in Article 1 (b) of the contested decision and listed in the appendix to AM & S Europe Limited's letter of 26 March 1979 to the Commission.

3. The Court will, before the date of the hearing, draw up a report on those documents in a form which it considers appropriate so as not to prejudice its final decision; this report will be notified to the parties.

4. The applicant, the defendant and the interveners will, at the hearing, be heard on questions which will be particularized at a later date.

Luxembourg, 4 February 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 20 JANUARY 1981

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My Lords,

I — Introductory

In this action, which is brought against the Commission under Article 173 of the EEC Treaty, the applicant is an English company called AM & S Europe Limited. It is a subsidiary of an Australian company, Australian Mining and Smelting Limited. Both companies belong to the well-known Rio Tinto Zinc group. A subsidiary of the applicant owns and operates a zinc smelter at Avonmouth, near Bristol.

On 10 February 1978, the Member of the Commission responsible for competition policy ordered investigations to be carried out under Article 14 of Regulation No 17 into a number of undertakings in the zinc industry, which were suspected of having jointly fixed prices and conditions of sale, controlled production and shared out markets, in breach of Article 85 of the Treaty. The applicant was one of those undertakings.

Article 14 of Regulation No 17 is so familiar to your Lordships that I do not think it necessary to read it. The Court was recently concerned with it in Case 136/79 *National Panasonic (UK) Ltd* v *Commission* (26 June 1980, not yet reported). The questions at issue in this case are, however, different from those that were at issue there.

The questions here at issue relate to the extent to which, and the manner in which, communications between a lawyer and his client may be protected from disclosure in an investigation under Article 14. Before I state the facts of the case and the precise nature of the questions to which they give rise, it may be helpful if I say something about the background.

II — The background

Article 20 of Regulation No 17, which is headed "Professional secrecy", imposes on the Commission and the competent authorities of the Member States, their officials and other servants, an obligation not to disclose information acquired by them as a result of the application of the regulation and "of the kind covered by the obligation of professional secrecy". The reference there to "professional secrecy" is obviously a reference to the concept known in French law for instance as "le secret professionnel", which is a wide concept in the sense that it applies not only to lawyers but to anyone whose occupation leads him to be entrusted which confidential information, e.g. members of the medical profession and government officials.

It might be suggested, though no one did so in argument before us in this case, that the express reference in Article 20 to "professional secrecy" and the absence of any express reference to any such concept elsewhere in the regulation must be taken to mean that the authors of the regulation intended to exclude the application of any such concept otherwise than in the circumstances described in Article 20. That would however be, so it seems to me, a somewhat rash application of that unreliable maxim *expressio unius est exclusio alterius.*

The Commission and the French Government suggested on the other hand that the "legislative history" of Article 14 showed that the Council, when enacting Regulation No 17, had deliberately rejected the idea that any concept of "professional secrecy" should apply in the context of that article. They relied, in so doing, on the rejection by the Council of amendments urged by the European

Parliament to the Commission's proposal for what became Regulation No 17. As your Lordships know, I entertain grave doubt whether it is permissible to interpret a Council Regulation by reference to its "legislative history". Be that as it may, I do not think that, in this instance, an examination of the "legislative history" of Article 14 leads to the conclusion suggested by the Commission and the French Government.

The Parliament's amendments had their origin in a report made by its Internal Market Committee on the Commission's proposal (the "Deringer Report" — European Parliament Doc. 57/1961). In paragraph 121 of that report the committee voiced a number of criticisms of Articles 9 and 11 of the proposal, which became respectively Articles 11 and 14 of the regulation. Article 11 of the regulation, your Lordships remember, empowers the Commission to request and, where necessary, to require information from, among others, "undertakings and associations of undertakings". Most of the committee's criticisms had nothing to do with the present problem. Paragraph 121 contained however a sentence in these terms:

"En tout cas, toute personne tenue de fournir des renseignements doit avoir le droit de refuser le témoignage tout comme le secret professionnel, par exemple des avocats et des experts-comptables, doit être garanti."

When one turns to the amendments proposed by the committee (at pp. 44 to 46 of its report) one finds that in fact it proposed none to what is now Article 14. It proposed a series of amendments to what is now Article 11 designed to give effect to the criticisms it had expressed in paragraph 121, and in particular to the view that owners or representatives of undertakings called upon to supply information should not be required to answer incriminating questions. There was no mention in the proposed amendments of "le secret professionnel". The formal opinion of the Parliament, embodied in a resolution dated 19 October 1961, did not differ in any material respect from what had been proposed by the committee.

It seems that, of the laws of the original Member States, only German law recognizes the general principle that a person may refuse to answer incriminating questions. That principle is of course recognized in English law also. It is however distinct from the principle that safeguards the confidentiality of communications between a lawyer and his client. One can understand that the Council should have wished to exclude from what is now Article 11 of the Regulation a rule that a person should not be required to answer incriminating questions, for that might have defeated the very purpose of the Article or at least rendered it largely ineffective. But one cannot, in my opinion, draw from the fact that the Council rejected the Parliament's suggestion in that respect the conclusion that the Council deliberately decided against the application of any principle protecting the confidentiality of communications between lawyer and client in the context either of Article 11 or of Article 14.

Regulation No 17 was adopted by the Council on 6 February 1962. We were told by the Commission that the absence from Article 14 of any reference to communications between lawyer and client did not seem to have given rise to

any difficulty in the early years of its application. The Commission did not, however, enlarge upon that, so that we do not know how often Article 14 was invoked in those years, nor to what extent cases then occurred in which Commission officials carrying out investigations came across communications of the kind in question. The Commission went on to tell us that, after the accession of the new Member States, the subject was raised more frequently in discussion in professional circles and short articles were published on it.

In 1976 the Consultative Committee of the Bars and Law Societies of the European Community (the "CCBE") published a report by Mr D. A. O. Edward, QC, of the Scottish Bar, entitled "The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community" (the "Edward Report"). Mr Edward, who was subsequently President of the CCBE, represented that body in the present proceedings before us. In the preparation of his report he was advised and assisted by distinguished members of the Bars of all the countries of the Community.

The title of the Edward Report is significant. "The Professional Secret" is of course a literal translation into English of "le secret professionnel". "Confidentiality" is the name given to the relevant concept in Scottish law, whilst "Legal Professional Privilege" is the name given to it in English and Irish law — an inaccurate name as Lord Wilberforce pointed out in *Waugh* v *British Railways Board* [1980] AC 251, at p. 531.

The Edward Report dealt with a host of problems of common interest to the Bars of the Member States ranging far beyond the particular questions with which your Lordships are concerned in the present case. I do not propose to embark upon an analysis of it, or even to attempt a summary of it. Beyond saying that it was, and still is, a remarkable feat of comparative law, I will confine myself to one comment on it, which is this.

The report rests on the premise that there is a fundamental difference between the laws of the original six Member States on the one hand and the laws of Ireland and of the United Kingdom on the other hand, whilst the law of Denmark should be considered separately. But — and this thought struck me when I first read the report in 1976 — the report itself unconsciously demonstrates that that is a mistaken approach, first because of differences between the laws of "the original six" that the report brings out and secondly because of differences between the laws of England and of Scotland that the report overlooks. The report was however, in my opinion, right in concluding that the differences between the laws of the different countries of the Community "are differences of approach or method (made necessary by their fundamentally different legal systems) rather than differences of result". That is not to say, of course, that the result is everywhere uniform.

In 1977 two members of the Legal Service of the Commission, Dr C. D. Ehlermann, its Director-General, and Dr D. Oldekop, wrote a paper for the following year's Congress of the FIDE in Copenhagen. The views they expressed in that paper were of course their personal views. They could not commit the Commission. Having regard,

however, to the standing of Drs Ehlermann and Oldekop, and also to the fact that the relevant passage in their paper is comparatively short, I propose to cite it almost in full. They said this (FIDE, Copenhagen 1978, Vol. 3, pp. 11.5-11.6):

"The question whether and if so, to what extent, communications between a lawyer and his client are or should be protected under Community law against discovery by the Commission ... constitutes a question of due process that should be mentioned in the context of a discussion dealing with the rights of defence with regard to the investigation powers of the Commission. In all of the Member States the secrecy of the relationship between a lawyer and his client enjoys legal protection against discovery by administrative authorities and even the judiciary, although within varying limits and by different methods. These limits and methods cannot be described in this paper."

The authors refer the reader instead to the Edward Report, and go on:

"In the area of Community law, the problem had been discussed during the deliberations of the European Parliament concerning the adoption of Regulation No 17/62; on the basis of the "Deringer Report", the European Parliament made a recommendation in favour of the protection of professional privilege. However, this recommendation was not adopted by the Council."

Your Lordships know that, in that respect, my interpretation of what happened differs from the authors', who continue:

"After the enlargement of the Communities the discussion has been revived on the background of the particularly extensive protection of professional privilege in the UK and Ireland (which extends not only to independent lawyers but also to lawyers who are full-time employees of the client).

Community law contains no specific and express rules relating to the protection of legal professional privilege in administrative procedures Article 20 Regulation No 17/62 prohibits only disclosure of secrets *by* the Commission, but not *to* the Commission."

Then, after a reference to Article 32 (2) of the Rules of Procedure of this Court, the authors conclude:

"Considering the legal situation in the Member States it seems justified to assume that there exists a general principle of law, applicable in Community law as part of 'the law' in the sense of Art. 164 EEC Treaty (Arts 31 ECSC Treaty, 136 EAEC Treaty), which, within certain limits, assures the professional privilege, also in administrative proceedings. Until now, the protection of professional privilege has not proved to be a particularly sensitive issue in the practice of the Commission and the extent of the appropriate protection is open to discussion. It is clear, though, that this protection ends where the lawyer himself assists or participates in illegal activities of his client. In the context of a future comprehensive and balanced solution of all the issues involved, there seems to be no reason to treat salaried lawyers employed by their client differently from independent lawyers in professional practice, provided that they are effectively subject to similar rules of professional ethics and discipline."

On 22 June 1978 the Commission gave its official view in answer to a question put down by Mr Cousté in the Parliament (Written Question No 63/78). The Commission's answer to that question was as follows:

"Article 14 of Council Regulation No 17/62 empowers the Commission to check and copy all correspondence and other business papers of a firm or association of firms, including papers prepared for it by outside lawyers and legal consultants.

Community competition legislation does not provide for any protection for legal papers. But the Commission, wishing to act fairly, follows the rules in the competition law of certain Member States and is willing not to use as evidence of infringements of the Community competition rules any strictly legal papers written with a view to seeking or giving opinions on points of law to be observed or relating to the preparation or planning of the defence of the firm or association of firms concerned. When the Commission comes across such papers it does not copy them.

Subject to review by the Court of Justice, it is for the Commission to determine the nature of a given paper.

Lastly, the Commission would remind the Honourable Member that, by virtue of Article 20 of Regulation No 17/62 of the Council, Commission staff are bound by an obligation of professional secrecy in all matters relating to the enforcement of Articles 85 and 86 of the EEC Treaty."

I turn back to the facts of this case.

III — The facts of the case

It seems that, at all events so far as the applicant was concerned, the original decision of the Member of the Commission responsible for competition policy to initiate an investigation was not a formal decision under paragraph 3 of Article 14, but one that led only to officials of the Commission being authorized to carry out an investigation under paragraphs 1 and 2 of that Article.

On 20 February 1979 three officials of the Commission (whom I will call "the inspectors") appeared at the applicant's premises at Bristol, accompanied by an official of the Office of Fair Trading, which is the "competent authority" in the United Kingdom for the purposes of Article 14. The inspectors were armed with "authorizations to investigate" issued under Article 14 (2). Those were served on the applicant's Managing Director, Mr A. T. Thomson, and the investigation proceeded on that and the following day, in the presence of two representatives of the applicant's solicitors. At the end of it the inspectors left taking with them copies of about 35 documents. They also left with Mr Thomson a written request for further documents relating to certain specified matters.

Mr Thomson responded to that request by a letter dated 26 March 1979, with which he sent to the Commission seven files of documents. He told the Commission however, in that letter, that the applicant's solicitors, during their review of the documents, had indicated that they felt that some of them were "covered by the doctrine of legal privilege". For that reason those documents were not produced. Descriptions of them were set out, in seventeen numbered paragraphs, in an appendix to the letter.

From those descriptions it seems that the documents withheld fell broadly into four categories:

(i) solicitors' instructions to counsel,

(ii) communications between an outside solicitor and the applicant or one of its parent companies containing legal advice or requests for legal advice,

(iii) documents containing legal advice or requests for legal advice from an "in-house" lawyer employed by the applicant or by one of its parent companies and

(iv) communications between executives of the applicant or one of its parent companies recording legal advice or requests for legal advice.

Mr Thomson also said in his letter that the applicant's solicitors had indicated that certain passages of documents included in the files to be sent to the Commission were of no relevance to the investigation it was conducting. Those passages had been deleted and the solicitors would shortly be sending to the Commission a statutory declaration describing the deleted passages so that it might be "satisfied" on that point.

Mr Thonson suggested that, should the Commission "need further confirmation regarding the privileged documents or the deleted passages", it should contact the applicant's solicitors to discuss the matter.

On 5 April 1979 the solicitors wrote to the Commission enclosing the promised statutory declaration.

The Commission did not follow up Mr Thomson's suggestion of discussions with the applicant's solicitors. Without, so it seems, any further communication with the applicant or its solicitors, it adopted, on 6 July 1979, a Decision under Article 14 (3) addressed to the applicant (No 79/670/EEC).

The preamble to that Decision, after reciting the facts, continued as follows as regards the documents for which "legal privilege" was claimed:

"Community competition legislation does not provide for any protection for legal papers. However, as the Commission made clear in its reply to Written Question No 63/78 in the European Parliament, asked by Mr Cousté, the Commission 'follows the rules in the competition law of certain Member States and is willing not to use as evidence of infringements of Community competition rules any strictly legal papers written with a view to seeking or giving opinions on points of law to be observed or relating to the preparation or planning of the defence of the firm or association of firms concerned. When the Commission comes across such papers it does not copy them'.

Clearly neither the undertaking concerned nor its legal advisers can be the ultimate or only arbiter either as to questions of fact or of law, as to whether any given document is one of these kinds of documents and was written in circumstances which would justify its not being used.

Under existing Community law, and subject to review by the Court of Justice, it is for the Commission to determine whether a given document should be used or not. Therefore it is necessary for

AM & S Europe Ltd to allow the Commission's inspector to look at the documents, and to ask questions in connection with them, as far as is necessary for the purpose of establishing whether they should be used or not. If the inspector considers that they should not be used, he will not take any copies and the documents will not be used subsequently by the Commission as evidence of any infringement."

The preamble then dealt with the applicant's claim to be allowed to delete from documents that were admittedly relevant to the investigation passages that its solicitors considered irrelevant. I need not read the recitals about that, because that claim was subsequently dropped by the applicant and is not an issue in the present action.

Article 1 of the Decision required the applicant to submit to an ivestigation at its premises at Bristol and Avonmouth and in particular to produce for examination the business records required by the Commission officials responsible for the investigation "which are in whole or in part connected with the subject of the inquiry". The Article then set out in paragraphs lettered (a), (b) and (c) three categories of business records which were "in particular" to be produced. Paragraph (a) specified the documents that were the subject of the written request made to Mr Thomson on 21 February and some others. Paragraph (b) specified "all documents for which legal privilege is claimed, as listed in the appendix to AM & S Europe Limited's letter of 26 March 1979 to the Commission". Paragraph (c) specified the complete texts of the documents from which passages had been deleted.

Article 2 provided that the investigation should begin on or after 9 July 1979.

On 25 July 1979 two of the Commission's inspectors who had carried out the earlier investigation in February attended at the applicant's premises at Bristol and served the Decision. They then carried out a further investigation at those premises, which lasted until 27 July.

During the investigation it was made clear on behalf of the applicant that it was willing to produce all the documents within Article 1 (a) of the Decision, with the exception of some for which "legal privilege" was claimed, and also to produce complete copies of the documents mentioned in Article 1 (c). The inspectors took copies of some documents and asked for copies of others.

The applicant declined to show the inspectors the entirety of the documents referred to in Article 1 (b) of the Decision. Its solicitors told the inspectors that, in their view, Community law did not require the applicant to disclose to them the contents of those documents, but that they were willing to let the inspectors see parts of the documents in question so that they could satisfy themselves that they were indeed privileged. The inspectors indicated that they were unwilling to proceed on the basis of seeing parts only of the documents. The applicant's solicitors proposed that the matter be discussed at a meeting to be arranged between the applicant's legal advisers and representatives of the Commission in Brussels. The investigation was then halted as respects the documents for which privilege was claimed, pending such a meeting.

On 2 August 1979 the applicant's solicitors wrote to the Commission enclosing copies of the remaining documents specified in Article 1 (a) but listing some thirteen which they were withholding on the ground that they too were covered by "legal privilege". All those documents except one were eventually disclosed to the Commission.

The meeting was held at Brussels on 18 September 1979 between officials of the Commission's Directorate-General of Competition (DG IV) and of its Legal Service, on the one hand, and the applicant's counsel and solicitors on the other. It was largely abortive.

The applicant's counsel (Mr Jeremy Lever, QC), relying to some extent on the passage in the preamble to the Decision stating that it was necessary for the inspector "to look at the documents, and to ask questions in connection with them, as far as is necessary for the purpose of establishing whether they should be used or not", proposed a procedure under which enough of each document would be shown to the inspectors to satisfy them of its privileged status. He emphasized that, if the inspectors were allowed to see the whole of a document, its confidentiality would be lost, particularly as the Commission, whilst stating that it would not use as evidence a document that had been written with a view to seeking or giving legal advice, had never said that its inspectors were debarred from using knowledge acquired by them from the perusal of such a document. Mr Lever added that if, upon being shown what the applicant's advisers considered was enough of a document to enable "any reasonable inspector" to judge whether it was privileged, the inspector should still feel unsatisfied, there would be a clear issue for submission to this Court as to whether the applicant had adequately complied with the Decision.

The Commission's representatives considered however that the Commission's Decision required the production of the whole of the withheld documents to the inspectors. They conceded that, in practice, the inspectors might well need to see only part of a document to determine that it should not be used as evidence by the Commission, but they considered it essential that the inspectors should have access to the entire document and that the inspectors alone should decide which parts of the document they would read in order to satisfy themselves that it should not be used.

In the upshot, all that was agreed between the parties at the meeting was that the dispute between them would have to be brought before this Court by means of proceedings taken by the applicant under Article 173 of the Treaty to challenge the Commission's Decision; and that, if such proceedings were taken, the Commission would, until the Court had given judgment, refrain from imposing any fine or penalty on the applicant for failure to comply with the Decision.

Accordingly, on 4 October 1979, the applicant commenced the present action, in which it claims a declaration that Article 1 (b) of the Decision is void or, alternatively, void "insofar as it necessarily requires the disclosure to the Commission's inspector of the whole of each of the documents for which the applicants claim protection on grounds of legal confidence".

IV — The issues in the case

The application was framed on the footing that there was no dispute between the parties as to the existence of a principle of Community law protecting communications between lawyer and client from disclosure, and that the issue between them was only as to procedure, the question being to what extent, if at all, the Commission was entitled to look at a document in order to determine whether a claim that it was privileged from disclosure in accordance with that principle was valid.

From the outset the Commission seemed to endorse that view of the case. It began by asking for an extension of time for lodging its defence while the applicant considered a letter that it (the Commission) wrote to the applicant's solicitors on 31 October 1979. In that letter the Commission said this:

"On reconsideration, the services of the Commission consider that the proposal put forward on behalf of AM & S at the meeting on 18 September 1979 and the practice thought appropriate by the Commission may not be as different as had previously appeared to be the case.

Accordingly this letter is written to suggest that the documents now in question should be shown to the representative of DG IV on a basis similar to that outlined by Mr Lever. This is of course without prejudice to the legal arguments of either party in the proceedings before the Court or in any difference of opinion which may arise over whether particular documents are protected, and without prejudice to further clarification by the Commission of its intended practice.

The services of the Commission have always considered that, depending on the circumstances, documents for which protecion is claimed need not be read in full by the Commission's inspector for the purpose of establishing whether they should be regarded as protected or not. The services of the Commission consider that the question of the extent to which the inspector must be able to examine the contents of documents for which protection is claimed must be governed by the following principles:

— the public interest in ensuring that all relevant evidence be submitted to the Commission and the Court requires that a claim that a document is protected must be clearly established;

— for that purpose the inspector responsible must be put in a position in which he can be satisfied objectively and with reasonable certainty that the document is one which is protected under Community law;

— the document is to be inspected only as far as is necessary for the purpose of establishing with the appropriate degree of certainty whether it is protected or not;

— the extent to which it may be necessary for the inspector to see the text of the document will depend on all the circumstances. In practice it would normally be sufficient for him to see the first and last pages of the document and the headings, if any, provided that these clearly show the nature of the entire document. In cases where for any reason such a disclosure does not permit the question of protection to be determined with the appropriate degree of certainty, the inspector must have a right to see other substantial parts of the document (in addition of course to obtaining evidence outside the text of the document itself if necessary).

I hope that this letter may be a sufficient basis to enable you to meet with Commission officials again. If so, it would be useful if you had with you copies of all the documents in question . . ."

The offer contained in that letter was declined on behalf of the applicant, mainly because the Commission did not thereby resile from its view that its inspectors were, in the last resort, entitled to see as much of a document as they thought fit before deciding whether it was privileged.

On 17 December 1979 the Commission lodged its defence, whereby it made two further concessions. The first was that its Decision was to be interpreted as meaning that "the inspector is authorized to look at documents for which protection is claimed only 'as far as is necessary for the purpose of establishing whether they should be used or not', i.e. used as evidence". The second was that "the Commission is prepared to give an assurance that its inspectors will be instructed that they are not to use any knowledge which they may gain as a result of inspecting documents for the purpose of deciding whether they are protected". Reliance was placed on behalf of the Commission, in subsequent argument before us, on the fact that it had made those concessions.

The Commission's defence, apart from announcing those concessions, fell into two parts. The first part consisted of a general discussion of the question of the protection of "legal confidence" in Community law. It was there that the Commission put forward its contention, with which I have already dealt, about the "legislative history" of Article 14. In that part also the Commission referred to the Edward Report, to the paper written for the FIDE Congress by Drs Ehlermann and Oldekop, and to the answer given by the Commission to Mr Cousté's Parliamentary Question (No 63/78). The Commission then went on to discuss two sources of authority on English law, which, in my opinion, it has misunderstood: the Law Reform Committee's 16th Report on "Privilege in Civil Proceedings" (Cmnd. 3472) and the decision of the House of Lords in *Waugh* v *British Railways Board* [1980] AC 521. (I shall discuss those authorities in a moment). The Commission concluded that "the question whether protection should be given for legal confidence, and if so how far it should be given and by what mechanism it should be controlled, are questions of policy to be decided pragmatically according to circumstances" and not questions of principle. The Commission expressed its agreement with the applicant that "the issues in this case are entirely questions of procedure". In the second part of the defence it argued in favour of a procedure "on the lines set out in" its letter of 31 October 1979.

The applicant in its reply stated "the very narrow issue that divides the parties" to be: "In order to verify claims for protection of documents under the principle of legal confidence, is the Commission entitled, as it claims, to inspect the documents for which the claim is made? Or, as the applicants claim, must the Commission take advantage of other means of verification that do not involve the Commission itself gaining knowledge of the legal confidences that are to be protected?"

The view that the issue in the case was a narrow one, relating only to the procedure whereby the question whether

a document was protected from disclosure should be decided, was reiterated by the Commission in its rejoinder.

Of the interveners, the British and French Governments both stated their views on the question of substantive law, the British Government contending that the concept of "legal professional privilege" or "confidentiality" or "secret professionnel" formed part of "the law" of the Community in the sense borne by that expression in Article 164 of the Treaty, and the French Government contending the contrary. Neither government, however, developed the point at all fully in its written observations. The CCBE, on the other hand, pointed out that "Questions of procedure do not arise *in vacuo*" and that it would be necessary for the Court, before it could decide the procedural question, to decide whether there was a principle of Community law affording, as of right, protection against disclosure of confidential communications between lawyer and client, and, if so, what its scope was. The CCBE accordingly made very full written submissions on those questions.

The Court agreed with the CCBE and invited the parties and the intervening governments to make submissions at the hearing on those questions of principle.

The applicant and the British and French Governments did so. Counsel for the Commission, on the other hand, told us that his instructions were to remain neutral on that issue and to leave it to "the wisdom of the Court". He was to stand by the answer given by the Commission to Mr Cousté and neither to accept nor to dispute that there was a principle of Community law such as was contended for by the applicant, the British Government and the CCBE. He pointed out that, if there were no such principle, the Commission must necessarily win this case, whilst, if there were such a principle, the Commission's arguments on the procedural question would be relevant.

There are thus in my opinion two major issues in this case.

The first is whether the exercise by the Commission of its powers under Article 14 of Regulation No 17 is subject to a principle affording, as of right, protection against the disclosure of communications passing between a lawyer and his client for the purpose of seeking or giving legal advice. The Court is not, I think, called upon, if it holds in favour of the existence of such a principle, to define in this case its precise scope, for instance to say to what extent it may apply where the communications are between an undertaking and a lawyer employed on its own staff (an "in-house" lawyer), or may not apply where, in the words of Drs Ehlermann and Oldekop, "the lawyer himself assists or participates in illegal activities of his client".

The second issue is, if such a principle exists, as to the correct procedure for giving effect to it.

V — The issue of principle

As respects the first issue I propose to begin by dealing with a suggestion that was tentatively put forward on behalf of the British Government, to the effect that, if the Court should hold that there was no principle of Community law of the kind for which it primarily contended, the solution might lie in holding that, in the absence of any relevant Community law, the provisions of the national law of each Member State should be applied in relation to documents found in that Member State. That solution, the British Government

said, would at least secure that the expectations of those who obtained legal advice in each Member State were not disappointed: the same rights could be invoked against the Community authority as against national authorities. Moreover the adoption of that solution would act as a spur to the enactment of Community legislation on the subject. The British Government cited, as affording some support for such an approach, Case 267/78 *Commission* v *Italy* [1980] ECR 31.

In my opinion that solution will not do. As the British Government itself acknowledged, the preamble to Regulation No 17 repeatedly refers to the need for Articles 85 and 86 of the Treaty to be applied in a uniform manner in the Member States, and it does so specifically in relation to the Commission's powers to undertake investigations. Case 267/78 is in my opinion distinguishable, because the Community legislation there in question did not confer powers of investigation directly on the Commission itself; it merely enabled the Commission to be "associated with" inspection measures carried out by the national authorities.

Having regard to the attitudes adopted by the parties and by the other interveners, the French Government bore alone the burden of arguing that there was no principle of Community law restricting the powers of the Commission under Article 14 of Regulation No 17. In so doing the French Government relied mainly on two propositions: (i) that there was no express provision of Community law imposing such a restriction and (ii) that the relevant laws of the Member States were too disparate for there to be derived from them any general principle that might apply. The French Government went so far as to suggest that the present case represented an attempt to foist on the Community what was no more than a domestic rule of English law.

The French Government's first proposition is unquestionably correct. This Court, however, has never regarded the absence of an express provision as precluding it from holding that a general principle of law could affect the application of Community legislation. Were it otherwise, Community law would admit, for example, of no principle of proportionality of no protection for legitimate expectations, of no right to be heard (except where expressly provided for) and of no guarantee of fundamental human rights. The French Government referred to Case 41/69 *ACF Chemiefarma* v *Commission* [1979] 2 ECR 661, where the Court held that it could not write into Regulation No 17 a period of limitation within which the Commission must initiate proceedings against an undertaking. That case is not, however, in my opinion, in point, because there can be no general principle about the length of a limitation period, if any. The imposition of it necessarily involves a choice that can be made only by a legislative act.

So the real question here is whether or not the laws of the Member States evince the existence of a general principle of the kind in question. I agree with the CCBE that, if such a principle can be distilled from them, it matters not if its conceptual origin, the methods whereby it has been developed, or even the scope

of its application in detail, differ from Member State to Member State.

I have already said that I did not propose to analyse or even to summarize the contents of the Edward Report. Nor do I propose to attempt an analysis of all the further authorities that have been placed before the Court as a result of the researches undertaken by the CCBE and by counsel for the applicant since the Edward Report was written. From an examination of that wealth of material, which covers the laws of all the Member States except Greece (because the case was argued before the accession of Greece to the Community) and also the laws of some non-member States, certain obvious conclusions can be drawn:

(i) As the French Government conceded, some protection for the confidentiality of communications between lawyer and client is given by the laws of all the Member States. In every Member State the hard core of the relevant law is that a lawyer cannot be called upon to give evidence of what he has been told by his client. But everywhere the protection extends beyond that.

(ii) In all Member States the protection is afforded primarily by imposing on the lawyer an obligation not to disclose the contents of those communications. In some countries (e.g. France) a breach of that obligation by the lawyer is a criminal offence. In others (e.g. England) it is only a civil wrong. In some countries (e.g. England) the obligation is owed only to the client, so that it is extinguished if the client waives his right to performance of it. In other countries (e.g. France) the obligation is considered to be "d'ordre publique", so that waiver by the client is not enough; the lawyer retains a discretion whether or not to disclose the contents of the communication. Incidental differences such as those do not, however, in my opninion, go to the heart of the matter.

(iii) In each country the development of the law has been largely conditioned by procedural rules characteristic of the legal system of that country. In England, for instance, much of the law has been developed in the context of "general discovery" in civil proceedings. That is a procedure under which, at an interlocutory stage in a civil action, each party is required to disclose to the other all the documents in his possession, custody or power relating to matters in question in the action, whether or not such documents would be admissible in evidence. Documents covered by "legal professional privilege" are exempt from such discovery. The procedure has, I believe, no exact equivalent in the legal system of any non-common law country — not even in the Scottish system. In Belgium and France on the other hand, many of the authorities are concerned with the powers and obligations of the "juge d'instruction", particularly when carrying out a search at the professional chambers of an "avocat". The "juge d'instruction" has, as we learned in Case 267/78, no direct equivalent in many other Member States. There again, however, such incidental differences do not, in my opinion, go to the heart of the matter.

(iv) To some extent also the development of the law in each country has been conditioned by the organization of the legal profession in that country, for instance, in England by the existence of the distinctive roles of barristers and solicitors, and in France by the distinctions between "avocats plaidants", "avocats consultants", "avoués" and "notaires". Once again, such differences do not, in my opinion, go to the heart of the matter.

Here we are concerned with documents found at the premises of the client which are claimed to be, or to reproduce, communications passing between the client and his lawyer for the purpose of requesting or giving legal advice. The question is whether such documents are protected from disclosure to a public authority exercising a statutory power of search.

As to that I must begin, I think, by saying a word about English law, partly because of the widespread impression that English law is, in this field, the most developed, and partly because, as I indicated earlier, the Commission has in my opinion misinterpreted some of the authorities relating to that law.

In English law the doctrine misnamed "legal professional privilege" (misnamed because that label suggests a privilege accorded to the legal profession) protects two distinct categories of documents. The first category is communications between a person and his lawyer for the purpose of obtaining or giving legal advice, whether or not in connection with pending or contemplated legal proceedings. The second category is communications between a person or his lawyer and third parties for the purpose of preparing for pending or contemplated legal proceedings. That distinction is clearly brought out in the authorities to which the Commission referred, the 16th Report of the Law Reform Committee and the judgments in the House of Lords in *Waugh* v *British Railways Board* — see in particular, in the latter, per Lord Edmund Davies [1980] AC at pp. 541-542.

Waugh v *British Railways Board* was about a document in the second category, namely a railway accident report which had been prepared for two distinct purposes, one of which was to enable the Board's solicitor to advise it upon, and to conduct on its behalf, any litigation that might arise from the accident. It was held that the report was not privileged because, in the case of a document in the second category, the purpose of preparing for legal proceedings must be the sole or dominant purpose. That requirement is however irrelevant in the case of documents in the first category, with which alone we are concerned in the present case. *Waugh* v *British Railways Board* is not therefore, in my opinion, in point in this case.

From the 16th Report of the Law Reform Committee the Commission deduced two propositions, neither of which, im my opinion, it supports.

The first was that "privilege" in English law is essentially a right to withhold evidence from a tribunal. This proposition the Commission deduced from the first sentence of the Report, which reads as follows:

"Privilege in the law of evidence is the right of a person to insist on there being withheld from a judicial tribunal information which might assist it to ascertain

facts relevant to an issue upon which it is adjudicating."

The point here is that the terms of reference of the Committee did not rquire it to examine the law of privilege generally, but only to examine its operation in civil litigation. Hence the Committee's definition of its scope in that sentence. The Committee did not thereby mean, and could not have meant, that "privilege" was no more than part of the law of evidence in civil proceedings.

From the remainder of the first paragraph of the report the Commission deduced that the approach of English law to "privilege" was pragmatic and that the extent of the protection it gave in any case depended on the particular circumstances of that case. In a general sense that is true. But the point that the Committee was making, so far as here relevant, was that in some cases the law gives a person an absolute right to claim privilege, whilst in others it accords the judge a discretion. As subsequent paragraphs of the report make clear (see in particular paragraphs 17 to 23), where "legal professional privilege" applies, it confers an absolute right; the judge has no discretion. Nor did the Committee recommend any change in the law in that respect.

Thus, in my opinion, the English authorities relied on by the Commission do not support the propositions for which it cited them.

As regards statutory powers of search, the starting point of English law, as we were reminded by the CCBE and by the British Government, is that the confidential character of a communication between a lawyer and his client comes into existence at the time when the communication is made. The right to have that confidentiality protected arises at the same time and continues thereafter for evermore. The right may however be overridden or modified by a statute.

Some United Kingdom statutes conferring powers of investigation expressly preserve the right. Such is in particular the case of Section 85 of the Fair Trading Act 1973 and Sections 3 and 7 of the Competition Act 1980. Thus, in the very field of competition law with which we are here concerned, the relevant United Kingdom statutes preserve the right as against the United Kingdom authorities.

Some United Kingdom statutes preserve the right, but subject to modification. An example of that is to be found in paragraph 5 of Schedule 4 to the Finance Act 1975.

Lastly some United Kingdom statutes are, like Regulation No 17, silent on the point. Counsel for the British Government hesitated to say that, in such a case, the presumption was that the right was preserved. There is a surprising dearth of United Kingdom judicial authority directly on that question. The only case that comes anywhere near dealing with it seems to be *Frank Truman Export Ltd* v *Metropolitan Police Commissioner* [1977] 1 QB 952, but it does not really do so. We were however referred on behalf of the applicant to the well established principle of English law that a statute is not to be interpreted as altering the common law to a greater extent than its terms provide, either expressly or by necessary implication — see Maxwell on the Interpretation of Statutes, 12th Ed., pp. 116 *et seq.* We were also referred on behalf of the applicant to cases in Canada and in New

Zealand where that principle has been applied to statutes conferring powers of investigation on public authorities without saying anything about the privilege of communications between lawyer and client, and where, accordingly, it has been held that such statutes did not override that privilege — see in particular *Re Director of Investigation and Reserarch and Shell Canada Ltd* (1975) 55 DLR (3d) 713, where the Federal Court of Appeal of Canada so held in realtion to section 10 of the Canadian Combines Investigation Act (a competition law provision), and *Commissioner of Inland Revenue* v *West-Walker* [1954] NZLR 191, where the Court of Appeal of New Zealand so held in relation to section 163 of the Land and Income Tax Act of New Zealand (a fiscal law provision). Decisions of the superior courts of Canada and of New Zealand are of persuasive authority in the English courts and I can, for my part, see no good reason why an English court should not follow those particular decisions.

I conclude that, if a provision like Article 14 of Regulation No 17 were to be found in an English statute, it would almost certainly be held not to override the confidentiality of communications between lawyer and client.

I must next say a word about the laws of Belgium and of France, because particular reliance was placed on them, on the one hand by the applicant and the CCBE and on the other hand by the French Government.

It seems clear from the authorities to which we have been referred that, in those two countries, the law protecting the confidentiality of communications between lawyer and client has developed not only on the basis of the concept of the "secret professionnel" but on the basis also of the concepts of "les droits de la défense" and of "le secret des lettres". The latter, sometimes called "le secret des lettres missives" or "le secret des lettres confidentielles", appears to be particularly important.

A helpful summary of the resultant law is to be found in a report and an opinion presented to the Belgian Conseil d'État by its Auditeur, C. Huberlant, in *Delhauter* v *Caisse générale d'épargne et de retraite*, JT 1962, p. 171. The Conseil d'État followed his opinion and held that the defendant could not be called upon to disclose an opinion ("consultation") that it had received from its "avocat" even though it had expressly relied upon it in the decision that was under challenge before the Conseil d'État.

Most of the Belgian and French authorities concerning statutory powers of search are about the obligations of the juge d'instruction when carrying out a criminal investigation. It is clear that he must respect the confidentiality of communications between a lawyer and his client. The French "Code de Procédure Pénale", by Articles 56, 76 and 96 expressly requires him to take beforehand effective measures to ensure that the "secret professionnel" and the "droits de la défense" shall be respected, wherever he may search. When the juge d'instruction searches the professional chambers of an avocat, he is accompanied by the bâtonnier or his representative, whose role it is to make sure that the confidentiality of communications between the avocat and his clients is respected.

The French Government drew our attention, however, to an important exception to the general rule. The French Ordonnance No 45-1484 of 30 June 1945, which is described in its title as relating to "la constatation, la poursuite et la répression des infractions à la législation économique", provides, by Article 15:

"Les agents visés à l'article 6 (paragraphes 1 et 2) peuvent exiger la communication, en quelque main qu'ils se trouvent, et procéder à la saisie des documents de toute nature (comptabilité, copies de lettres, carnets de chèques, traites, comptes en banque, etc.), propres à faciliter l'accomplissement de leur mission. Ils ont le droit de prélever des échantillons.

Les agents de la direction générale du contrôle économique, des régies financières, de la répression des fraudes et des poids et mesures peuvent également, sans se voir opposer le secret professionnel, consulter tous documents dans les administrations ou offices de l'État, des départements, des communes et des colonies, les établissements publics et assimilés, les établissements et organismes placés sous le contrôle de l'État, ainsi que les entreprises et services concédés par l'État, les départements, les communes et les colonies."

It was held by the French Conseil d'État in the *Appraillé* case (Recueil des Arrêts du Conseil d'État, 1952, p. 512) that, although only the second paragraph of Article 15 expressly excluded the application of "le secret professionnel", it was also excluded by the first paragraph, so that M. Appraillé, an "avoué", had properly been fined for refusing to disclose confidential documents.

That decision shows of course that in France, as in England, an aptly worded statutory provision can override the confidentiality of communications between a lawyer and his client. It also shows how the Conseil d'État interpreted the particular statutory provision there in question. But it does not, so it seems to me, establish the existence of a general rule of French law that, if a statutory provision conferring a power of investigation is silent as to such communications, it automatically overrides their confidentiality.

The laws of the other countries of the Community were not discussed in anything like the same detail in the argument before us. I hope that I shall not be thought to minimize their importance if I confine myself, as regards them, to referring your Lordships to the written observations of the CCBE, and in particular to the appendices thereto, and to saying that the authorities there cited seem to me, on the whole, to lend support to the CCBE's submissions. It seems at all events clear that, in no country other than France, does legislation confer on the authorities responsible for the administration of competition law powers of investigation enabling them to disregard the confidentiality of communications between lawyer and client. Indeed, had it been otherwise, it is difficult to see how Doctors Ehlermann and Oldekop could have reached the conclusions they did.

There is however one point on which I think that the submissions of the applicant and of the CCBE went too far. They submitted that the right to confidential communication between lawyer and client was a fundamental human right. I do not think it is. There is no mention of it, as such, in the European Convention on Human Rights, or, seemingly, in the constitution of any Member State; and your Lordships have already seen that, in England and in France at least, it is acknowledged to be a right that can be overridden or modified by an appropriately worded statute. The material placed before the Court by the CCBE shows that that is so also in Belgium. In my opinion it is a right that the laws of civilized countries generally recognize, a right not lightly to be denied, but not one so entrenched that, in the Community, the Council

could never legislate to override or modify it. I agree, however, that the Council cannot be held to have overridden it simply by dint of saying nothing about it.

My conclusion therefore, on this part of the case, is that the powers of the Commission under Article 14 of Regulation No 17 are exerciseable subject to the right of the undertaking under investigation to claim confidentiality for communications passing between itself and its lawyers for the purpose of seeking or giving legal advice.

The next question is as to the procedure that is appropriate to secure that right whilst avoiding its abuse.

VI — The procedural issue

The fundamental basis of the Commission's position on that issue is that the only satisfactory way of deciding whether a document is entitled to protection is by allowing someone to look at it. With that I agree.

The Commission goes on to say that, under present arrangements, that someone can only be its own inspector. As your Lordships have seen, the Commission concedes that in many cases the inspector need not look at the whole of the document in order to be satisfied. But, the Commission submits, the forms that communications between a lawyer and his client may take are so diverse that the inspector must be allowed to look at as much of the document as he thinks fit and, if necessary, at the whole of it. The Commission stresses the concessions that it has made that, not only will a protected document not be copied, but the inspector will not be allowed to use knowledge that he has gained from it. In that connection the Commission says that, under the organization of its Direcorate-General of Competition, the role of the inspector is only to gather evidence. The evidence so collected is handed over to an official in another Directorate of the direcorate-General, who becomes the "rapporteur" in the case. The inspector who sees the documents is not the person who later decides whether there is sufficient evidence that the undertaking concerned has infringed the Treaty. That is the responsibility of other officials, including members of the Legal service, and ultimately of the Commission itself.

The Commission considers that, under those arrangements, the only opportunity that this Court can have to review an inspector's decision as to whether a document is entitled to protection or not is in an action brought by the undertaking concerned under Article 173 of the Treaty to challenge any eventual decision of the Commission that the undertaking has been guilty of an infringement of the Treaty. If then the Court found that the decision had been based in a sufficiently important respect on information contained in a document that should have been treated as protected but was not, the Court could declare the decision void. There was, the Commission submitted, in the present state of the legislation, no earlier stage at which the Court be called upon to intervene.

To be fair to the Commission, it does not claim that the procedure it contends for is perfect. It states its readiness to alter the procedure by regulation and says that it "will of course be guided by anything the Court may say in its judgment in this case". The Commission submits, however, that "with the safeguards outlined its procedure is a reasonably satisfactory procedure and

the only procedure available under existing Community law", and that "until it is changed, it must be used".

I will say at once that I do not share the Commission's view that that is the only procedure available under existing Community law. Nor am I sure that the Commission is itself empowered to alter the relevant legislation. Article 87 of the Treaty confers legislative powers only on the Council and, whilst the Council has delegated some legislative powers to the Commission by Article 24 of Regulation No 17, it is by no means clear that they extend to the present subject-matter.

I am also impressed by some of the criticisms made by the applicant and others of the procedure favoured by the Commission.

In the first place that procedure, in my opinion, confers too much power on the inspector, who need not be a lawyer and who, even if he is a lawyer, may make mistakes, not least because we are in an area of Community law that is still largely uncharted. If the inspector erroneously decides, in the case of a document which in truth is entitled to protection, that it is not entitled to protection, there is nothing to stop him taking copies of it, or to stop it thereafter being freely used by the Commision. In such a case the suggested remedy in an eventual action before this Court will be illusory. The dissemination of a document that should have remained confidential will have taken place long before any such action can be brought. Moreover the availability of that remedy will depend on the Commission reaching a decision adverse to the undertaking concerned and on its basing that decision to a material extent on the contents of that document.

Alternatively, the inspector may, having seen the confidential contents of a document, decide that it is protected. In that case he is required by the Commission's instructions to put what he has seen out of his mind. We all know how difficult it is, even for a judge, to perform that feat. But, even if the inspector does conscientiously and successfully perform it, those affected will not be able to be sure that he has done so. We were reminded by the applicant, in this connection, of the maxim that "justice should not only be done, but should manifestly and undoubtedly be seen to be done". We were also told by counsel for the applicant that, despite the division of functions between the inspector and other officials within the Commission's Directorate-General of Competition, it is none the less the practice for the inspector to attend the oral hearing held by the Commission, and for him to participate in it by putting questions to representatives of the undertaking or undertakings concerned. It would be impossible, in my opinion, for anyone to be sure that a question put by the inspector, the answer to which would be recorded and could be used in evidence, had not been inspired, albeit unconsciously perhaps, by something that he had read in the protected document.

The fundamental flaw in the procedure advocated by the Commission, or perhaps rather in the thinking that underlies it, seems to me to be that it misapprehends the real basis of the principle protecting the confidentiality of communications between a lawyer and his client, which, in a nutshell, is that, in a civilized society, a man is entitled to feel that what passes between him and his lawyer is secure from disclosure. That principle is accordingly breached as soon

as there is disclosure of the contents of such a communication, and not merely by its being used in evidence. That is not to say, of course, that, where a genuine dispute arises as to whether a document is entitled to protection, someone should not look at it to resolve the dispute. But that someone should, in general, be independent of the parties to the dispute, and be himself secure — which is another way of saying that the determination of such a dispute is essentially a judicial function.

The applicant's main submission was that, until on the inititative of the Commission the Council made a regulation for the verification of claims for protection of documents on grounds of "legal confidence", it was incumbent both on the undertaking claiming such protection and on the Commission to take reasonable steps to agree upon a means of verification that did not involve the Commission itself being entitled to see the contents of the documents, since that would be "a clear denial" of the principle of the protection of "legal confidence". In the event of ultimate disagreement between the parties, it would, the applicant submitted, be for this Court to inspect the documents and adjudicate on the dispute.

The applicant envisaged that, if the Commission and the undertaking concerned in a particular case disagreed on the question whether each of them had taken such "reasonable steps", the Commission could proceed to take a decision imposing on the undertaking a fine under Article 15 (1) (c) of Regulation No 17 or periodic penalty payments under Article 16 (1) (d) of that Regulation. The dispute could then be brought before this Court by way of an action by the undertaking under Article 173 of the Treaty challenging that decision.

The applicant made various suggestions as to the sort of "reasonable steps" that the parties might take, whilst emphasizing that those steps might vary from case to case and might be for discussion between the undertaking and the Commission. The applicant instanced an attempt by the undertaking concerned, such as it had itself made in the appendix to Mr Thomson's letter of 26 March 1979, to give a careful description of the nature of the documents; and an attempt, again such as it had itself made, to show Commission officials enough of each document to persuade them of its nature. As a last resort the applicant envisaged the possibility for the parties to agree upon "a reputable experienced and wholly independent lawyer" who could inspect the documents and verify their description. If the undertaking refused a request by the Commission that the documents should be submitted to such an independent lawyer, it should, the applicant said, be held to have acted unreasonably and therefore disentitled to succeed in any action it might bring before this Court to challenge a decision of the Commission imposing a fine or penalties upon it.

The applicant conceded that that was an "improvised" procedure but submitted that improvisation was inevitable in the absence of legislation prescribing a proper procedure. The blame lay with the Commission for not having exercised its power to propose such legislation.

There are to my mind two objections to the course thus proposed by the applicant.

The first is that the task of this Court in this case is to lay down what is the correct procedure in the present state of

Community law, not to give its approval to suggestions for improvisation pending the enactment of further Community legislation, if any.

The second is that the adoption of that course would involve departing in two ways from the institutional structure of the Community as laid down in the Treaty. First it would involve delegating a power of decision to a person, "the independent lawyer", not recognized by the Treaty. Secondly it would involve requiring the Commission to adopt a decision in ignorance of the full facts on which the decision was based, leaving those facts to be ascertained by this Court.

The latter objection applies also, in my opinion, to somewhat analogous procedures that were suggested to us on behalf of the British Government and of the CCBE.

I have come to the conclusion that it is impossible — and it is indeed logically impossible — to envisage a procedure which, on the one hand, ensures that the contents of a document for which protection is claimed are not disclosed to anyone in the Commission so long as there has been no authoritative decision that that claim is ill-founded, whilst, on the other hand, leaving it to the Commission to decide in the first instance upon the validity of that claim, so as to pave the way for proceedings about it in this Court.

One might envisage a procedure under which the existing internal arrangements of the Commission were improved, so that, for instance, where an undertaking claimed protection for a particular document and was unable to persuade the Commission's inspector, on the spot, of its protected nature, the document could be sent in a sealed envelope for perusal by, say, someone in the Commission's Legal Service, who would be required to impart its contents only to the Members of the Commission responsible for taking the actual decision on the claim, and who would be required, also, to take no further personal part in the case. But I can find no provision in the present legislation on the basis of which such a procedure could be prescribed, and it would still be open to the objection that it necessitated disclosure of the contents of the document to persons within the Commission.

In the result I am of the opinion that the solution lies in a submission that was made on behalf of the CCBE, and also by counsel for the applicant at the hearing, as an alternative to his main submission. It is that resort should be had to the national courts. That solution differs, of course, from the solution put forward by the British Government as its alternative submission on the issue of principle, in that it involves, not the application of national law, but the application by the national courts of Community law, those courts being able, when in doubt, to refer to this Court under Article 177 of the Treaty.

There is, in my opinion, a sound legislative basis for that solution in paragraph 6 of Article 14 of Regulation No 17, which requires a Member State, where an undertaking "opposes" an investigation ordered pursuant to that Article, to "afford the necessary assistance to the officials authorized by the Commission". The organs of the Member State there referred to must include its courts. Moreover resort to them appears all the more logical when one bears in mind that, by virtue of Article 13 of the Regulation, an investigation ordered by the Commission under Article 14, including one ordered

by decision of the Commission under Article 14 (3), may be undertaken by officials of the competent authorities of the Member States instead of by officials of the Commission. Where a dispute of the present kind arose between an undertaking in a Member State and the competent authority of that Member State, the natural forum for resolving it would be the courts of that State. Indeed it is difficult to envisage any other. It would, I think, be odd if the appropriate forum differed according to whether the investigation was being carried out by officials of the national authority, assisted or not by officials of the Commission under Article 13 (2), or by officials of the Commission, assisted or not by officials of the national authority under Article 14 (5). It is to be observed that the ultimate sanctions provided for by Articles 15 (1) (c) and 16 (1) (d) apply in either case. There is of course no difficulty in the way of the Commission appearing as a party to proceedings in the courts of a Member State — see Article 211 of the Treaty.

Counsel for the Commission, at the hearing, questioned whether that solution would be appropriate. He did so, as I understood him, on three grounds.

The first was that an appropriate procedure might not exist in all Member States. He himself, however, rather destroyed that ground when he conceded, on the basis of paragraph 13 of the judgment of this Court in Case 826/79 the *Mireco* case (10 July 1980, not yet reported), which had been cited by counsel for the applicant, that resort to the national courts would be appropriate where the dispute arose between an undertaking and a national authority enforcing Community competition law. At all events, Article 14 (6) of Regulation No 17 seems to me, particularly in the light of Article 5 of the Treaty, amply adequate to require Member States to introduce the necessary procedures if and in so far as they do not already exist.

Counsel's second ground was that, if the matter were left to national courts, there would be a risk that in practice they would apply their national rules of law. That, in my opinion, is not a tenable ground. National courts are used to distinguishing between cases where they must apply their national law and cases where they must apply Community law. Indeed it is their duty so to do.

Counsel's third ground was at first sight more impressive. It was that resort to the national courts would cause delay. One answer to that is of course that the risk of delay is no reason for denying a person justice. But in any case I think that the risk can be exaggerated. The paucity of reported cases about disputes of the present kind shows that they are in fact rare. That is so even in England, where, so it seems from what we have learnt in the present case, the legal profession is particularly alert to the need to protect confidential documents, and where both the substantive and the procedural law afford ample opportunities for litigation about it. I think it probable that, in practice, provided that the Commission's inspectors exercise common sense, such a dispute will arise only where either the undertaking

concerned is using delaying tactics, in which case the competent national courts should make short shrift of it, or where a genuine question of principle is at stake, in which case it will be right that that question should be properly considered.

VII — Conclusions

It follows, in my opinion, that Article 1 (b) of the Commission's Decision of 9 July 1979 should be declared void and that the applicant is entitled to its costs as against the Commission.

If your Lordships share my view, the British Government and the CCBE, as successful interveners, who asked for costs, will also be entitled to them as against the Commission — see Article 69 (2) of the Rules of Procedure of the Court (the English text of which is, as I ventured to point out in Case 130/75 *Prais* v *Council* [1976] 2 ECR 1589, at pp. 1609-1610, defective). The CCBE did not in fact ask for costs until the hearing, but that has been held to be sufficient — see Case 113/77 *NTN Bearing Co.* v *Council* [1979] ECR 1185, at pp. 1192, 1210-1211, and 1274. As regards the French Government, I think that justice will be done if it is simply left to bear its own costs.

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 26 JANUARY 1982

My Lords,

In February 1979, officials of the Commission required the applicants to make available documents which they wished to see in connection with an investigation being conducted pursuant to Article 14 (1) of Council Regulation No 17 of 6 February 1962 (Official Journal English Special Edition, 1959-1962, p. 87). This was said to be an investigation of competitive conditions concerning the production and distribution of zinc metal and its alloys and zinc concentrates in order to verify that there is no infringement of Articles 85 and 86 of the EEC Treaty. The applicants produced copies of most of the documents. Some, however, were not produced; so far as relevant, on the basis that they were covered by legal confidentiality, which entitled the