JUDGMENT OF THE COURT (Grand Chamber)

14 September 2010 *

In Case C-550/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 30 November 2007,

Akzo Nobel Chemicals Ltd, established in Hersham (United Kingdom),

Akcros Chemicals Ltd, established in Hersham,

represented by M. Mollica, avocate, and subsequently by M. van der Woude, avocat and C. Swaak, advocaat,

appellants,

* Language of the case: English.

supported by

United Kingdom of Great Britain and Northern Ireland, represented by V. Jackson and E. Jenkinson, acting as Agents, and M. Hoskins, Barrister,

Ireland, represented by D. O'Hagan, acting as Agent, and M. Collins SC, with an address for service in Luxembourg,

Kingdom of the Netherlands, represented by C. Wissels, Y. de Vries and M. de Grave, acting as Agents,

interveners in the appeal,

the other parties to the proceedings being:

European Commission, represented by F. Castillo de la Torre and X. Lewis, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Conseil des barreaux européens, established in Brussels (Belgium), represented by J. Flynn QC,

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

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

American Corporate Counsel Association (ACCA) – European Chapter, established in Paris (France), represented by G. Berrisch, Rechtsanwalt, instructed by D. Hull, solicitor,

International Bar Association, established in London (United Kingdom), represented by J. Buhart and I. Michou, avocats,

interveners at first instance,

THE COURT (Grand Chamber)

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta (Rapporteur) and E. Levits, Presidents of Chamber, A. Rosas, U. Lõhmus, M. Safjan and D. Šváby, Judges,

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 February 2010,

after hearing the Opinion of the Advocate General at the sitting on 29 April 2010,

gives the following

Judgment

1 By their appeal, Akzo Nobel Chemicals Ltd ('Akzo') and Akcros Chemicals Ltd ('Akcros') seek to have set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') of 17 September 2007 in Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*

('the judgment under appeal'), in so far as it rejected the claim of legal professional privilege for correspondence with Akzo's in-house lawyer.

I — European Union law

2 Article 14 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) provides:

'1. In carrying out the duties assigned to it by Article [105 TFEU] and by provisions adopted under Article [103 TFEU], the Commission may undertake all necessary investigations into undertakings and associations of undertakings.

To this end the officials authorised by the Commission are empowered:

(a) to examine the books and other business records;

(b) to take copies of or extracts from the books and business records;

(c) to ask for oral explanations on the spot;

(d) to enter any premises; land and means of transport of undertakings.

2. The officials of the Commission authorised for the purpose of these investigations shall exercise their powers upon production of an authorisation in writing …

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties … and the right to have the decision reviewed by the Court of Justice.

…'

II — Facts

3 In the judgment under appeal the General Court summarised the material facts as follows:

'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 … and Akcros … and their respective subsidiaries to submit to an investigation on the basis of Article 14(3) of Regulation No 17… 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.

…

8. The third document which gave rise to a dispute consists of a number of handwritten notes made by Akcros' … 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' … general manager and Mr S., Akzo'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'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 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.

…

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 B and for confirmation by the Commission that all copies of those documents in its possession had been destroyed. …

…

18. On 8 September 2003 … 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...'

III — Procedure before the General Court and the judgment under appeal

4 The actions brought by the appellants before the General Court on 11 April and 4 July 2003 respectively, sought (i) 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, Akcros and their respective subsidiaries to submit to an investigation on the basis of Article 14(3) of Regulation No 17 (Case COMP/E-1/38.589) and (ii) 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 the annulment of the rejection decision of 8 May 2003 (Case T-253/03).

5 By the judgment under appeal, the General Court dismissed the action for annulment of the decision ordering the investigation (Case T-125/03) as inadmissible and the action for annulment of the rejection decision of 8 May 2003 (Case T-253/03) as unfounded.

IV — Forms of order sought

6 Akzo/Akcros claim that the Court should:

— set aside that the judgment under appeal, in so far as the General Court rejected the claim of legal professional privilege for communications with Akzo's in-house lawyer;

— annul the rejection decision of 8 May 2003, in so far as it refused to return the e-mail correspondence with Akzo's in-house lawyer (part of Set B documents); and

— order the Commission to pay the costs of the appeal and of the proceedings before the General Court in as far as they concern the plea raised in the present appeal.

7 The Conseil des barreaux européen, intervener at first instance, claims that the Court should:

— set aside the judgment in so far as the General Court denies that the communications between Akzo and Mr S. benefit from legal professional privilege, and either annul the rejection decision of 8 May 2003 to the same extent or alternatively, if the Court should take the view that the matter is not in a state for it to rule upon the application, remit the matter to the General Court; and

— order the Commission to pay the costs incurred by it in the appeal proceedings and the proceedings before the General Court, in so far as they relate to the issues taken on appeal.

8 The Algemene Raad van de Nederlandse Orde van Advocaten, intervener at first instance, claims that the Court should:

— set aside the judgment under appeal in so far as it rejected the claim by Akzo that two e-mails exchanged between Ackros' general manager and Akzo's in-house lawyer were not covered by the Community concept of legal professional

privilege in view of the employment relationship between that in-house lawyer and Akzo; and

— order the Commission to pay its costs in the proceedings before the General Court and in this appeal.

9 The European Company Lawyers Association, intervener at first instance, claims that the Court should:

— set aside the judgment under appeal in so far as the General Court held that the communications between Akcros and the member of the legal department of Akzo were not subject to legal professional privilege; and

— order the Commission to pay its costs.

10 The Association of Corporate Council Association (ACCA) – European Chapter, intervener at first instance, claims that the Court should:

— set aside the judgment under appeal in so far as the General Court rejected the claim of legal professional privilege for e-mail correspondence with Akzo's in-house lawyer (part of the Set B documents);

— annul the Commission's decision of 8 May 2003 refusing to return to the appellants copies of that e-mail correspondence or, alternatively, refer the matter back to the General Court; and

— order the Commission to pay the costs in connection with these proceedings and the proceedings before the General Court in so far as they relate to the issue under appeal.

11 The International Bar Association, intervener at first instance, claims that the Court should:

— set aside the judgment under appeal to the extent that it denies that the Set B e-mails exchanged between Akzo Nobel and Mr S. benefit from legal professional privilege; and

— order the Commission to pay the International Bar Association's costs of the appeal proceedings and of the proceedings before the General Court to the extent that the costs relate to issues considered in the appeal.

12 The United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands, interveners on appeal, endorse the form of order sought by Akzo and Akcros.

13 The Commission contends that the Court should:

— dismiss the appeal; and

— order the appellants to pay the costs.

V — The appeal

A — *Subject-matter of the appeal*

14 The appeal concerns exclusively one part of the Series B documents, namely two e-mails exchanged between the Director General of Akcros and Mr S. When the investigations were carried out at the appellants' premises in the United Kingdom, Mr S., a member of the Netherlands Bar, was employed in the legal department of Akzo, a company incorporated under English law. The Commission added copies of those e-mails to the file.

15 The Commission has stated, without being contradicted on that point by the appellants, that its decision of 11 November 2009 to impose fines in the context of the procedure which had given rise to the investigations carried out in 2003 at the premises of Akzo and Akcros (Case COMP/38.589 – Heat stabilisers; SEC(2009) 1559 and SEC(2009) 1560) was not based on those two e-mails. The Commission's statement

that no exchange of information with the national competition authorities has taken place with respect to those e-mails has also not been contradicted.

B — *Appellants' interest in bringing proceedings*

1. Arguments of the parties

16 First of all, the Commission questions whether Akzo and Akcros have an interest in bringing proceedings. The two e-mails do not fulfil the first condition for legal professional privilege set out in paragraphs 21 and 23 of the judgment in Case 155/79 *AM & S Europe* v *Commission* [1982] ECR 1575, according to which legal advice must be requested and given for the purposes of the client's rights of defence. The first e-mail is merely a request for comments on a draft letter to be sent to a third party. The second e-mail contains mere changes to the wording.

17 Therefore, the Commission takes the view that the two e-mails cannot in any event be covered by legal professional privilege.

18 Next, the Commission states that the appellants do not claim that the documents at issue fulfil the first condition for legal professional privilege laid down in paragraphs 21 and 23 of *AM & S Europe* v *Commission*.

19 Finally, the Commission adds that Akzo's and Akcros' interest in bringing proceedings ceased at the latest on the date of its decision of 11 November 2009 imposing fines on them.

20 Akzo and Akcros reply that the content of the two e-mails was never examined by the General Court. It upheld the rejection decision of 8 May 2003 on the basis that the documents at issue could not be privileged because they were not communications with an external lawyer. Moreover, that decision excluded legal professional privilege not because of the content of the documents at issue, but solely because of the status of the lawyer concerned.

21 Akzo and Akcros submit that the question whether the two e-mails fulfil the first condition required for legal professional privilege is a question of fact which has not yet been decided. That issue cannot be resolved in the present proceedings, which are limited to questions of law.

2. Findings of the Court

22 In answer to the objection raised by the Commission, it must be recalled that the interest in bringing proceedings is a condition of admissibility which must continue up to the Court's decision in the case (see, Joined Cases C-373/06 P, C-379/06 P and C-382/06 P *Flaherty and Others* v *Commission* [2008] ECR I-2649, paragraph 25 and the case-law cited).

23 The Court also stated that such an interest exists as long as the appeal may, if successful, procure an advantage to the party bringing it (see, Case C-277/01 P *Parliament* v *Samper* [2003] ECR I-3019, paragraph 28, and Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, paragraph 42, and order of 8 April 2008 in Case C-503/07 *Saint-Gobain Glass Deutschland* v *Commission* [2008] ECR I-2217, paragraph 48 and the case-law cited).

24 As regards the present appeal, the Commission's assertion that the two e-mails exchanged between the Director General of Akcros and Mr S. clearly could not be covered by legal professional privilege, is not capable of affecting the appellants' interest in bringing proceedings. Such an argument, which seeks to show that the General Court rightly held that the two e-mails at issue are not covered by legal professional privilege is not a matter of admissibility, but pertains to the substance of the appeal.

25 As to the Commission's argument that the adoption of the decision of 11 November 2009 eliminated the appellants' interest in pursuing the present proceedings, it must be recalled that, by the rejection decision of 8 May 2003, which is the subject-matter of the judgment under appeal, the Commission refused to accede to the appellants' request, inter alia, to return to them the two e-mails exchanged between the Director General of Akcros and Mr S. and to confirm that all the copies of those documents in its possession had been destroyed. Any breach of legal professional privilege in the course of investigations does not take place when the Commission relies on a privileged document in a decision on the merits, but when such a document is seized by one of its officials. In those circumstances, the appellants' interest in bringing proceedings continues for at least as long as the Commission has the documents referred to in the rejection decision of 8 May 2003 or copies thereof.

26 In those circumstances, Akzo and Akcros have an interest in bringing this appeal.

C — *Substance*

27 Akzo and Akcros put forward three grounds of appeal, the first as the principal ground of appeal and the second and third as alternative grounds.

28 All the grounds of appeal are directed against paragraphs 165 to 180 of the judgment under appeal. The appellants submit in essence that the General Court wrongly refused to apply legal professional privilege to the two e-mails exchanged with Mr S.

29 The European Company Lawyers Association, intervener at first instance, and Ireland, intervener before the Court, have argued that by the judgment under appeal the General Court infringed the right to property and professional freedom. It must be observed that Akzo and Akcros did not raise those pleas at first instance. In those circumstances they must be rejected as inadmissible.

1. The first ground of appeal

30 Akzo and Akcros base the first ground of appeal on two arguments. They submit, first of all, that the General Court incorrectly interpreted the second condition for legal professional privilege, which concerns the professional status of the lawyer with whom communications are exchanged, as laid down in the *AM & S Europe* v *Commission* judgment, and, second, that by that interpretation the General Court breached the principle of equality.

31 The Commission submits that that ground of appeal is unfounded.

(a) The first argument

(i) Arguments of the parties

32 Akzo and Akcros submit that the General Court, in paragraphs 166 and 167 of the judgment under appeal, gave a 'literal and partial interpretation' in *AM & S Europe* v *Commission* of the second condition of legal professional privilege relating to the lawyer's status. The General Court should have chosen a 'teleological' interpretation of that condition and should have held that the exchanges at issue were protected by that principle.

33 Akzo and Akcros submit that paragraph 21, read in conjunction with paragraph 24, of *AM & S Europe* v *Commission*, reveals that the Court of Justice does not equate the existence of an employment relationship with a lack of independence on the part of the lawyer.

34 Akzo and Akcros, and a number of the interveners, submit that the criterion that the lawyer must be independent cannot be interpreted so as to exclude in-house lawyers. An in-house lawyer enrolled at a Bar or Law Society is, simply on account of his obligations of professional conduct and discipline, just as independent as an external lawyer. Furthermore, the guarantees of independence enjoyed by an 'advocaat in dienstbetrekking', that is an enrolled lawyer in an employment relationship under Dutch law, are particularly significant.

35 Akzo and Akcros observe that the rules of professional ethics and discipline applicable in the present case make the employment relationship fully compatible with the concept of an independent lawyer. They argue that the contract between Mr S. and the company which employed him provided that the company was to respect the lawyer's freedom to perform his functions independently and to refrain from any act which might affect that task. The contract also authorised Mr S. to comply with all the professional obligations imposed by the Netherlands Bar.

36 Akzo and Akcros add that the employed lawyer concerned in this case is subject to a code of conduct and to the supervision of the Netherlands Bar. Furthermore, regulations lay down a certain number of additional guarantees aiming to resolve in an impartial manner any differences of opinion between the undertaking and its in-house lawyer.

37 The Commission states that the application, by the General Court, of legal professional privilege was correct. It is clear from paragraphs 24 to 26 of the judgment in *AM & S Europe* v *Commission* that the fundamental quality required of a lawyer so that communications with him are privileged is that he is not an employee of his client.

38 Accordingly, in the Commission's view, if the Court had wanted legal professional privilege to apply also to communications exchanged with lawyers who are employed by the person who asks their advice, it would not have limited the scope of the second condition, as set out in paragraph 21 of *AM & S Europe* v *Commission*.

39 The Commission submits that in *AM & S Europe* v *Commission* the Court placed lawyers in one of the following two categories: (i) employed salaried lawyers and (ii) lawyers who are not bound by a contract of employment. Only documents drafted by lawyers in the second category were regarded as being covered by legal professional privilege.

(ii) Findings of the Court

40 It must be recalled that, in *AM & S Europe* v *Commission*, the Court, taking account of the common criteria and similar circumstances existing at the time in the national laws of the Member States, held, in paragraph 21 of that judgment, that the confidentiality of written communications between lawyers and clients should be protected at Community level. However, the Court stated that that protection was subject to two cumulative conditions.

41 In that connection, the Court stated, first, that the exchange with the lawyer must be connected to 'the client's rights of defence' and, second, that the exchange must emanate from 'independent lawyers', that is to say 'lawyers who are not bound to the client by a relationship of employment'.

42 As to the second condition, the Court observed, in paragraph 24 of the judgment in *AM & S Europe* v *Commission*, that the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart to that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest. The Court also held, in paragraph 24, that such a conception reflects the legal traditions common to the Member States and is also to be found in the legal order of the European Union, as is demonstrated by the provisions of Article 19 of the Statute of the Court of Justice.

43 The Court repeated those findings in paragraph 27 of that judgment, according to which written communications which may be protected by legal professional privilege must be exchanged with 'an independent lawyer, that is to say one who is not bound to his client by a relationship of employment'.

44 It follows that the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers.

45 As the Advocate General observed in points 60 and 61 of her Opinion, the concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment

relationship. An in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.

46 As regards the professional ethical obligations relied on by the appellants in order to demonstrate Mr S.'s independence, it must be observed that, while the rules of professional organisation in Dutch law mentioned by Akzo and Akcros may strengthen the position of an in-house lawyer within the company, the fact remains that they are not able to ensure a degree of independence comparable to that of an external lawyer.

47 Notwithstanding the professional regime applicable in the present case in accordance with the specific provisions of Dutch law, an in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence.

48 It must be added that, under the terms of his contract of employment, an in-house lawyer may be required to carry out other tasks, namely, as in the present case, the task of competition law coordinator, which may have an effect on the commercial policy of the undertaking. Such functions cannot but reinforce the close ties between the lawyer and his employer.

49 It follows, both from the in-house lawyer's economic dependence and the close ties with his employer, that he does not enjoy a level of professional independence comparable to that of an external lawyer.

50 Therefore, the General Court correctly applied the second condition for legal professional privilege laid down in the judgment in *AM & S Europe* v *Commission*.

51 Accordingly, the first argument put forward by Akzo and Ackros under the first ground of appeal cannot be accepted.

(b) The second argument

(i) Arguments of the parties

52 Akzo and Akcros submit that, in paragraph 174 of the judgment under appeal, the General Court wrongly rejected the claim that refusing to apply legal professional privilege to correspondence exchanged with an in-house lawyer violates the principle of equal treatment. The independence guaranteed by the rules of professional ethics and discipline applicable in the present case should be the benchmark for determining the scope of that principle. According to that criterion, the position of in-house lawyers enrolled with a Bar or Law Society is no different from that of external lawyers.

53 The Commission takes the view that the General Court, in paragraph 174 of the judgment under appeal, rightly held that in-house lawyers and external lawyers are clearly in very different situations, owing, in particular, to the personal, functional, structural and hierarchical integration of in-house lawyers within the companies that employ them.

(iii) Findings of the Court

54 It must be recalled that the principle of equal treatment is a general principle of European Union law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union.

55 According to settled case-law, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56; and Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 23).

56 As to the essential characteristics of those two categories of lawyer, namely their respective professional status, it is clear from paragraphs 45 to 49 of this judgment that, despite the fact that he may be enrolled with a Bar or Law Society and that he is subject to a certain number of professional ethical obligations, an in-house lawyer does not enjoy a level of professional independence equal to that of external lawyers.

57 As the Advocate General stated, in point 83 of her Opinion, that difference in terms of independence is still significant, even though the national legislature, the Netherlands legislature in this case, seeks to treat in-house lawyers in the same way as external lawyers. After all, such equal treatment relates only to the formal act of admitting an in-house lawyer to a Bar or Law Society and the professional ethical obligations incumbent on him as a result of such admission. On the other hand, that legislative framework does not alter the economic dependence and personal identification of a lawyer in an employment relationship with his undertaking.

58 It follows from those considerations that in-house lawyers are in a fundamentally different position from external lawyers, so that their respective circumstances are not comparable for the purposes of the case-law set out in paragraph 55 of this judgment.

59 Therefore, the General Court rightly held that there was no breach of the principle of equal treatment.

60 Consequently, the second argument put forward as part of the first ground of appeal must also be rejected.

61 Therefore, that ground of appeal must be rejected in its entirety.

2. The second ground of appeal

62 Should the Court consider that the General Court has not erred in its interpretation of *AM & S Europe* v *Commission*, and that, by that judgment pronounced in 1982, it

intended to exclude from the benefit of legal professional privilege correspondence with lawyers bound by a relationship of employment, Akzo and Akcros put forward, in the alternative, a second ground of appeal which consists of two arguments, each being divided into two parts.

63 In the first argument, the appellants, supported by a number of interveners, rely on the evolution of the national legal systems, on the one hand, and European Union law on the other. Akzo and Akcros base their second argument on the rights of defence and the principle of legal certainty.

64 In the Commission's view none of the arguments put forward support the ground of appeal.

(a) The first part of the first argument (evolution of the national legal systems)

(i) Arguments of the parties

65 Akzo and Akcros submit that, having regard to significant recent developments 'in the legal landscape' since 1982, the General Court should have 'reinterpreted' the judgment in *AM & S Europe* v *Commission*, as far as concerns the principle of legal professional privilege.

66 Akzo and Akcros take the view that, in paragraphs 170 and 171 of the judgment under appeal, the General Court wrongly refused to widen the personal scope of legal professional privilege on the ground that national laws are not unanimous and unequivocal in recognising legal professional privilege for communications with in-house lawyers. Notwithstanding the lack of a uniform tendency at national level, European Union law could set legal standards for the protection of the rights of defence which are higher than those set in certain national legal orders.

67 The Commission observes that, by their plea, the appellants are essentially asking the Court to change the case-law deriving from the judgment in *AM & S Europe* v *Commission*.

68 The Commission states that the appellants do not challenge the General Court's finding that there is no clear majority support in the laws of the Member States for the premiss that communications with in-house lawyers should be protected by legal professional privilege.

(ii) Findings of the Court

69 It must be recalled that the Court stated, in its reasoning in the judgment in *AM & S Europe* v *Commission* relating to legal professional privilege in investigation procedures in matters of competition law, that that area of European Union law must take into account the principles and concepts common to the laws of the Member States concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client (see paragraph 18 of that judgment). For that purpose, the Court compared various national laws.

70 The Court observed, in paragraphs 19 and 20 of the judgment in *AM & S Europe* v *Commission* that, although the protection of written communications between lawyer and client is generally recognised, its scope and the criteria for applying it vary in accordance with the different national rules. However, the Court acknowledged, on the basis of that comparison, that legal professional privilege should be protected under European Union law, as long as the two conditions laid down in paragraph 21 of that judgment are fulfilled.

71 As the General Court held, in paragraph 170 of the judgment under appeal, even though it is true that specific recognition of the role of in-house lawyers and the protection of communications with such lawyers under legal professional privilege was relatively more common in 2004 than when the judgment in *AM & S Europe* v *Commission* was handed down, it was nevertheless not possible to identify tendencies which were uniform or had clear majority support in the laws of the Member States.

72 Furthermore, it is clear from paragraph 171 of the judgment under appeal that a comparative examination conducted by the General Court shows that a large number of Member States still exclude correspondence with in-house lawyers from protection under legal professional privilege. Additionally, a considerable number of Member States do not allow in-house lawyers to be admitted to a Bar or Law Society and, accordingly, do not recognise them as having the same status as lawyers established in private practice.

73 In that connection, Akzo and Akcros themselves accept that no uniform tendency can be established in the legal systems of the Member States towards the assimilation of in-house lawyers and lawyers in private practice.

74 Therefore no predominant trend towards protection under legal professional privilege of communications within a company or group with in-house lawyers may be discerned in the legal systems of the 27 Member States of the European Union.

75 In those circumstances, and contrary to the appellants' assertions, the legal regime in the Netherlands cannot be regarded as signalling a developing trend in the Member States, or as a relevant factor for determining the scope of legal professional privilege.

76 The Court therefore considers that the legal situation in the Member States of the European Union has not evolved, since the judgment in *AM & S Europe* v *Commission* was delivered, to an extent which would justify a change in the case-law and recognition for in-house lawyers of the benefit of legal professional privilege.

77 The first part of the first argument must therefore be dismissed.

(b) The second part of the first argument (development of the law of the European Union)

(i) Arguments of the parties

78 Akzo and Akcros submit that the General Court, in paragraphs 172 and 173 of the judgment under appeal, disregarded the relevance of the development of European Union law, resulting in particular from the entry into force of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

79 According to Akzo and Akcros, the 'modernisation' of the procedural rules on cartels has increased the need for in-house legal advice, the importance of which should not be underestimated in preventing infringements of competition law, since in-house lawyers are able to rely on intimate knowledge of the undertakings and their activities.

80 Akzo and Akcros add that the establishment of compliance programmes, which are desirable in the interest of the correct application of European Union competition law, requires that exchanges within an undertaking or group with in-house lawyers may take place in a confidential environment.

81 The Commission takes the view that the findings of the General Court in the judgment under appeal concerning the ground of appeal put forward by Akzo and Akcros are in no way vitiated by an error of law.

82 The Commission submits that the provisions of Regulation No 1/2003 have no effect on the scope of legal professional privilege.

(ii) Findings of the Court

83 Although it is true that Regulation 1/2003 has introduced a large number of amendments to the rules of procedure relating to European Union competition law, it is also the case that those rules do not suggest that they require lawyers in independent practice and in-house lawyers to be treated in the same way with respect to

legal professional privilege, since that principle is not at all the subject-matter of the regulation.

84 It is clear from the provisions of Article 20 of Regulation No 1/2003 that the Commission may conduct all necessary inspections of undertakings and associations of undertakings, and in that context, examine the books and other records related to the business, irrespective of the medium on which they are stored, and also take or obtain in any form copies or extracts of such books or records.

85 That regulation, like Article 14(1)(a) and (b) of Regulation No 17, has therefore defined the powers of the Commission broadly. As it is clear from Recitals 25 and 26 in the preamble to Regulation No 1/2003, the detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively and safeguard the effectiveness of inspections, the Commission should be empowered to enter any premises where business records may be kept, including private homes.

86 Thus, Regulation No 1/2003, contrary to the appellants' assertions, does not aim to require in-house and external lawyers to be treated in the same way as far as concerns legal professional privilege, but aims to reinforce the extent of the Commission's powers of inspection, in particular as regards documents which may be the subject of such measures.

87 Therefore, the amendment of the rules of procedure for competition law, resulting in particular from Regulation No 1/2003, is also unable to justify a change in the case-law established by the judgment in *AM & S Europe* v *Commission*.

88 Therefore, the second part of the first argument must also be dismissed.

89 It follows that the first argument put forward under the second plea must be rejected in its entirety.

(c) The first part of the second argument (rights of the defence)

(i) Arguments of the parties

90 Akzo and Akcros submit that the General Court's interpretation, in paragraph 176 of the judgment under appeal, concerning the scope of legal professional privilege, lowers the level of protection of the rights of defence of undertakings. Recourse to legal advice from an in-house lawyer would not be as valuable and its usefulness would be limited if the exchanges within an undertaking or group with such a lawyer were not protected by legal professional privilege.

91 The Commission takes the view that, contrary to the appellants' submissions, the rights of defence are in no way undermined by the interpretation of the scope of legal professional privilege adopted by the General Court.

(ii) Findings of the Court

92 It must be recalled that in all proceedings in which sanctions, especially fines or penalty payments, may be imposed observance of the rights of the defence is a fundamental principle of European Union law which has been emphasised on numerous occasions in the case-law of the Court (see, Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 30; Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraph 68; Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraph 68), and which has been enshrined in Article 48(2) of the Charter of Fundamental Right of the European Union.

93 By this ground of appeal, the appellants seek to establish that the rights of the defence must include the right of freedom of choice as to the lawyer who will provide legal advice and representation and that legal professional privilege forms part of those rights, regardless of the professional status of the lawyer concerned.

94 In that connection, it must be observed that, when an undertaking seeks advice from its in-house lawyer, it is not dealing with an independent third party, but with one of its employees, notwithstanding any professional obligations resulting from enrolment at a Bar or Law Society.

95 It should be added that, even assuming that the consultation of in-house lawyers employed by the undertaking or group were to be covered by the right to obtain legal advice and representation, that would not exclude the application, where in-house lawyers are involved, of certain restrictions and rules relating to the exercise of the profession without that being regarded as adversely affecting the rights of the defence. Thus, in-house lawyers are not always able to represent their employer before

all the national courts, although such rules restrict the possibilities open to potential clients in their choice of the most appropriate legal counsel.

96 It follows from those considerations that any individual who seeks advice from a lawyer must accept the restrictions and conditions applicable to the exercise of that profession. The rules on legal professional privilege form part of those restrictions and conditions.

97 Therefore, the argument alleging breach of the rights of the defence is unfounded.

(d) The second part of the second argument (principle of legal certainty)

(i) Arguments of the parties

98 Akzo and Akcros submit that the findings of the General Court undermine the principle of legal certainty, since Article 101 TFEU is often applied in parallel with the corresponding national provisions. Legal professional privilege for correspondence with in-housel lawyers should not therefore depend on whether it is the Commission or a national competition authority which carries out an investigation.

99 The Commission argues to the contrary that, if legal professional privilege, which is applicable to its investigations, were no longer defined at European Union level but under national law, that would give rise to complex and uncertain situations for all the persons concerned, which would prejudice the principle of legal certainty relied on by Akzo and Akcros.

(ii) Findings of the Court

100 It must be recalled that legal certainty is a general principle of European Union law which requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them (see Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 30; Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 79; and Case C-226/08 *Stadt Papenburg* [2010] ECR I-131, paragraph 45).

101 In answer to the complaint based on the abovementioned principle, it should be observed that the General Court's interpretation in the judgment under appeal that exchanges within an undertaking or group with in-house lawyers are not covered by legal professional privilege in the context of an investigation carried out by the Commission does not give rise to any legal uncertainty as to the scope of that protection.

102 The Commission's powers under Regulation No 17 and Regulation No 1/2003 may be distinguished from those in enquiries which may be carried out at national level. Both

types of procedure are based on a division of powers between the various competition authorities. The rules on legal professional privilege may, therefore, vary according to that division of powers and the rules relevant to it.

103 The Court has held in that connection that restrictive practices are viewed differently by European Union law and national law. Whilst Articles 101 TFEU and 102 TFEU view them in the light of the obstacles which may result for trade between the Member States, each body of national legislation proceeds on the basis of considerations peculiar to it and considers restrictive practices solely in that context (see, to that effect, Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR I-4785, paragraph 11).

104 In those circumstances, the undertakings whose premises are searched in the course of a competition investigation are able to determine their rights and obligations vis-à-vis the competent authorities and the law applicable, as, for example, the treatment of documents likely to be seized in the course of such an investigation and whether the undertakings concerned are entitled to rely on legal professional privilege in respect of communications with in-house lawyers. The undertakings can therefore determine their position in the light of the powers of those authorities and specifically of those concerning the seizure of documents.

105 Therefore, the principle of legal certainty does not require that identical criteria be applied as regards legal professional privilege in those two types of procedure.

106 Accordingly, the fact that, in the course of an investigation by the Commission, legal professional privilege is limited to exchanges with external lawyers in no way undermines the principle relied on by Akzo and Akcros.

107 Therefore, the argument based on the principle of legal certainty is unfounded.

108 It follows that the second ground of appeal must be dismissed in its entirety.

3. The third ground of appeal

(a) Arguments of the parties

109 In the further alternative, Akzo and Akcros claim that the findings of the General Court, taken as a whole, violate the principle of national procedural autonomy and the principle of the conferred powers.

110 Akzo and Akcros state that Article 22(2) of Regulation No 1/2003 expresses the principle of national autonomy in procedural matters in the area in question. The European Union legislature expressly stated that, even in the case of inspections carried out at the request of the Commission in order to establish an infringement of the provisions of Article 101 TFEU or Article 102 TFEU, the agents of the national competition authority are to exercise their powers in accordance with their national rules.

The legislature has not given a harmonised definition of legal professional privilege, which means that the Member States remain sovereign to decide that specific aspect of the protection of rights of defence.

111 The Commission submits that the judgment under appeal does not breach the principles referred to in the third ground of appeal. The principle of national procedural autonomy governs situations in which the courts and administrations of the Member States are required to implement European Union law, but does not apply where the legal limits of the actions of the institutions themselves are at issue.

112 The Commission concludes that the uniform scope of legal professional privilege throughout the European Union with respect to the procedures seeking to establish an infringement of Article 101 TFEU and Article 102 TFEU constituted a proper application of the judgment in *AM & S Europe* v *Commission* by the General Court. Consequently there has also been no breach of the principle of conferred powers.

(b) Findings of the Court

113 It must be recalled that, in accordance with the principle of national procedural autonomy, in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law (see, to that

effect, Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; and Case C-13/01 *Safalero* [2003] ECR I-8679, paragraph 49).

114 However, in the present case, the Court is called on to decide on the legality of a decision taken by an institution of the European Union on the basis of a regulation adopted at European Union level, which, moreover, does not refer back to national law.

115 The uniform interpretation and application of the principle of legal professional privilege at European Union level are essential in order that inspections by the Commission in anti-trust proceedings may be carried out under conditions in which the undertakings concerned are treated equally. If that were not the case, the use of rules or legal concepts in national law and deriving from the legislation of a Member State would adversely affect the unity of European Union law. Such an interpretation and application of that legal system cannot depend on the place of the inspection or any specific features of the national rules.

116 As far as concerns the principle of conferred powers, it must be stated that the rules of procedure with respect to competition law, as set out in Article 14 of Regulation No 17 and Article 20 of Regulation No 1/2003, are part of the provisions necessary for the functioning of the internal market whose adoption is part of the exclusive competence conferred on the Union by virtue of Article 3(1)(b) TFEU.

117 In accordance with the provisions of Article 103 TFEU, it is for the European Union to lay down the regulations or directives to give effect to the principles in Articles 101 TFEU and 102 TFEU concerning the competition rules applicable to undertakings.

That power aims, in particular, to ensure observance of the prohibitions referred to in those articles by the imposition of fines and periodic penalty payments and to define the Commission's role in the application of those provisions.

118 In that connection, Article 105 TFEU provides that the Commission is to ensure the application of the principles laid down in Articles 101 TFEU and 102 TFEU and to investigate cases of suspected infringement.

119 As the Advocate General stated, in paragraph 172 of her Opinion, national law is applicable in the context of investigations conducted by the Commission as European competition authority only in so far as the authorities of the Member States lend their assistance, in particular with a view to overcoming opposition by the undertakings concerned through the use of coercive measures, in accordance with Article 14(6) of Regulation No 17 or Article 20(6) of Regulation No 1/2003. However, the question of which documents and business records the Commission may examine and copy as part of its inspections under antitrust legislation is determined exclusively in accordance with EU law.

120 Accordingly, neither the principle of national procedural autonomy nor the principle of conferred powers may be invoked against the powers enjoyed by the Commission in the area in question.

121 Therefore, the third ground of appeal must also be dismissed.

122 It follows from all of the foregoing considerations that the appeal is unfounded.

Costs

123 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs and Akzo and Akcros have been unsuccessful, the latter must be ordered to pay the costs. As they have brought the appeal jointly, they are to be jointly and severally liable for them.

124 The United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands, as interveners in the proceedings before the Court, are each to bear their own costs, in accordance with the first paragraph of Article 69(4) of the Rules of Procedure.

125 The other parties to the proceedings, which supported the appeal and which were unsuccessful, are to bear their own costs by analogous application of the third paragraph of Article 69(4) of the Rules of Procedure.

On those grounds, the Court (Grand Chamber) hereby:

1. Dismisses the appeal;

2. Orders the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands to bear their own costs;

3. Orders the Conseil des barreaux européens, the Algemene Raad van de Nederlandse Orde van Advocaten, the European Company Lawyers Association, the American Corporate Counsel Association (ACCA) – European Chapter and the International Bar Association to bear their own costs;

4. Orders the remainder of the costs of the proceedings to be born jointly and severally by Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd.

[Signatures]