel by a relationship of employment and a manager of a company belonging to that group is not covered by LPP, as defined in *AM & S*.

170 As regards, secondly, the argument advanced by the applicants in the alternative, to the effect that the Court of First Instance should extend the personal scope of LPP beyond the limits established by the Court of Justice in *AM & S*, the Court would point out, first, that an examination of the laws of the Member States shows that, even though it is the case, as the applicants and certain interveners submit, that

specific recognition of the role of in-house lawyers and the protection of communications with such lawyers under LPP is relatively more common today than when the judgment in *AM & S* was handed down, it is not possible, nevertheless, to identify tendencies which are uniform or have clear majority support in that regard in the laws of the Member States.

171 In particular, first, a comparative examination of laws shows that a large number of Member States still exclude in-house lawyers from protection under LPP. In addition, in certain Member States, the issue seems not to have been decided unequivocally or definitively. Furthermore, various Member States have aligned their regimes with the Community system, following upon the judgment in *AM & S*. Secondly, such an examination shows that a considerable number of Member States do not allow in-house lawyers to be admitted to the Bar or Law Society and, accordingly, do not recognise them as lawyers established in private practice. In fact, in a number of countries, to be a lawyer employed by a person who is not a lawyer in private practice is incompatible with the status of 'avocat'. Moreover, even in countries which do permit this possibility, the fact that in-house lawyers are admitted to a Bar or Law Society and are subject to professional ethical rules does not always mean that communications with such persons are protected under LPP.

172 As regards, secondly, the applicants' argument that the evolution of Community competition law requires the solution adopted by the Court of Justice in *AM & S* to be reconsidered, it must be pointed out that protection under LPP represents a limitation on the Commission's investigatory powers and that those powers are exercised primarily for the purpose of combating the most serious infringements of Article 81(1) EC, including, in particular, price-fixing cartels and market-sharing, together with infringements of Article 82 EC. Accordingly, it must be considered that abolishing, in the context of the modernisation of Community competition law, the notification system, and consequently conferring on undertakings under Regulation No 1/2003 greater responsibility in assessing whether their conduct is lawful in the light of Article 81(3) EC, are not directly relevant to this problem area.

173 Furthermore, even if the adoption of Regulation No 1/2003 and of the Commission Notice on Immunity from fines and reduction of fines in cartel cases may have increased the need for undertakings to examine their conduct and to define legal strategies in respect of competition law with the help of a lawyer who has in-depth knowledge of the particular undertaking and of the market in question, the fact remains that such exercises of self-assessment and strategy definition may be conducted by an outside lawyer in full cooperation with the relevant departments of the undertaking, including its internal legal department. In that context, communications between in-house lawyers and outside lawyers are in principle protected under LPP, provided that they are made for the purpose of the undertaking's exercise of the rights of defence. It is therefore clear that the personal scope of that protection, as laid down in *AM & S*, is not a real obstacle preventing undertakings from seeking the legal advice they need and does not prevent their in-house lawyers from taking part in self-assessment exercises or strategy definition. Finally, it must be pointed out that the modernisation of competition law does not necessarily mean that the respective roles of outside lawyers and in-house lawyers have changed substantially in this respect since the judgment in *AM & S*. In any event, since Community competition law is aimed at undertakings, it would not be permissible, in principle, for purely internal communications within a particular undertaking to fall outside the Commission's investigatory powers, with the exception, as has been stated above, of notes which do no more than report the text or the content of communications with outside lawyers containing legal advice, and of preparatory documents drawn up exclusively in order to seek legal advice from an outside lawyer in exercise of the rights of defence.

174 Thirdly, as regards the arguments of the applicants and of certain interveners that the differential treatment of in-house lawyers in *AM & S* is contrary to the principle of equal treatment and raises problems from the point of view of the free movement of services and the freedom of establishment, it is settled case-law that the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25; Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309, and Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraph 96). It must be pointed out, however, that in-house lawyers and outside

lawyers are clearly in very different situations, owing, in particular, to the functional, structural and hierarchical integration of in-house lawyers within the companies that employ them. Accordingly, no infringement of the principle of equal treatment arises from the fact of treating such professionals differently in respect of protection under LPP. Moreover, as regards the applicants' claim as to the harm which might be caused to the free movement of services and the freedom of establishment by restricting the personal scope of protection of confidentiality, it suffices to say that this claim has not been substantiated. Finally, as the Commission points out, the arguments advanced by ACCA regarding the protection afforded to lawyers who are not members of a Bar or Law Society in a Member State are not at all relevant to the present proceedings.

175 As regards, fourthly, the case of *Interporc* v *Commission*, it should be borne in mind that this case concerns individuals' access to Commission documents, and not limitations on the Commission's powers to investigate infringements of the competition rules. In any event, contrary to what the applicants submit, the Court, in Case T-92/98 *Interporc* v *Commission*, did not hold that correspondence between the members of the Commission's legal service and the Commission was covered by LPP. The Court in fact applied the exception to disclosure based on LPP only to exchanges between the Commission and its outside lawyers; on the other hand, the Commission's correspondence with members of its legal service was not disclosed on the basis of the exception relating to the protection of work done within the Commission (Case T-92/98 *Interporc* v *Commission*, paragraph 41).

176 Fifthly and finally, the applicants claim that, since the correspondence between Mr S. and the General Manager of Akcros Chemicals is protected under their respective national laws, Community law should also afford them such protection under LPP. More generally, the CCBE, and, less explicitly, the ECLA and the Netherlands Bar

Association, maintain that the personal scope of the Community concept of confidentiality should be governed by national law. In that respect, it should be recalled that the protection of LPP is an exception to the Commission's powers of investigation. Therefore, the protection directly affects the conditions under which the Commission may act in a field as vital to the functioning of the common market as that of compliance with the rules on competition (*AM & S*, paragraph 30). For those reasons, the Court of Justice and the Court of First Instance have been at pains to develop a Community concept of LPP. The argument of the applicants and the interveners is at odds both with the development of that Community concept and with the uniform application of the Commission's powers in the common market and must therefore be rejected.

177 In the light of the foregoing, the Court rejects the argument advanced by the applicants in the alternative, concerning extension of the personal scope of protection of LPP beyond the limits laid down by the Court of Justice in *AM & S*.

178 Moreover, it must be pointed out that the applicants also appear to indicate that the e-mails in dispute report, among other information, the advice provided by their external lawyer (see paragraph 145 above). However, on examination of the documents in question, this claim cannot be upheld.

179 Consequently, it must be concluded that the Commission did not err in taking the view that the correspondence exchanged between the General Manager of Akcros Chemicals and the member of Akzo Nobel's legal department, forming part of the Set B documents, should not be covered by LPP.

180 Accordingly, the Court must reject the second plea in law.

The third plea in law, alleging violation of the fundamental rights which form the basis of LPP

181 By their third plea, the applicants submit that, by violating the protection of LPP, the Commission also infringed the fundamental rights on which that principle is based. They consider that protection of LPP is based on a number of fundamental rights recognised in the laws of the various Member States and in Community law, including the rights of defence, respect for privacy and freedom of expression. However, they merely set out this third plea in a very succinct manner, without supporting their claim with specific arguments.

182 The Court considers that this third plea cannot be considered to be independent from the two pleas examined earlier. In fact, the applicants' claim that fundamental rights were infringed is not based on grounds of complaint different from those made to establish the alleged infringement of the principle of protection of LPP. However, those complaints have already been analysed in the context of the first and second pleas in this case.

183 Consequently, there is no further need to examine this third plea in law.

184 In the light of the foregoing, it must be concluded that the infringements on the part of the Commission found to have been committed during the procedure for

examination of the documents for which the applicants claimed protection of LPP has not unlawfully deprived the applicants of that protection in respect of the disputed documents, since, as has been held, the Commission did not err in deciding that none of those documents fell within the scope of that protection.

185 The action in Case T-253/03 must therefore be dismissed.

Costs

186 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 87(3), where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.

187 In the present case, although the applicants have been unsuccessful, the Court considers that the Commission had, in any event, committed various irregularities in the administrative procedure on which the present cases are based. Accordingly, the Court considers that it will make an equitable assessment of the case by holding that the applicants are to bear three fifths of their own costs and three fifths of those incurred by the Commission in relation to the main proceedings and to the proceedings for interim relief. As regards the Commission, it is to bear two fifths of its own costs and pay two fifths of those incurred by the applicants in relation to the main proceedings and to the proceedings for interim relief.

188 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener to bear its own costs. In this case, the interveners intervening in support of the applicants are to bear their own costs in relation to the main proceedings and to the proceedings for interim relief.

On those grounds,

THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

hereby:

1. Dismisses the action in Case T-125/03 as inadmissible;

2. Dismisses the action in Case T-253/03 as unfounded;

3. Orders Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd to bear three fifths of their own costs relating to the main proceedings and to the proceedings for interim relief, and to pay three fifths of the costs incurred by the Commission relating to the main proceedings and to the proceedings for interim relief;

4. Orders the Commission to bear two fifths of its own costs relating to the main proceedings and to the proceedings for interim relief, and to pay two fifths of the costs incurred by Akzo Nobel Chemicals and Akcros Chemicals relating to the main proceedings and to the proceedings for interim relief;

5. Orders the interveners to bear their own costs relating to the main proceedings and to the proceedings for interim relief.

Cooke García-Valdecasas Labucka

Prek Ciucă

Delivered in open court in Luxembourg on 17 September 2007.

E. Coulon J.D. Cooke

Registrar President

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