ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
28 May 2004 *

In Case T-253/03,

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

Akcros Chemicals Ltd, established in Surrey,

represented by C. Swaak and M. Mollica, lawyers,

applicants,

supported by

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

* Language of the case: English.

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

and

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

interveners,

v

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

defendant,

APPLICATION lodged by the **European Council on Legal Affairs** for leave to intervene in support of the form of order sought by the applicants in the present case, the object of which is an application for annulment of Decision C (2003) 1533 final of 8 May 2003 rejecting a claim of legal professional privilege for certain documents seized in the context of an investigation pursuant to 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 COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: H. Jung,

makes the following

Order

1 On 30 January 2003, the Commission adopted, on the basis of 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), Decision C (2003) 85/4 ordering, 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'). On 10 February 2003, the Commission adopted, likewise on the basis of Article 14(3) of Regulation No 17, Decision C (2003) 559/4 ('the decision of 10 February 2003') amending the decision of 30 January 2003.

2 On the basis of those decisions, on-the-spot investigations were carried out at the premises of the applicants in Eccles, Manchester (United Kingdom) on 12 and 13 February 2003. During that investigation, the Commission officials copied a large number of documents. In the course of the investigation, the applicant's representatives informed the Commission officials that certain documents might

be covered by the professional privilege protecting communications with lawyers. When the documents in question were examined, a dispute arose in respect of five documents, which were treated in two different ways. The Commission officials did not reach a definitive conclusion on the spot as to whether two of 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. As regards the other three documents in question, the Commission official responsible for the investigation took the view that they were not protected by legal professional privilege and, therefore, made copies, which were placed with the rest of the file without being separated in a sealed envelope.

3 On 17 February 2003, the applicants addressed a letter to the Commission, in which they stated why, in their view, the five documents were protected by legal privilege. By letter of 1 April 2003, the Commission informed the applicants that it was not possible to conclude, on the basis of the arguments put forward in their letter of 17 February 2003, that the documents were in fact protected by legal privilege. However, in its letter, the Commission pointed out that the applicants could submit their observations on its initial conclusions within a period of two weeks, at the end of which the Commission would adopt a final decision.

4 By application lodged at the Registry of the Court of First Instance on 11 April 2003, the applicants brought an action for, in essence, annulment of the Commission's decision of 10 February 2003 and, to the extent necessary, the decision of 30 January 2003 requiring the applicant companies and their respective subsidiaries to submit to the investigation in question (Case T-125/03 *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*).

5 On 8 May 2003, the Commission adopted Decision C (2003) 1533 final on the basis of Article 14(3) of Regulation No 17 ('decision of 8 May 2003'). In Article 1 of that decision, the Commission refused the applicants' request that the documents in

question be returned to them and that the Commission confirm that all copies of those documents in its possession had been destroyed. Moreover, in Article 2 of the decision of 8 May 2003, the Commission stated that it intended to open the sealed envelope containing two of those documents.

6 By application lodged at the Registry of the Court of First Instance on 4 July 2003, the applicants brought an action under the fourth paragraph of Article 230 EC for annulment of the decision of 8 May 2003.

7 By applications lodged on 30 July, 7 August and 18 August 2003 respectively, the Council of Bars and Law Societies of the European Union ('the CCBE'), the Algemene Raad van de Nederlandse Orde van Advocaten ('the Netherlands Bar') and the European Company Lawyers Association ('ECLA') applied for leave to intervene in support of the form of order sought by the applicants. The CCBE, the Netherlands Bar and the ECLA were granted leave to intervene by single order of the President of the Fifth Chamber of 4 November 2003.

8 On 26 November 2003, the European Council on Legal Affairs, represented by I. Forrester QC and J. Killick, lawyer, lodged an application for leave to intervene in support of the form of order sought by the applicants, in its own name and on behalf of its members.

9 In its application, the applicant to intervene claimed that it had a well-established interest in the outcome of the proceedings since the result of the case would have consequences for the daily activities of its members. In particular, the applicant to intervene pointed out that the case gives the Court an opportunity to reassess the principles laid down by the Court of Justice in its judgment in Case 155/79 *AM & S* v

Commission [1982] ECR 1575 and particularly to reconsider the question of the scope of legal professional privilege and the issue whether the procedural guarantees adequately ensure observance of that privilege. It points out that those issues have a considerable impact on the role of in-house lawyers and independent practitioners who are members of a bar outside the European Union. The applicant to intervene submits that it represents the interests of in-house lawyers based in Europe and that its objective is to defend the interests of its members.

10 The application for leave to intervene was served on the parties in accordance with the first subparagraph of Article 116(1) of the Rules of Procedure of the Court of First Instance.

11 In observations submitted on 18 December 2003, the applicants took the view that the applicant to intervene had demonstrated that it had an interest in the result of the case and asked the Court to grant its application for leave to intervene. By a separate document submitted on the same day, the applicants applied for confidential treatment vis-à-vis the applicant to intervene.

12 In observations submitted on 9 December 2003, the Commission raised no objection to the application for leave to intervene. It asked the Court to order the applicant to intervene to pay the costs incurred by the Commission in connection with that application. In a separate document submitted on the same day, the Commission stated that it did not request confidential treatment vis-à-vis the applicant to intervene.

13 In its observations, which were lodged on 7 January 2004, the CCBE claimed that the application for leave to intervene was inadmissible since that applicant does not satisfy the requirements imposed on individuals or on representative associations

the object of which is to defend their members' interests. The CCBE took the view that the applicant to intervene is in fact a group of individuals and that it has no direct and existing interest in the form of order sought in the case but a mere interest in the pleas raised. Finally, the CCBE took the view that the position of the members of the applicant to intervene could not be affected by the outcome of this case.

14 The other interveners did not raise any objections to that application for leave to intervene.

15 In accordance with the third subparagraph of Article 116(1) of the Rules of Procedure, the President of the Fifth Chamber referred the application for leave to intervene to the Chamber.

Findings of the Court

16 Under the second paragraph of Article 40 of the Statute of the Court of Justice, which is applicable to the Court of First Instance pursuant to the first paragraph of Article 53 of that statute, the right to intervene in cases before the Court is open not only to the Member States and the institutions of the Community but also to any person establishing an interest in the result of the case.

17 It should be noted, first, that the applicant to intervene is an unincorporated association of in-house lawyers employed by leading companies established in Europe which has no legal personality.

18 Although bodies which have no legal personality may be granted leave to intervene, they must nevertheless satisfy the basic requirements for such personality, in particular the ability, however restricted, to undertake autonomous action and to assume liability (order of 11 December 1973 in Joined Cases 41/73, 43/73 to 48/73, 50/73, 111/73, 113/73 and 114/73 *Générale sucrière and Others* v *Commission* [1973] ECR 1465, paragraph 3). The Court notes that the applicant to intervene was constituted by a simple informal decision of its founders, that it has no statutes and that it is merely a forum for exchanging information and practical experiences and for discussing matters of interest to its members.

19 Accordingly, it must be concluded that the applicant to intervene does not satisfy the minimum requirements for basic legal personality of legal persons as established in the order in *Générale sucrière*, cited above.

20 In any event, the applicant to intervene has 25 members representing the same number of companies. The function of each member of the applicant to intervene is to give advice on European competition law and on other legal matters to the company employing him.

21 It is settled case-law that representative associations the object of which is to protect their members in cases raising questions of principle liable to affect those members may be granted leave to intervene (orders of the President of the Court of Justice of 17 June 1997 in Joined Cases C-151/97 P(I) and C-157/97 P(I) *National Power and PowerGen* [1997] ECR I-3491, paragraph 66, and of 28 September 1998 in Case

C-151/98 P *Pharos* v *Commission* [1998] ECR I-5441, paragraph 6; orders of the President of the Court of First Instance of 22 March 1999 in Case T-13/99 R *Pfizer* v *Council*, not published in the ECR, paragraph 15, and of 28 May 2001 in Case T-53/01 R *Poste Italiane* v *Commission* [2001] ECR II-1479, paragraph 51). More specifically, an association may be allowed to intervene if it represents an appreciable number of undertakings active in the sector concerned, its objects include that of protecting its members' interests, the case may raise questions of principle affecting the functioning of the sector concerned and the interests of its members may therefore be affected to an appreciable extent by the forthcoming judgment (see, to that effect, order of the Court of 8 December 1993 dismissing the application for leave to intervene submitted by Yves Saint Laurent Parfums SA in Case T-87/92 *Kruidvat* v *Commission* [1993] ECR II-1375, paragraph 14).

22 The Court does not consider the applicant to intervene to be a representative association the object of which is to protect the interests of in-house lawyers within the meaning of the case-law cited above. Given that the applicant to intervene has only 25 members, it cannot be regarded as representing a sufficiently large number of professionals active in the sector concerned. Similarly, since the applicant to intervene has no statutes, it is impossible to establish whether its object is indeed to ensure that its members' interests are protected.

23 With respect to the possibility that the members of the applicant to intervene might have an individual interest, it is sufficient to point out that the contested decision does not affect the members directly since it does not directly concern the companies represented within the applicant to intervene. That applicant's members therefore cannot have a direct and existing interest in the ruling on the specific measure the annulment of which is sought in the present case but rather have a simple interest in the pleas raised (see, to that effect, the order in *National Power and PowerGen*, cited above, paragraph 53).

24 In the light of the foregoing, it must be concluded that the applicant to intervene has failed to establish an interest in the result of the case within the meaning of the second paragraph of Article 40 of the Statute of the Court of Justice.

25 The application for leave to intervene is therefore dismissed.

Costs

26 Under Article 87(1) of the Rules of Procedure, the decision as to costs is to be given in the final judgment or in the order which closes proceedings. Since the present order closes the proceedings with respect to the applicant to intervene, it is appropriate to give a decision on the costs relating to its application for leave to intervene.

27 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant to intervene has been unsuccessful, it must be ordered to bear its own costs and, in accordance with the form of order sought by the Commission, to pay those incurred by the Commission in connection with the present intervention proceedings. Since neither the applicants nor the interveners applied for costs in their pleadings, they must bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby orders:

1. **The application for leave to intervene lodged by the European Council on Legal Affairs is dismissed.**

2. **There is no need to rule on the application lodged by the applicants for confidential treatment vis-à-vis the European Council on Legal Affairs.**

3. **The European Council on Legal Affairs shall pay the costs incurred by the Commission in connection with the intervention proceedings and bear its own costs.**

4. **The applicants and the interveners shall bear their own costs relating to the intervention proceedings.**

Luxembourg, 28 May 2004.

H. Jung

Registrar

P. Lindh

President