ORDER OF THE PRESIDENT OF THE COURT

27 September 2004 *

In Case C-7/04 P(R)

APPEAL pursuant to the second paragraph of Article 57 of the Statute of the Court of Justice, brought on 9 January 2004,

Commission of the European Communities, represented by R. Wainwright and C. Ingen-Housz, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

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

Akcros Chemicals Ltd, established in Surrey (United Kingdom),

* Language of the case: English.

represented by C. Swaak, advocaat, and M. Mollica, avocate,

applicants at first instance,

supported by

European Company Lawyers Association (ECLA), represented by M. Dolmans, advocaat, and K. Nordlander, advokat, instructed by J. Temple-Lang, solicitor,

Council of the Bars and Law Societies of the European Union (CCBE), represented by J. Flynn QC,

Algemene Raad van de Nederlandse Orde van Advocaten, represented by O. Brouwer, advocaat,

interveners,

THE PRESIDENT OF THE COURT,

after hearing the views of the Advocate General, A. Tizzano,

makes the following

Order

1 This appeal has been brought against the order of the President of the Court of First Instance of the European Communities of 30 October 2003 in Joined Cases T-125/03 R and T-253/03 R *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2003] ECR II-4771 ('the contested order').

2 By that order the President of the Court of First Instance, first, dismissed an application for suspension of operation of the decision of the Commission of the European Communities of 10 February 2003 amending the decision of 30 January 2003 ordering Akzo Nobel Chemicals Ltd, Akcros Chemicals Ltd and Akcros Chemicals and their subsidiaries to submit to an investigation under Article 14(3) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), and for other interim measures to protect the applicants' interests (Case T-125/03 R). Second, he dismissed in part an application for suspension of operation of the Commission's decision of 8 May 2003 rejecting a claim of legal privilege in respect of five documents copied during an investigation, and for other interim measures to protect the applicants' interests (Case T-253/03 R).

3 By a document lodged on 16 February 2004, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd ('Akzo') brought a cross-appeal seeking annulment of the contested

order in so far as it dismisses in its entirety the application for interim measures in Case T-125/03 R and dismisses in part the application for interim measures in Case T-253/03 R.

4 The interveners submitted their observations in support of the form of order sought by Akzo by documents of 16 February 2004.

5 Having obtained an extension of the time-limit for submitting its observations on the cross-appeal, the Commission submitted them on 16 April 2004.

6 Since the parties' written observations contain all the information necessary for judgment to be given on the applications, there is no need to hear oral observations from them.

Facts and procedure before the Court of First Instance

7 The facts of the dispute and the procedure before the Court of First Instance are summarised as follows in paragraphs 1 to 20 of the contested order:

'1 On 10 February 2003, the Commission adopted a decision under Article 14(3) 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) ("the decision of 10 February 2003"), amending the decision of 30 January

2003 whereby the Commission ordered, among other undertakings, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd ("the applicants") and their respective subsidiaries to submit to an investigation aimed at seeking evidence of possible anti-competitive practices ("the decision of 30 January 2003").

2 On 12 and 13 February 2003, Commission officials accompanied by representatives of the Office of Fair Trading carried out an investigation on the basis of those decisions at the applicants' premises in Eccles, Manchester (United Kingdom). During the investigation, the Commission officials made copies of a large number of documents.

3 In the course of the investigation, the applicants' representatives informed the Commission officials that certain documents in a particular file might be covered by the legal professional privilege that protects communications with lawyers and that the Commission could not therefore have access to them.

4 The Commission officials then informed the applicants' representatives that they needed to look at the documents briefly, without examining them, 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 those from the Office of Fair Trading had reminded the applicants of the criminal consequences of obstructing an investigation, it was decided that the leader of the investigating team would briefly review the documents in question, with a representative of the applicants at her side. It was also decided that, should the applicants' representative claim that a document was covered by professional privilege, he was to provide more detailed reasons for his request.

5 In the course of the examination of the documents in the file indicated by the applicants' representatives, a dispute arose in respect of five documents which were ultimately treated in two different ways.

6 The first of these documents is a two-page typewritten memorandum dated 16 February 2000 from the General Manager of Akcros Chemicals to one of his superiors. According to the applicants, this memorandum contains information gathered by the General Manager of Akcros Chemicals in the course of internal discussions with other employees. They state that the information was gathered for the purpose of obtaining outside legal advice in connection with the competition law compliance programme already put in place by Akzo Nobel.

7 The second of these documents is a second copy of the two-page memorandum described in the preceding paragraph, which also contains handwritten notes referring to contacts with one of the lawyers representing the applicants and mentioning him by name.

8 After receiving the applicants' explanations about these first two documents, the Commission officials were not in a position to reach a definitive conclusion on the spot about whether the documents should be privileged. They therefore made copies and placed them in a sealed envelope, which they removed at the close of the investigation. In their application, the applicants have designated these documents as belonging to "Set A".

9 The third document at issue between the Commission officials and the applicants consists of a series of handwritten notes by the General Manager of Akcros Chemicals, which, the applicants maintain, were drafted during discussions with lower-level employees and used for the purpose of preparing the typewritten memorandum in Set A.

10 Finally, the last two documents in question represent an exchange of emails between the General Manager of Akcros Chemicals and Akzo Nobel's competition law coordinator, who is registered as an attorney at the Netherlands Bar and, at the material time, was also a member of Akzo Nobel's Legal Department and, consequently, employed by that undertaking on a permanent basis.

11 After reviewing the last three documents and receiving the applicants' explanations, the leader of the investigating team formed the view that they were definitely not protected by legal privilege. She therefore copied the documents and placed the copies with the rest of the file, but did not place them in a sealed envelope, unlike the documents in Set A. In their application, the applicants have designated these documents as belonging to "Set B".

12 On 17 February 2003, the applicants wrote to the Commission explaining why in their view both the documents in Set A and those in Set B were protected by legal privilege.

13 By letter of 1 April 2003, the Commission informed the applicants that it was not convinced by the arguments, set out in their letter of 17 February 2003, that the documents referred to were covered by professional privilege. In that letter, however, the Commission informed the applicants that they could submit observations on those preliminary conclusions within two weeks, following which it would adopt a final decision.

14 By application lodged at the Registry of the Court of First Instance on 11 April 2003, the applicants brought an action under the fourth paragraph of Article 230 EC for, in particular, annulment of the decision of 10 February 2003 and, so far as necessary, the decision of 30 January 2003, "in as far as it has been interpreted by the Commission as legitimating and/or constituting the basis of the Commission's action (which is not severable from the decision), of seizing and/or reviewing and/or reading documents covered by [legal professional privilege]". That case is Case T-125/03.

15 On 17 April 2003, the applicants informed the Commission that they had lodged their application in Case T-125/03. They also informed the Commission that the observations which they had been invited to submit on 1 April 2003 were incorporated in the application.

16 On the same day, the applicants lodged an application under Articles 242 EC and 243 EC requesting the President of the Court of First Instance, inter alia, to suspend the operation of the decision of 10 February 2003 and, so far as necessary, the operation of the decision of 30 January 2003. That case was registered by the Registry as Case T-125/03 R.

17 On 8 May 2003, the Commission adopted a decision under Article 14(3) of Regulation No 17 ("the decision of 8 May 2003"). In Article 1 of that decision, the Commission rejects the applicants' request for the return of the documents in Set A and Set B and for confirmation that all the copies of those documents in the Commission's possession have been destroyed. In Article 2 of the decision of 8 May, moreover, the Commission states that it intends to open the sealed envelope containing the documents in Set A. The Commission states, however, that it will not do so before the expiry of the period prescribed for lodging an appeal against the decision of 8 May 2003.

18 On 14 May 2003, the Commission presented its written observations on the application for interim measures in Case T-125/03 R.

19 On 22 May 2003, the President of the Court of First Instance invited the applicants to submit their observations on the inferences which in their view should be drawn, in Case T-125/03 R, from the decision of 8 May 2003. The applicants submitted their observations on 9 June 2003 and the Commission replied on 3 July 2003.

20 By application under the fourth paragraph of Article 230 EC, lodged at the Registry of the Court of First Instance on 4 July 2003, the applicants brought an action for annulment of the decision of 8 May 2003 and for an order that the Commission should pay the costs of the action. By separate document registered on 11 July 2003, the applicants lodged an application for interim measures, requesting the President of the Court of First Instance, in particular, to suspend the operation of the decision of 8 May 2003. That case is Case T-253/03 R.'

The contested order

Case T-125/03 R

8 In Case T-125/03 R the judge hearing the application for interim measures found, in paragraph 67 of the contested order, that all the pleas directed by the applicants against the decision of 10 February 2003 and, so far as necessary, against the decision of 30 January 2003 in reality related to measures taken subsequent to and moreover distinct from those decisions.

9 Referring to settled case-law of the Community judicature, the judge then observed, in paragraph 68 of the contested order, that, in connection with an investigation based on Article 14 of Regulation No 17, an undertaking cannot plead the illegality of the investigation procedures as a ground for annulment of the measure on the basis of which the Commission carried out that investigation.

10 Since he considered that the applicants had not therefore established the existence of a prima facie case, the judge dismissed the application for suspension of operation in Case T-125/03 R.

Case T-253/03 R

11 In Case T-253/03 R the judge hearing the application for interim measures dealt first with the second plea in law, alleging breach of professional privilege.

12 He started by noting that Akzo did not claim that the Set A documents constituted in themselves a communication with an outside lawyer or a document reporting the text or the content of such a communication. Akzo maintained, on the contrary, that both documents in Set A were memoranda drafted for the purpose of a telephone conversation with a lawyer.

13 Since he considered that the case raised very important and complex questions concerning the possible need to extend, to a certain degree, the scope of professional privilege as delimited by the case-law to working or summary documents drafted for the sole purpose of obtaining the assistance of a lawyer, the judge concluded that

those questions required a detailed examination in the main proceedings and that the application did not therefore appear at that stage to be manifestly unfounded.

14 As regards the handwritten memoranda in Set B, the judge hearing the application for interim measures made the same assessment of them as of the Set A memoranda, in view of the similarities between the two groups of documents.

15 As regards the two emails in Set B, exchanged between the general manager of Akcros Chemicals and the competition law coordinator of Akzo Nobel, the judge noted that they had not been exchanged between a lawyer and his client, and that they were therefore not in principle covered by professional privilege, applying the principles stated in Case 155/79 *AM & S* v *Commission* [1982] ECR 1575.

16 The judge then observed that the applicants and the interveners had put forward arguments which he considered were prima facie capable of supporting a wider interpretation of professional privilege.

17 In view of the complex nature of the question of the conditions under which written communications with a lawyer employed by an undertaking on a permanent basis might possibly be protected by professional privilege, the judge considered that the question should be reserved for the Court of First Instance hearing the main application.

18 As to the first plea in law, alleging breach of the procedural principles laid down in *AM & S* v *Commission* and of Article 242 EC, the judge hearing the application for interim measures first recalled those principles and then analysed the actual course of the Commission's investigation.

19 In paragraph 137 of the contested order, he noted a further delicate question raised by that plea. It was necessary to consider whether, in the light of the duty of an undertaking subject to an investigation to submit relevant material of such a kind as to prove that a document must in fact be protected, the Commission's officials are prima facie entitled to cast a cursory glance over that document, as they did in the present case, in order to form their own view of its eligibility for protection.

20 On this point, in paragraph 139 of the contested order, the judge considered that it was not ruled out that, in the context of an investigation under Article 14(3) of Regulation No 17, the Commission's officials must refrain from casting even a cursory glance over the documents which an undertaking claims to be protected by professional privilege, at least if that undertaking has not given its consent.

21 Since he considered that he was faced with a complex question of interpretation of the procedure defined in *AM & S* v *Commission*, and that it could not be ruled out that the Commission had failed to observe the procedural principles laid down in that judgment, the judge accepted that the condition relating to a prima facie case was satisfied for both the Set A and the Set B documents.

22 He then accepted that it was urgent to order the interim measures sought. With respect to the Set A documents, to which the Commission had not yet had access, it was necessary, in order to prevent serious and irreparable harm being caused, to order the Commission not to read those documents, and consequently to suspend the operation of Article 2 of the decision of 8 May 2003.

23 With respect to the Set B documents, on the other hand, which the Commission had already read and which were not placed in a sealed envelope, the judge reached the conclusion that the condition relating to urgency was not satisfied.

24 Finally, in the case of the Set A documents, he proceeded to balance the interests involved. He concluded that the balance of interests tilted in favour of suspending the operation of Article 2 of the decision of 8 May 2003.

25 The operative part of the contested order reads as follows:

'1. Cases T-125/03 R and T-253/03 R are joined for the purposes of this order.

2. The Council of the Bars and Law Societies of the European Union, the Algemene Raad van de Nederlandse Orde van Advocaten and the European Company Lawyers Association are granted leave to intervene in Cases T-125/03 R and T-253/03 R.

3. At the stage of the application for interim measures, the requests for confidential treatment submitted by the applicants in respect of certain matters in the procedural documents in Cases T-125/03 R and T-253/03 R and referred to as such in the letter of 16 September 2003 from the Registry to the applicants are granted.

4. The application for interim measures in Case T-125/03 R is dismissed.

5. The Commission's statement that it will not allow third parties to have access to the Set B documents pending judgment in the main proceedings in Case T-253/03 is noted.

6. In Case T-253/03 R, the operation of Article 2 of the Commission's decision of 8 May 2003 concerning a claim of legal privilege (Case COMP/E-1/38.589) is suspended pending the judgment of the Court in the main proceedings.

7. The sealed envelope containing the Set A documents will be kept by the Registry of the Court of First Instance pending the decision of the Court in the main action.

8. The remainder of the application for interim measures in Case T-253/03 R is dismissed.

9. The costs in Cases T-125/03 R and T-253/03 R are reserved.'

The appeal and the cross-appeal

26 By its appeal the Commission seeks annulment of points 6 and 7 of the operative part of the contested order. It puts forward three pleas in law: errors of law in assessing and establishing the condition of a prima facie case, errors of law in assessing and establishing the condition of urgency, and breach of procedural

requirements in relation to the rules of evidence affecting the interests of the Commission.

27 The cross-appeal by Akzo seeks annulment of points 4 and 8 of the operative part of the contested order. Akzo puts forward two pleas in law, the first, in Case T-125/03 R, alleging breach of the right to effective judicial protection, and the second, in Case T-253/03 R, alleging breach of that right and incorrect application of the concept of irreparable harm.

The appeal

28 It should be recalled at the outset that, according to settled case-law, interim measures may be ordered only if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as it must, in order to avoid serious and irreparable harm to the applicant's interests, be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (see, in particular, the order of the President of the Court in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30).

29 If it is apparent that the condition of urgency is not satisfied, the application for interim measures must consequently be dismissed, without it being necessary to

examine the other conditions, including that relating to a prima facie case which, according to paragraphs 98 and 127 of the contested order, ought possibly to be approached on the basis of a concept of professional privilege involving a reconsideration of the principles of Community law governing professional privilege, as stated in particular in *AM & S* v *Commission.*

The second plea, relating to the condition of urgency

Arguments of the parties

30 The Commission submits that the assessment of the condition of urgency is tainted by several errors of law. Those errors result from the application of an incorrect method for reaching a finding of urgency, the failure to state reasons properly and to establish the criteria required to find urgency, and the failure to take the weakness of the prima facie case into account when assessing urgency.

31 The Commission submits that the judge hearing the application for interim measures, in accepting that the condition of urgency was satisfied, based himself on the reasoning that the disclosure, albeit provisional, of information entrusted by a litigant to his lawyer could be capable of causing irremediable harm to the confidence which that litigant placed, in confiding in his lawyer, in the fact that it would never be disclosed. In paragraph 167 of the contested order, the judge himself acknowledges that the harm which would result from the mere reading of the Set A documents does not relate to the need to protect the applicants' rights of defence but is inferred from 'the particular nature of professional privilege'.

32 The judge thus applied a concept of professional privilege which has not been recognised and is not consistent with the existing case-law, in particular *AM & S* v *Commission*. In the contested order, professional privilege is defined as a right of undertakings, the essence of which is inherently and irremediably affected by any restriction on its exercise. In *AM & S* v *Commission*, on the other hand, the protection of communications between a lawyer and his client is analysed in the context of a procedure liable to give rise to decisions applying Articles 81 EC and 82 EC or decisions imposing fines.

33 The Commission further submits that neither the seriousness nor the irreversibility nor the certainty of the alleged damage has been shown.

34 The Commission also points out that it undertook, that undertaking being referred to in paragraph 157 of the contested order, that it would not allow third parties to have access to the documents in question before the Court of First Instance adjudicated on the main application, thus preventing any risk of disclosure in the hands of third parties.

35 Akzo submits that the contested order correctly applied the case-law on professional privilege, in particular the principles laid down in *AM & S* v *Commission*.

Assessment

36 It must be recalled that the purpose of the procedure for interim relief is to guarantee the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court of Justice. For the purpose of attaining that objective, urgency must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the interim relief (order of the President of the Court in Case C-180/01 P-R *Commission* v *NALOO* [2001] ECR I-5737, paragraph 52).

37 The Court has also held, with respect to a decision by the Commission to order an investigation, that if that decision were annulled by the Community judicature, the Commission would in that event be prevented from using, for the purposes of proceeding in respect of an infringement of the Community competition rules, any documents or evidence which it might have obtained in the course of that investigation, as otherwise the decision on the infringement might, in so far as it was based on such evidence, be annulled by the Community judicature (Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 49).

38 The same principles apply where a decision of the Commission not to allow professional privilege for one or more documents is at issue and that decision is annulled by the Community judicature.

39 The Commission accepts, moreover, that if the decision of 8 May 2003 were subsequently held to be unlawful, it would be required to remove from its file the documents affected by that unlawfulness and would therefore be unable to use them as evidence.

40 In those circumstances, the possibility of the unlawful use of the Set A documents in proceedings for infringement of the Community competition rules brought by the Commission is purely theoretical, and in any event improbable.

41 It should be added that, while the mere reading by the Commission of the information in the Set A documents, without that information being used in proceedings for the infringement of the Community competition rules, may possibly be capable of affecting professional privilege, that circumstance is not in itself sufficient to show that the condition of urgency is satisfied in the present case.

42 In view of the Commission's undertaking not to allow third parties to have access to the Set A documents until judgment is given on the main application in Case T-253/03 and of the impossibility of the Commission using those documents as evidence in proceedings for infringement of the Community competition rules if the decision of 8 May 2003 were held to be unlawful, only the disclosure of the documents in question could serve to establish that the condition of urgency is satisfied in the present case. In this respect, it should be recalled that the Commission's officials have already examined, albeit cursorily, documents in Set A during the investigation.

43 The harm which might possibly result from a more detailed reading of those documents is not sufficient to establish the existence of serious and irreparable harm, since the Commission is prevented from using the information thus obtained.

44 Since the condition relating to urgency is therefore not satisfied, the second plea in law in the appeal must be accepted and points 6 and 7 of the operative part of the contested order annulled.

The cross-appeal

The first plea in law

45 Akzo submits that the dismissal of the application for interim measures in Case T-125/03 R breaches the right to effective judicial protection. In Akzo's view, the challengeable act can only be the decision taken pursuant to Article 14(3) of Regulation No 17 which was the basis of the alleged breach of procedure. Any subsequent decision would be less directly linked to the breach and could not constitute the act that immediately and irreversibly affects the legal position of the undertaking under investigation. Moreover, no Community provision requires the Commission to adopt, following the investigation, an act against which proceedings may be brought. The judicial protection of the undertaking concerned thus depends on a discretionary decision of the Commission.

46 On this point, it suffices to state that the judge hearing the application for interim measures correctly applied settled case-law, which Akzo moreover does not call into question, according to which acts subsequent to the adoption of a decision cannot affect the validity of that decision. Nor does the application of that case-law to the course of the investigation in the present case leave Akzo without judicial protection. The Commission adopted the refusal decision shortly after the investigation, and if it had not done so Akzo could have brought proceedings for the return by the Commission of the documents placed in the sealed envelope and taken to Brussels.

The second plea in law

47 By its second plea, Akzo submits that, by holding that the application in Case T-253/03 R relating to the Set B documents did not satisfy the condition of urgency, the judge hearing the application for interim measures infringed the right to effective judicial protection and based himself on an excessively strict interpretation of the concept of irreparable harm.

48 Akzo submits that, by refusing to grant the interim measures sought in Case T-253/03 R as regards those documents, the judge encouraged the Commission to include those documents in its file rather than place them in a sealed envelope. In the light of the reasoning in the contested order, the Commission is thus able to make sure than any application for interim measures made in order to secure the status of those documents pending a definitive decision will be dismissed.

49 On this point, it should be pointed out that in the contested order the judge found that the Commission had already read the three Set B documents, which had not been placed in a sealed envelope, so that, if the decision of 8 May 2003 were annulled in the main proceedings, the Commission would not be able to use the information in question as evidence.

50 According to the judge, in practice, harm could be established only if the Commission adopted measures based on the information in the Set B documents and Akzo were unable subsequently to demonstrate with sufficient certainty an actual link between that information and the measures taken. However, the judge regarded that risk as hypothetical.

51 He added that in its observations the Commission had stated that it would not allow third parties to have access to the Set A and Set B documents until judgment was given in the main action, and he took note of that declaration.

52 In ruling out, in those circumstances, any real possibility of irreparable harm, and consequently holding that the condition of urgency was not satisfied, the judge did not err in law.

53 The cross-appeal must therefore be dismissed in its entirety.

On those grounds, the President of the Court orders:

1. **Points 6 and 7 of the operative part of the order of the President of the Court of First Instance of the European Communities of 30 October 2003 in Joined Cases T-125/03 R and T-253/03 R *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2003] ECR II-4771 are annulled.**

2. **The declaration of the Commission of the European Communities that it will not allow third parties to have access to the Set A documents until judgment is given in the main action in Case T-253/03 is noted.**

3. **The application for interim measures in Case T-253/03 R is dismissed.**

4. **The cross-appeal is dismissed.**

5. **Costs are reserved.**

Signatures.