OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 29 April 2010 [1](1)

Case C-550/07 P

Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd
v
European Commission

(Appeal – Competition – Administrative procedure – Commission's powers of investigation – Documents copied in the course of an investigation and later placed on the file – Protection of confidentiality of communications between lawyers and their clients ('legal professional privilege') – Internal group correspondence with an in-house lawyer – In-house lawyer admitted to a Bar or Law Society – Article 14 of Regulation (EEC) No 17 – Regulation (EC) No 1/2003)

I – Introduction

1. Does the protection of communications between lawyers and their clients ('legal professional privilege'), (2) guaranteed as a fundamental right under the law of the European Union, also extend to internal exchanges of opinions and information between the management of an undertaking and an 'enrolled in-house lawyer' employed by that undertaking? (3) That, in essence, is the question which the Court has been asked to resolve in this appeal. (4) It has a practical significance for the future application and implementation of European competition law which cannot be underestimated and has lost none of its relevance even after the modernisation of the law governing antitrust proceedings carried out by Council Regulation (EC) No 1/2003. (5)

2. The background to this case is formed by a search (an 'investigation' or 'inspection') conducted by the European Commission, as competition authority, in February 2003 at the business premises of Akzo Nobel Chemicals Ltd (Akzo) and Akcros Chemicals Ltd (Akcros) in the United Kingdom. (6) In the course of that search, the Commission officials took photocopies of certain documents which the representatives of Akzo and Akcros regarded as being exempt from seizure because, in their view, they were covered by legal professional privilege.

3. This gave rise to a legal dispute between the two companies concerned and the Commission. Akzo and Akcros brought proceedings before the Court of First Instance (now: 'the General Court') against, on the one hand, the Commission's decision ordering the

investigation and, on the other hand, the Commission's decision to place a number of disputed documents on the file. By judgment of 17 September 2007 (7) ('the judgment under appeal'), the General Court dismissed the first action as inadmissible and the second action as unfounded.

4. This appeal is concerned exclusively with the question whether the General Court was justified in dismissing the second action as unfounded. At this stage of the proceedings, only two of the disputed documents remain of interest. These are printouts of emails between the general manager of Akcros and an employee of Akzo's in-house legal department who was also a member of the Netherlands Bar.

II – Legal context

5. The legal context of this case is defined by Regulation No 17, (8) Article 14 of which reads as follows:

'(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 or 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 …

…'

6. Regulation No 1/2003, which modernised the European law on antitrust proceedings and replaced Regulation No 17, is not applicable to this case, since the material facts took place before 1 May 2004. (9)

III – Background to the dispute

A – *The investigations conducted by the Commission and their administrative consequences*

7. As the General Court's findings of fact show, (10) the background to this dispute is an investigation conducted by the European Commission in its capacity as competition authority. In early 2003, the Commission, by a decision (11) under Article 14(3) of Regulation No 17, ordered an investigation to be carried out at the premises of Akzo and Akcros as well as at their subsidiaries in order to safeguard evidence of possible anti-competitive practices ('the decision ordering the investigation'). The companies concerned were required by that decision to submit to those investigations.

8. On the basis of the decision ordering the investigation, on 12 and 13 February 2003, Commission officials, assisted by representatives of the Office of Fair Trading (OFT), (12) carried out an investigation at the premises of Akzo and Akcros in Eccles, Manchester (United Kingdom). (13) During the investigation, the Commission officials took photocopies of a considerable number of documents.

9. In the course of those operations, the representatives of Akzo and Akcros informed the Commission officials that certain documents were likely to be covered by the protection of confidentiality of communications between lawyers and their clients. The Commission officials replied 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 representatives of Akzo and Akcros 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 Akzo and Akcros at her side.

10. During the examination of the documents in question, a dispute arose in relation to various documents which the General Court – on the basis of the submissions advanced by Akzo and Akcros – classified into two categories of documents ('Set A' and 'Set B').

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

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

13. *Set B* likewise comprises several documents. These are, on the one hand, a number of handwritten notes made by Akcros' general manager, which are said by the appellants to have been written during discussions with employees and used for the purpose of preparing the typewritten memorandum in Set A and, on the other hand, two emails 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 the Akzo group's legal department and was therefore employed by that group on a permanent basis.

14. After examining the documents in Set B and obtaining the observations of Akzo and Akcros, 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.

15. On 17 February 2003, Akzo and Akcros sent the Commission a letter setting out the reasons why, in their view, the documents in Set A and Set B were protected by legal professional privilege. By letter of 1 April 2003, the Commission informed the undertakings concerned that the arguments put forward by them in their letter of 17 February 2003 were insufficient to show that the documents in question were covered by legal professional

privilege. However, the Commission gave them the opportunity to submit observations on those provisional conclusions within two weeks, after which it would adopt a final decision.

16. By decision of 8 May 2003, (14) the Commission refused to recognise the claim of Akzo and Akcros to legal professional privilege in respect of the documents in dispute ('the rejection decision'). In Article 1 of that decision, the Commission rejects the request by Akzo and Akcros that the documents in Set A and Set B be returned and that the Commission confirm that all copies of those documents in its possession had been destroyed. In Article 2 of the rejection decision, the Commission announces its intention to open the sealed envelope containing the documents in Set A and to add them to file, although it points out that it will not undertake this before expiry of the time-limit for bringing an action against the decision.

B – *The court proceedings*

1. The proceedings at first instance

17. Akzo and Akcros together brought two actions for annulment before the General Court, one against the decision ordering the investigation (15) (Case T-125/03) and the other against the rejection decision (16) (Case T-253/03). In respect of both decisions, they also lodged an application for interim relief under Article 242 EC and Article 243 EC (now: Article 278 TFEU and Article 279 TFEU) (Joined Cases T-125/03 R and T-253/03 R).

18. On 8 September 2003, in connection with the proceedings for interim relief, the Commission complied with the request of the President of the General Court and sent the President, under confidential cover, a copy of the Set B documents and the sealed envelope containing the Set A documents.

19. On 30 October 2003, the President of the General Court dismissed the application for interim relief in Case T-125/03 R, (17) but granted in part the application for interim relief in Case T-253/03 R. Accordingly, the President suspended the operation of the rejection decision of 8 May 2003 in so far as, in that decision, the Commission had decided to open the sealed envelope containing the Set A documents; he also ordered those documents to be kept by the Registry of the General Court pending the Court's decision in the main action. Similarly, the President took formal note of the Commission's statement that it would not permit third parties access to the Set B documents until judgment was given in Case T-253/03.

20. On appeal by the Commission, the order of the President of the General Court of 30 October 2003 in the proceedings for interim relief was set aside by the President of the Court of Justice on 27 September 2004, (18) in so far as the former had suspended the operation of the rejection decision of 8 May 2003 and ordered the Set A documents to be kept by the Registry of the General Court. In addition, the President of the Court of Justice took formal note of the Commission's statement that it would not allow third parties to have access to the Set A documents until judgment was given in Case T-253/03.

21. The Registry of the General Court subsequently returned the sealed envelope containing the Set A documents to the Commission by letter of 15 October 2004.

22. In the main proceedings, the General Court gave the judgment under appeal on 17 September 2007. In that judgment, it dismissed the action for annulment brought by Akzo and Akcros against the decision ordering the investigation (Case T-125/03) as inadmissible and their action for annulment of the rejection decision (Case T-253/03) as unfounded.

2. The appeal proceedings against the judgment under appeal

23. By document of 30 November 2007, (19) Akzo and Akcros together lodged this appeal against the judgment of 17 September 2007. This appeal is concerned solely with the question whether or not the two emails exchanged between Mr S. and Akcros' general manager were covered by legal professional privilege. The appellants claim that the Court should:

– set aside the judgment under appeal in so far as it rejected the claim for legal professional privilege in respect of communications with Akzo Nobel's in-house lawyer;

– annul the Commission's rejection decision of 8 May 2003 in so far as it refuses to return the email correspondence with Akzo Nobel's in-house lawyer;

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

24. The Commission contends that the Court should:

– dismiss the appeal; and

– order the appellants to pay the costs.

25. Before the Court of Justice, the parties presented, first, written submissions and then, on 9 February 2010, oral argument on the appeal.

3. Other parties to the proceedings at first instance and new interveners

26. In the proceedings at first instance, the General Court granted leave to intervene in support of the forms of order sought by Akzo and Akcros in Joined Cases T-125/03 and T-253/03 to the following associations: (20) the Council of the Bars and Law Societies of the European Union (CCBE), the Algemene Raad van de Nederlandse Orde van Advocaten (General Council of the Netherlands Bar) (ARNOVA), the European Company Lawyers Association (ECLA), the American Corporate Counsel Association – European Chapter (ACCA) and the International Bar Association (IBA). Those associations are also taking part in these appeal proceedings as *other parties to the proceedings*, in support of Akzo and Akcros.

27. Furthermore, in accordance with the first paragraph of Article 40 of the Statute and Article 93(1) in conjunction with Article 123 of the Rules of Procedure of the Court, the President of the Court of Justice has granted leave to intervene in support of the forms of order sought by Akzo and Akcros on appeal to the following Member States: (21) Ireland, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland.

28. However, the President of the Court of Justice refused to grant leave to intervene in support of the forms of order sought by Akzo and Akcros on appeal to the following associations, on the ground that they have not established a legitimate interest in the result of the case (second paragraph of Article 40 of the Statute of the Court): (22) the Association of General Counsel and Company Secretaries of the FTSE 100 (GC 100), the Chamber of Commerce of the United States of America (CCUSA), the International Chamber of Commerce (ICC), the American Bar Association (ABA), the Law Society of England and Wales (LSEW) and the United States Council for International Business (USCIB).

29. At first instance, the General Court itself had refused to grant leave to intervene in support of the forms of order sought by Akzo and Akcros in Joined Cases T-125/03 and T-253/03 to two further associations: (23) the European Council on Legal Affairs and the Section on Business Law of the International Bar Association.

C – *The Commission's interim completion of the administrative procedure*

30. As the Commission informed the Court of Justice at the end of the written stage of the appeal proceedings, the administrative procedure of which the investigation carried out at the premises of Akzo and Akcros in 2003 formed part has now closed. By decision of 11 November 2009, the Commission, on the basis of Article 81 EC in conjunction with Articles 7 and 23(2) of Regulation No 1/2003, imposed fines totalling EUR 173 860 400 on 24 plastic additives producers. (24) The addressees of that decision included not only Akros Chemicals Ltd but also, among others, several companies of the Akzo Nobel group, although not Akzo Nobel Chemicals Ltd.

31. According to its unchallenged submission, the Commission did *not* rely on the two disputed emails in the abovementioned decision imposing fines of 11 November 2009.

IV – Legal assessment

32. In their appeal, Akzo and Akcros do not pursue all the issues which formed the subject-matter of the proceedings at first instance. On appeal, the legal debate is instead confined to only some of the documents in 'Set B', more specifically the two emails exchanged between Mr S. and Akcros' general manager, copies of which the Commission placed on the file following the investigation.

A – *Interest in bringing proceedings*

33. Before assessing the merits of the appeal, it is necessary to consider whether Akzo and Akcros are entitled to claim an interest in bringing these proceedings.

34. The requirement for an interest in bringing proceedings ensures at a procedural level that the courts are not asked to give expert opinions on purely hypothetical questions of law. Accordingly, the existence of an interest is a mandatory condition of admissibility which must be examined by the Court of its own motion and which may be relevant at various stages of the proceedings. Thus, there is no doubt that an interest must exist at the time when an action or an appeal is first brought; however, it must also continue to exist beyond that time and up to the Court's decision in the case. (25)

35. For a person to have an interest in bringing appeal proceedings the appeal must be likely, if successful, to procure an advantage for that party. (26)

36. The Commission doubts that such an interest exists in this case, for two reasons. First, the two emails to which the dispute is now confined are automatically excluded from the scope of legal professional privilege because they were not drafted in connection with the exercise of the rights of defence. Second, in the main proceedings, the Commission has since issued the decision imposing fines of 11 November 2009, in which it did not rely on those two emails; consequently, the interest of Akzo and Akcros in bringing proceedings has by now ceased to exist, if it had not done so already.

37. Neither of the Commission's two objections is valid.

38. With regard to the first argument, the question whether the General Court was justified in denying the claim for legal professional privilege in respect of the two documents concerned is not an issue of admissibility; it goes to the merits of the appeal. The appellants would have no interest in bringing proceedings only if it were *manifest* that the content of the two emails exchanged between Mr S. and Akcros' general manager indisputably did not fall in any respect within the scope of legal professional privilege. However, the judgment under appeal does not contain any findings of fact in relation to the content of those emails or the context in which they were sent because those factors were not relevant to the adjudication given by the General Court. Accordingly, the existence of an interest in bringing proceedings cannot automatically be ruled out in this appeal. At this stage of the proceedings, any more detailed examination of the content and context of the emails in question would inevitably raise issues of both admissibility and substance and would also be inappropriate for reasons of procedural economy.

39. The second argument advanced by the Commission, to the effect that the appellants' interest in pursuing these appeal proceedings ceased to exist when the decision imposing fines of 11 November 2009 was given, is equally inconclusive.

40. Thus, in response to a question put at the hearing, the Commission was forced to concede that one of the two appellants in these proceedings, namely Akzo Nobel Chemicals Ltd, was not an addressee of the decision imposing fines of 11 November 2009 in the first place. Consequently, *that* company's interest in bringing proceedings could certainly not be called into question by the abovementioned decision imposing fines. This fact alone is sufficient to support the conclusion that there is no further need to consider whether Akros Chemicals Ltd, the second appellant, has an interest in bringing proceedings either since this is a joint appeal. (27)

41. In any event, the interest of the undertakings concerned in bringing proceedings against investigative measures cannot be made dependent on whether or not the Commission relied on a document which may be covered by legal professional privilege in a subsequent decision imposing fines. Any breach of legal professional privilege during an investigation represents a serious interference with a fundamental right which is committed not when the Commission actually relies on a document exempt from seizure in a substantive decision but as soon as a Commission official removes a document or takes a copy of it. By extension, therefore, such interference with a fundamental right is not remedied or 'made good' by the fact that the Commission does not in the end adduce the document in question as evidence. The interference continues in being at least for as long as the Commission has the document or a copy of it in its possession. The undertaking concerned retains its interest in bringing legal proceedings against that measure for the same length of time. (28)

42. Reference must be made in this connection to the principle of effective judicial protection, which is recognised in settled case-law as a general principle of European Union law ('EU law') (29) and stems from the constitutional traditions common to the Member States as well as from Articles 6 and 13 of the ECHR. (30) This principle has now also found its way into the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union; (31) the Charter has been legally binding since the entry into force of the Treaty of Lisbon (Article 6(1) TEU), and is therefore, at the present stage of these proceedings, the criterion for assessing whether the appellants currently still have an interest in bringing proceedings.

43. Undertakings in whose premises the Commission conducts an investigation must be given the opportunity to seek a comprehensive and effective judicial review of the legality of

both the decision ordering that investigation and the individual steps taken during the investigation.

44. Commission officials regularly remove many documents (or copies of them) in the course of investigations. It is in the nature of such investigations that documents which at first sight appear to be relevant prove not to be admissible as evidence on closer examination. Similarly, antitrust proceedings initially brought against certain undertakings may be discontinued for lack of evidence after the findings of an investigation have been evaluated. An 'area devoid of legal protection' would be created if, in such circumstances, the undertakings concerned were denied access to the Courts of the European Union for the purpose of challenging the legality of an investigation, or individual measures connected with an investigation, conducted by Commission officials.

45. The appellants therefore continue to have an interest in pursuing the proceedings. Their appeal is admissible.

B – *Substantive analysis of the appeal*

46. The appeal lodged by Akzo and Akcros is based on three pleas in law which are directed against paragraphs 165 to 185 of the judgment under appeal. The appellants claim, in essence, that the General Court was wrong to refuse their claim for legal professional privilege in respect of internal correspondence with the Akzo group's enrolled in-house lawyer.

47. In EU law, the protection of legal professional privilege has the status of a general legal principle in the nature of a fundamental right. This follows, on the one hand, from the principles common to the legal systems of the Member States: (32) legal professional privilege is currently recognised in all 27 Member States of the European Union, in some of which its protection is enshrined in case-law alone, (33) but in most of which it is provided for at least by statute if not by the constitution itself. (34) On the other hand, the protection of legal professional privilege also derives from Article 8(1) of the ECHR (protection of correspondence) in conjunction with Article 6(1) and (3)(c) of the ECHR (35) (right to a fair trial) as well as from Article 7 of the Charter of Fundamental Rights of the European Union (36) (respect for communications) in conjunction with Article 47(1), the second sentence of Article 47(2) and Article 48(2) of that Charter (right to be advised, defended and represented, respect for rights of the defence).

48. Legal professional privilege serves to protect communications between a client and a lawyer who is independent of that client. On the one hand, it is the essential corollary to the client's rights of defence (37) and, on the other hand, it is based on the specific role of the lawyer as 'collaborating in the interests of justice' (38) and as being required to provide, in full independence, and in the overriding interests of justice, such legal assistance as the client needs. (39)

49. Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 6 of the ECHR and by Articles 47 and 48 of the Charter of Fundamental Rights, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations. (40)

50. Neither side in these proceedings is seriously calling into question the existence of legal professional privilege as such. However, the scope of the protection afforded by legal professional privilege is fiercely disputed. More specifically, the issue is whether and, if so, to

what extent internal company or group communications with enrolled in-house lawyers are covered by the protective scope of legal professional privilege. It is the answer to this question which will ultimately determine the extent of the Commission's powers of investigation in antitrust proceedings under Article 14 of Regulation No 17 (for future cases: Articles 20 and 21 of Regulation No 1/2003). (41)

1. The scope of legal professional privilege and the alleged infringement of the principle of equality (first plea in law)

51. The appellants rely primarily on their first plea in law. In that plea, Akzo and Akcros accuse the General Court of having misinterpreted the principle of legal professional privilege as defined by the Court of Justice in *AM & S*, (42) and of having thereby infringed the principle of equality.

(a) The scope of legal professional privilege in accordance with *AM & S* (first part of the first plea in law)

52. In the first part of the first plea in law, (43) Akzo and Akcros, supported by several other parties to the proceedings, submit that the General Court erred in adopting a purely 'literal' interpretation of the judgment of the Court of Justice in *AM & S* instead of interpreting and applying it in accordance with its spirit and purpose. The appellants take the view that, on a 'teleological interpretation' of *AM & S*, the Court would have had to conclude that the disputed email exchange with Akzo's enrolled in-house lawyer, Mr S., was covered by legal professional privilege.

53. First of all, the United Kingdom is right to point out that the Court's judgment in *AM & S* is not a statute. This immediately casts doubt on whether the appellants' reference to methods of interpretation such as the literal and purposive approaches has any bearing here. Ultimately, however, this issue can be left unresolved. What Akzo and Akcros actually contend is that the General Court misconstrued the scope of legal professional privilege as established in *AM & S*. I shall examine that contention below.

54. In *AM & S*, the Court recognised that 'the confidentiality of written communications between lawyer and client' must also be protected at Community level (now, at European Union level). For the purposes of reliance on that protection, the Court identified two cumulative conditions ('criteria') which it had drawn from a combination of the laws of all the Member States at that time: (44)

– First, the communication with the lawyer must have a connection with the exercise of the client's rights of defence: it must be a 'communication' made 'for the purposes and in the interests of the client's rights of defence' (*connection with the rights of defence*).

– Second, it must be a communication with an independent lawyer, that is to say with a lawyer who is 'not bound to the client by a relationship of employment' (*independence of the lawyer*).

55. The parties to the proceedings all share the view that, at its current stage, the dispute between them is now concerned only with the second of these criteria, that is to say the independence of the lawyer with whom communications were exchanged. (45) There is, however, a fierce dispute between them as to how that criterion of independence is to be understood. At the hearing in particular, each side accused the other of adopting an excessively

formalistic approach and of losing sight of the principles underlying the criterion of independence.

56. Unlike the Commission, the appellants, the parties intervening in support of them and the other parties to the proceedings take the view that the criterion of the independence of the lawyer concerned must not be interpreted *negatively* so as to exclude enrolled in-house lawyers but *positively*, by reference to the professional and ethical obligations to which lawyers admitted to a Bar or Law Society are generally subject. (46) They submit that because of the professional ethical obligations applicable to him an in-house lawyer who is also a member of a Bar or Law Society automatically enjoys the same independence as an external lawyer who pursues his profession on a self-employed basis or as an employee of a law firm. The guarantees as to the independence of an *advocaat in dienstbetrekking* under Netherlands law (47) (also referred to as a '*Cohen advocaat*' (48)) which were applicable to Mr S. in this case are in fact particularly extensive.

57. I do not find this line of argument convincing.

58. In *AM & S*, the requirement of independence is unequivocally linked to the fact that the lawyer in question must *not be in a relationship of employment* with his client. The explicit reference to this fact at two points in the grounds of the judgment (49) would have been redundant if the Court had intended that the formal act of admission to a Bar or Law Society and the professional ethical obligations associated with such admission would alone be sufficient to guarantee the independence of an in-house lawyer.

59. In *AM & S*, the Court therefore deliberately interpreted legal professional privilege as meaning that the protection which it affords does not extend to internal company or group communications with enrolled in-house lawyers. This becomes particularly apparent when the judgment is compared with the Opinion of Advocate General Sir Gordon Slynn. The Advocate General referred to the detailed discussion of the position of in-house lawyers which had taken place in that case and pronounced himself resolutely in favour of the proposition that legal professional privilege should also be granted to lawyers who are 'professionally qualified and subject to professional discipline' and are 'employed full time ... in the legal departments of private undertakings'. (50) The Court did not concur with that view in its judgment in *AM & S*.

60. In the judgment in *AM & S*, the concept of the independence of lawyers is instead determined *not only positively* – by reference to professional ethical obligations (51) – *but also negatively* – by reference to the absence of an employment relationship. (52) (53) It is only where an in-house lawyer is subject, as a member of a Bar or Law Society, to the professional ethical obligations commonly applicable in the European Union *and*, furthermore, is not in an employment relationship with his client that communications between the two are protected by legal professional privilege under EU law.

61. The reasoning behind this is that an enrolled in-house lawyer, despite his membership of a Bar or Law Society and the professional ethical obligations associated with such membership, 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 clients. Consequently, an enrolled in-house lawyer is less able to deal effectively with any conflicts of interest between his professional obligations and the aims and wishes of his client than an external lawyer.

62. Militating against the proposition that an enrolled in-house lawyer is sufficiently independent is, first, the fact that, as an employee, such a lawyer is often required to follow work-related instructions issued by his employer and is in any event part and parcel of the

structures of the company or group by which he is employed. In the words of the General Court, an enrolled in-house lawyer is 'structurally, hierarchically and functionally' (54) dependent on his employer, whereas this is not true of an external lawyer in relation to his clients.

63. The appellants and some of the other parties to the proceedings raise the objection that, under Netherlands law, an *advocaat in dienstbetrekking* such as Mr S. is expressly exempt from the instructions of his employer in the context of the provision of legal advice. Indeed, the undertaking and its enrolled in-house lawyers conclude a separate agreement to that effect (55) which is regulated by the Netherlands Bar Association. Differences of opinion relating to the nature and substance of legal advice provided by an enrolled in-house lawyer do not entitle the employer to take disciplinary measures against the enrolled in-house lawyer and certainly not to terminate the employment relationship. Disputes may be referred either to the *Raad van Toezicht* (Supervisory Council) set up by the Bar Association to oversee professional ethics, or to the national courts.

64. There is no doubt that such schemes are exemplary. They strengthen the position of enrolled in-house lawyers within the undertaking in which they are employed. Nevertheless, they are not capable of guaranteeing that enrolled in-house lawyers enjoy a degree of independence equal to that of external lawyers. After all, extensive protection given in a document is not necessarily effective in practice. Thus, even if an undertaking has a contractual obligation not to issue instructions to its enrolled in-house lawyers on matters of substance, this does not guarantee that the relationship between an enrolled in-house lawyer and his employer will be genuinely free from direct or indirect pressure and influence in the course of day-to-day business. The question whether an enrolled in-house lawyer is in fact able to give independent legal advice is determined rather by the conduct and attitude adopted by his employer on each individual occasion.

65. That aside, it is doubtful whether it is really possible in practice to impose a penalty every time an employer intentionally or unintentionally calls into question the independence of one of its enrolled in-house lawyers. After all, the persons concerned are likely to be reluctant to allow every single dispute to be escalated and thus to keep calling into question the basis for the continuation of their working relationship. There is also a real danger that, in eagerness to show obedience to their employer, enrolled in-house lawyers will 'choose' to give legal advice the substance of which will be acceptable to that employer.

66. However, even if it were to be assumed, as the appellants do, that schemes such as those provided for under Netherlands law can be effective, this in no way alters the fact that enrolled in-house lawyers are for the most part *economically dependent* on their employer; this issue was the subject of heated debate between the parties to the proceedings both in the written procedure and also, and in particular, at the hearing. (56)

67. It is true that an external lawyer is also economically dependent to some extent on his clients. If a client is not satisfied with the legal advice or defence provided by his external lawyer, the client may withdraw the instruction or, as the case may be, refrain from engaging his services in the future. It should be noted in this regard that, unlike enrolled in-house lawyers and other corporate jurisconsults, external lawyers do not have any protection against dismissal. For lawyers who make their living largely from giving advice to and acting in legal proceedings on behalf of one or a small number of large clients, this may come to pose a serious threat to their independence.

68. However, for external lawyers, such a threat is and remains more of an exception and is not consistent with the typical role of a lawyer in private practice or of an independent law firm.

A self-employed lawyer usually works for a large number of clients, which, in the event of a conflict of interests between his professional ethics and the aims and wishes of a client, makes it easier for him, if necessary, to withdraw his services of his own accord in order to safeguard his independence.

69. In the case of an enrolled in-house lawyer, the situation is different. As an employed person, an enrolled in-house lawyer is typically – rather than only exceptionally – characterised by complete economic dependence on his employer, who alone provides him with most of his income in the form of a salary. In so far as the relevant national rules of professional ethics contain any provision at all allowing enrolled in-house lawyers to take on external instructions alongside their activities as employees of the undertaking for which they work, (57) such instructions will generally be of only minor financial significance to them and will in no way alter their economic dependence on their employer. The degree to which enrolled in-house lawyers are economically dependent on their employer is therefore usually far greater than the degree to which external lawyers are dependent on their clients. The fact, raised by a number of the parties to the proceedings, that enrolled in-house lawyers are protected against dismissal under employment law likewise does nothing to alter their economic dependence.

70. In addition to their economic dependence on their employer, enrolled in-house lawyers usually exhibit a considerably stronger *personal identification* with the undertaking for which they work, as well as with its corporate policy and corporate strategy than would be true of external lawyers in relation to the business activities of their clients.

71. Both their considerably greater economic dependence and their much stronger identification with the client – their employer – militate against the proposition that enrolled in-house lawyers should enjoy the protection afforded by legal professional privilege in respect of internal company or group communications. (58)

72. Consequently, the line of argument advanced to that effect by the appellants and the other parties supporting them must be rejected.

73. Some of the parties to the proceedings, in particular the Netherlands and ARNOVA, raise the objection that it is disproportionate to refuse to extend the protection afforded by legal professional privilege to internal company communications with enrolled in-house lawyers as a general principle. They argue that the Commission could take a 'more lenient approach', so to speak, by ascertaining on a case-by-case basis whether a given in-house lawyer satisfies the requirement of independence; to that end, they could contact the national authorities. The Netherlands and ARNOVA apparently assume that general information about the provisions governing the profession of lawyer in a particular Member State would itself be sufficient to make it possible to determine conclusively whether an in-house lawyer is independent.

74. This argument is also untenable, however. As I have already said, the question whether an enrolled in-house lawyer is able to give independent legal advice or is exposed to pressure and influence is determined definitively by the practice actually adopted by an undertaking in its day-to-day business. In this regard, an abstract assessment of the legal provisions governing the status of enrolled in-house lawyers in a particular Member State is not significant in itself since it sheds no light either on the reality of the working relationships within the undertaking in question or on the economic dependence of an enrolled in-house lawyer and the extent to which he identifies personally with his employer.

75. The first part of the first plea in law is therefore unfounded.

(b) The alleged infringement of the principle of equality (the second part of the first plea in law)

76. In the second part of the first plea in law, Akzo and Akcros, as well as most of the parties intervening in support of them at both instances, claim that the General Court infringed the principle of equality by treating in-house lawyers differently from external lawyers in relation to legal professional privilege. (59)

77. The principle of equal treatment and non-discrimination is a general legal principle of EU law (60) which has now also found expression in Articles 20 and 21 of the Charter of Fundamental Rights. The same principle is also laid down in Article 14 of the ECHR and in Protocol No 12 to the ECHR, to which some of the parties to the proceedings have made incidental reference. (61)

78. According to settled case-law, the general principle of equal treatment or non-discrimination 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. (62)

79. In this connection, the elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the provision which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account. (63)

80. As mentioned above, (64) legal professional privilege serves to protect communications between a client and a lawyer who is independent of that client. It is, on the one hand, the essential corollary to the client's rights of defence and, on the other hand, is based on the specific role of the lawyer in 'collaborating in the interests of justice' and as being required to provide, in full independence, and in the overriding interests of justice, such legal assistance as the client needs.

81. Contrary to the submission made by ECLA, employment as an in-house lawyer is a highly relevant factor in the assessment of a lawyer's independence. For, as discussed in detail above, (65) a salaried in-house lawyer – notwithstanding his membership, if any, of a Bar or Law Society and the professional ethical obligations associated with such membership – 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 clients. In most cases, enrolled in-house lawyers work exclusively, or in any event primarily, for a single 'client' – their employer – whereas a lawyer in private practice tends to have a much larger and evolving client base and to give legal advice to 'all those in need of it'. (66)

82. With regard to their respective degrees of independence when giving legal advice or providing representation in legal proceedings, there is therefore usually a significant difference between a lawyer in private practice or employed by a law firm, on the one hand, and an enrolled in-house lawyer, on the other. The fact that they are significantly less independent makes it more difficult for enrolled in-house lawyers to deal effectively with a conflict of interests between their professional obligations and the aims and wishes of their undertaking.

83. Contrary to the view taken by ARNOVA, that difference is not irrelevant solely because the national legislature – in this case, the Netherlands legislature – accorded the same treatment in law to external lawyers and enrolled in-house lawyers (*advocaten in dienstbetrekking*). 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 nothing to alter the economic dependence of an enrolled in-house lawyer and the far greater extent to which he identifies personally with his client, (67) who is also his employer. Consequently, irrespective of any legal equivalence, the fact remains that there is a significant difference between lawyers in private practice or employed in law firms and enrolled in-house lawyers in relation to their degree of independence.

84. It was on the basis of that very difference that the General Court concluded, without erring in law, that it is not appropriate to extend legal professional privilege to internal company or group communications with enrolled in-house lawyers. Consequently, it cannot be concluded that the principle of equal treatment has been infringed.

85. The second part of the first plea in law is therefore also unfounded.

(c) Interim conclusion

86. Since the first plea in law is unfounded in its entirety, consideration must now be given to the second plea in law, advanced in the alternative.

2. The alleged need to extend the scope of legal professional privilege (second plea in law)

87. By their second plea in law, Akzo and Akcros claim that, in its determination of the scope of legal professional privilege, the General Court failed to take account of significant developments in the 'legal landscape' which made it necessary to reconsider the case-law in *AM & S*, in order in particular to avert the risk of infringement of the rights of defence and the principle of legal certainty. They are supported in this submission by many of the interveners at first and second instance.

(a) The alleged changes 'in the legal landscape' (the first part of the second plea in law)

88. The changes in the 'legal landscape' referred to by the appellants relate, on the one hand, to the status of enrolled in-house lawyers in the legal systems of the Member States and, on the other hand, to the modernisation of the law governing antitrust proceedings carried out by Regulation No 1/2003.

(i) The status of enrolled in-house lawyers in the national legal systems

89. With regard, first, to the status under the national legal systems of corporate jurisconsults in general and enrolled in-house lawyers in particular, it is common ground between the parties to the proceedings that the relevant provisions in the now 27 Member States of the European Union vary greatly; in relation to legal professional privilege in particular, there is no discernible general trend towards treating enrolled in-house lawyers in the same way as lawyers in private practice. ECLA makes this point very succinctly when it says that 'there is no uniform answer to the question of privilege of in-house lawyers in all Member States'. (68) In the same vein, the appellants themselves refer to a 'lack of uniform tendency at national level'. (69)

90. The General Court concurs with that assessment. It holds that 'it is not possible ... to identify tendencies which are uniform or have clear majority support ... in the laws of the Member States'. On the basis inter alia of that finding, the General Court refuses to pave the way for an 'extension of the personal scope of protection of [legal professional privilege] beyond the limits laid down by the Court of Justice in *AM & S*'. (70)

91. The appellants and numerous other parties to the proceedings, on the other hand, take the view that even the changes in the laws of a small number of Member States towards an extension of legal professional privilege to enrolled in-house lawyers are reason enough to reverse the case-law in *AM & S* at European Union level. They are of the opinion that the General Court was wrong to make the development of that case-law contingent on a majority trend among the Member States.

92. In responding to this claim, it must be remembered first that the Court of Justice of the European Union – consisting of the Court of Justice, the General Court and specialised courts – is to ensure that in the interpretation and application of the Treaties the law is observed (Article 19(1) TEU (71)). At an early stage, the Court of Justice inferred from the character of the Community (now: the European Union) as a community governed by the rule of law that, within its jurisdiction, certain principles based on the rule of law must apply and fundamental rights must be protected, even if they have not, or not yet, been laid down in writing. (72)

93. Where the Court of Justice answers questions concerning the existence or non-existence of a general legal principle by reference to the laws of the Member States, it generally draws on the constitutional traditions (73) or legal principles common to the Member States. (74)

94. Such recourse to common constitutional traditions or legal principles is not necessarily subject to the precondition that the practice in question should constitute a tendency which is uniform or has clear majority support. It depends rather on an *evaluative comparison* of the legal systems which must take due account, in particular, not only of the aims and tasks of the European Union but also of the special nature of European integration and of EU law. (75)

95. Accordingly, it is by no means inconceivable that even a legal principle which is recognised or even firmly established in only a minority of national legal systems will be identified by the Courts of the European Union as forming part of EU law. This is the case in particular where, in view of the special characteristics of EU law, the aims and tasks of the Union and the activities of its institutions, such a legal principle is of particular significance, (76) or where it constitutes a growing trend.

96. Thus, only recently, the Court held the prohibition of discrimination on grounds of age to be a general principle of EU law, (77) even though, at that time, that prohibition did not appear to constitute a tendency which was uniform or had clear majority support in the national legal systems or even in the constitutional law of the Member States. (78) However, that principle was consistent with a specific task incumbent on the European Union in combating discrimination (Article 19 TFEU, formerly Article 13 EC) and had also been given specific expression by the Union legislature in the form of a directive; (79) moreover, it mirrored a more recent trend in the protection of fundamental rights at Union level, to which the European Parliament, the Council and the Commission had jointly given expression on the occasion of the solemn proclamation of the Charter of Fundamental Rights (see, in particular, Article 21 thereof), (80) the Heads of State and Government of the Member States having previously given their endorsement at the Biarritz European Council (October 2008).

97. The right of access to the file referred to by some of the parties to the proceedings at the hearing, as recognised by the Courts of the European Union in the context of antitrust proceedings conducted by the Commission in its capacity as competition authority, (81) may likewise not have been recognised in this form in all the Member States. This might have been because some Member States did not previously have competition authorities of their own and, in others, because the competition authorities appeared only as prosecutor in court proceedings. The Commission, on the other hand, is entrusted with both the investigation and the decision

concluding the proceedings; in administrative proceedings of this kind, the right of access to the file is an essential component of the rights of defence and, therefore, the expression of a basic procedural guarantee based on the rule of law. It was therefore logical that the Courts of the European Union should recognise the right of access to documents at European level.

98. With respect to the legal professional privilege at issue here, however, there are no comparable circumstances apparent which would support the proposition that EU law should be brought into line with the legal position in a minority of Member States. The extension of the protection afforded by legal professional privilege to internal company or group communications with enrolled in-house lawyers is not justified on grounds of any special characteristics exhibited by the tasks and activities of the European Commission as competition authority and it does not currently constitute a growing trend among the Member States, be it in the area of competition law or in any other field.

99. First, the tasks, powers and activities in general of the European Commission as competition authority are essentially no different in the context of antitrust proceedings from those of the Member States' competition authorities; more specifically, the Commission's search powers for the purposes of investigations are in fact even less extensive than those of many national authorities. (82) Consequently, if the vast majority of the Member States have no need to deny the competition authorities access to communications between an undertaking and its enrolled in-house lawyers, it is safe to assume that there is no compelling need to extend the scope of legal professional privilege at European Union level either.

100. Next, as far as the recent developments in the national legal systems are concerned, there is still no evidence of a clear – let alone growing – trend towards the protection of internal company and group communications with enrolled in-house lawyers.

101. Of the now 27 Member States of the European Union a significant number continue to prohibit in-house lawyers from becoming members of a Bar or Law Society at all; (83) in the vast majority of those Member States, this automatically means that internal company communications with in-house lawyers do not benefit from the protection afforded by legal professional privilege. (84)

102. In a number of other Member States, the legal position in relation to legal professional privilege for enrolled in-house lawyers cannot be considered sufficiently established, either because there are no specific legal provisions on the matter or there is as yet no settled case-law or administrative practice. (85) As a result, national legislation, administrative practice and case -law sometimes seem to draw on the solutions applied at European Union level rather than the other way round. (86)

103. Only in a small minority of the 27 Member States does the protection afforded by legal professional privilege currently apply also to internal company or group communications with in-house lawyers. This phenomenon is restricted to the common-law area (87) and to a small number of other Member States – inter alia the Netherlands – (88) but it is certainly not a more recent development which constitutes a growing trend among the Member States. The changes in the law at national level since *AM & S*, (89) geared towards extending legal professional privilege to certain in-house lawyers, likewise seem to me to be too isolated to be regarded as a clear trend.

104. Accordingly, I take the view that the legal position in the now 27 Member States of the European Union, even some 28 years after *AM & S*, has not developed in such a way as would require – today or in the foreseeable future – the case-law at European Union level to be

changed so as to recognise enrolled in-house lawyers as benefiting from legal professional privilege.

105. Furthermore, it should be noted that the European Union legislature has also recently signalled that it is more opposed to than in favour of the idea of treating lawyers in private practice and enrolled in-house lawyers in the same way in relation to legal professional privilege. Those signals were discussed at length with the parties to the proceedings at the hearing.

106. Thus, although, during the process of drawing up legislation to modernise European law governing antistrust proceedings (Regulation No 1/2003) and to revise the EC Merger Regulation (Regulation No 139/2004), members of the European Parliament tabled proposals aimed at extending legal professional privilege to in-house lawyers, (90) those proposals were ultimately not adopted by the legislature. (91)

107. Contrary to the view of ECLA, representations made in this way by the European Union legislature are not irrelevant solely because they are – at least in part – prompted by 'legislative policy considerations'. (92) On the contrary, it is precisely when called upon to develop EU law by recognising general legal principles that the Court cannot disregard the opinions of the European Union institutions motivated by legislative policy.

108. Moreover, contrary to the view taken by the appellants and some of the other parties to the proceedings, the two directives which seek to facilitate practice of the profession of lawyer contain nothing which would provide compelling support for the proposition that self-employed lawyers and enrolled in-house lawyers should be treated in the same way in relation to legal professional privilege.

109. It is true that Directive 98/5, (93) as Article 1(3) thereof makes clear, applies to both self-employed and salaried lawyers. Article 8 of that directive provides that a lawyer registered in a host Member State under his home-country professional title may practise as a salaried lawyer in the employ of another lawyer, an association or firm of lawyers, or a public or private enterprise to the extent that the host Member State so permits for lawyers registered under the professional title used in that State. However, that article makes clear only that a Member State whose legal system recognises enrolled in-house lawyers must not refuse to allow lawyers from other Member States to practise their profession in this way. It in no way implies that the Union legislature regards self-employed lawyers and enrolled in-house lawyers as enjoying the same degree of independence.

110. Furthermore, Directive 77/249 (94) had already contained a reference to 'lawyers who are in the salaried employment of a public or private undertaking'. Indeed, the Court made express reference to that directive in *AM & S*, but it did not infer from it that enrolled in-house lawyers also benefit from legal professional privilege. (95)

111. In short, neither of the two directives relating to the profession of lawyer militates in favour of extending legal professional privilege to enrolled in-house lawyers.

112. Finally, the provisions of EU law on the combating of money laundering and terrorist financing, which expressly recognise professional privilege for 'independent legal professionals', were discussed at the hearing before the Court of Justice. (96) Akzo interprets that provision as also covering enrolled in-house lawyers. Such an interpretation might at first sight be supported by the preamble to Directive 2005/60, which refers to 'legal professionals, as defined by the Member States'. (97) It is, however, contradicted by the recommendations of the

Financial Action Task Force ('FATF') cited by the Commission, (98) which are to be relied on for the purposes of interpreting that directive; those recommendations expressly exclude salaried in-house lawyers from the category of persons subject to their requirements. (99) It is true that these proceedings are not the appropriate forum in which to take a definitive view on the interpretation of Directive 2005/60. For our purposes here, however, it is sufficient to conclude that the provisions of EU law on money laundering and terrorist financing certainly cannot be construed as providing a clear signal in favour of the proposition that legal professional privilege should be extended to enrolled in-house lawyers.

113. For all these reasons, the line of argument advanced by the appellants and the other parties to the proceedings supporting them to the effect that there has been a shift in the 'legal landscape' in relation to the status of enrolled in-house lawyers must be rejected.

(ii) Modernisation of the law governing antitrust proceedings under Regulation No 1/2003

114. With reference to paragraphs 172 and 173 of the judgment under appeal, the appellants cite a further ground by way of justification for extending legal professional privilege to internal company or group communications with enrolled in-house lawyers. They submit that the modernisation of the law governing antitrust proceedings carried out by Regulation No 1/2003 leads to an increasing need for internal corporate legal advice, the role of which in preventing infringements of competition law cannot be underestimated. The legal advice given by enrolled in-house lawyers is particularly valuable in day-to-day business because it can be obtained more quickly and more economically and because it is based on an intimate knowledge of the undertaking concerned and its business. In addition, a number of parties to the proceedings have made reference to the growing importance of 'compliance programmes' within undertakings, which serve to ensure that the undertaking conducts itself in accordance with the law and the relevant rules and regulations.

115. In the view of many of the parties to the proceedings, the effective provision of internal corporate legal advice and a successful compliance programme are dependent on the possibility of free and faithful internal company or group communications with enrolled in-house lawyers. Otherwise, they submit, the company's management will be averse to disclosing sensitive information to an enrolled in-house lawyer and the enrolled in-house lawyer will be inclined to give advice orally rather than in writing, thus compromising the quality and usefulness of the legal advice in question.

116. It should be pointed out first of all in this regard that the changes made to the rules governing the scope of the Commission's powers of investigation as part of the modernisation of the law governing antitrust proceedings were not applicable to the search, at issue here, of Akzo's and Akros' business premises. The investigation started in early 2003 and did not therefore fall within the scope *ratione temporis* of Regulation No 1/2003, which entered into force on 1 May 2004 (see in this regard Article 45(2) of that regulation). Nevertheless, the argument based on the new law governing antitrust proceedings should not be dismissed solely on grounds of the scope *ratione temporis* of Regulation No 1/2003. After all, the volume of internal company or group legal advice may have increased just in the run-up to the introduction of the new system.

117. In substance, however, neither the increased importance of enrolled in-house lawyers nor the indisputable usefulness of their legal advice – including under the scheme of Regulation No 1/2003 at issue here – supports the proposition that internal company or group communications should be placed under the protection of legal professional privilege. Nor can

an extension of legal professional privilege to enrolled in-house lawyers be justified simply by reference to their in-depth knowledge of the undertaking concerned and its business.

118. On the contrary, the reference made by a number of parties to the proceedings to the enrolled in-house lawyer's closeness to his employer proves to be a double-edged sword. On the one hand, such closeness saves an enrolled in-house lawyer the job of having to spend an extensive amount of time familiarising himself afresh with the facts of a particular case each time his advice is sought and enables him to build up a basis of trust with his in-house interlocutors. On the other hand, it is precisely that special proximity to the undertaking concerned and its business which calls the independence of the enrolled in-house lawyer seriously into question. (100) He lacks the necessary distance from the client – his employer – that would characterise genuinely independent legal advice.

119. When an undertaking calls on the services of one of its enrolled in-house lawyers, it is not ultimately communicating with a neutral third party but with a person who is a member of its own staff, despite all the professional ethical obligations to which that person is subject by virtue of his membership of a Bar or Law Society. Such 'in-house' communications do not merit the protection afforded by legal professional privilege, no matter how often they are made, how highly significant they are or how useful they are to the undertaking.

120. Nor does the reference made by many of the parties to the proceedings to the compliance programmes operated by undertakings lead to a different conclusion. As the Commission has submitted without being contradicted, much of the internal corporate legal advice given under compliance programmes is general in nature and has no specific connection with the current or future exercise of the rights of defence. For this reason alone, therefore, communications exchanged between an undertaking and its enrolled in-house lawyer 'for compliance purposes' do not generally fulfil the first condition laid down in *AM & S.* (101) Consequently, the General Court was right to find that this kind of internal corporate legal advice is 'not directly relevant' to the issue of legal professional privilege. (102)

121. All things considered, therefore, a departure from the case-law in *AM & S* likewise cannot ultimately be justified by reference to the advantages and significance of internal corporate legal advice or to the procedural-law reform carried out by Regulation No 1/2003.

(b) The alleged infringement of the rights of defence and the principle of legal certainty (second part of the second plea in law)

122. The appellants and a number of the interveners supporting them at first and second instance submit that it is an infringement of the rights of defence to exclude internal company or group communications with an enrolled in-house lawyer. Such a practice, they submit, is also contrary to the principle of legal certainty.

(i) The principle of legal certainty in relation to the rights of defence

123. Akzo and Akcros base their claim in this regard on the rights of defence in conjunction with the principle of legal certainty. They refer to the fact that, in European competition law, Article 81 EC (now Article 101 TFEU) is often applicable in combination with corresponding provisions of national law (see in this regard Article 3 of Regulation No 1/2003). They submit that it is unacceptable that the protection of communications with enrolled in-house lawyers should depend on whether investigations are conducted by the Commission or by a national competition authority.

124. The principle of legal certainty is a fundamental principle of EU law. (103) This principle requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them. (104) In other words, individuals must know their rights and obligations precisely and be able to rely on them. (105)

125. Transposed to this context, the foregoing means that an undertaking whose premises are searched by a competition authority as part of an antitrust investigation must know for certain whether it can rely on legal professional privilege in respect of internal company or group communications with enrolled in-house lawyers.

126. The relevant EU law satisfies those requirements. As interpreted by the existing case-law in *AM & S*, (106) it provides that internal company or group communications with enrolled in-house lawyers do *not* fall within the scope of the protection afforded by legal professional privilege. There is no legal uncertainty in this regard.

127. With regard to the relationship between investigations conducted by the European Commission and investigations conducted at national level, Regulation No 17, like Regulation No 1/2003, is based on a clear delimitation of the respective competences of the competition authorities. A search is ordered and carried out either by the Commission or by a national competition authority. It is always clear from the decision ordering the investigation (investigation authorisation), which must be presented to the undertaking in writing, which authority has ordered the search (Article 14(2) and (3) of Regulation No 17 or Article 20(3) and (4) of Regulation No 1/2003).

128. If the Commission conducts an investigation, the rules governing that investigation are determined by EU law; if a national authority conducts an investigation, the rules governing that investigation are determined by national law (see expressly to this effect now Article 22(2) of Regulation No 1/2003 (107)). This also includes the corresponding rules on legal professional privilege.

129. It is true that officials from the national competition authority may assist the Commission in an investigation which it is conducting (Article 14(5) and (6) of Regulation No 17 or Article 20(5) and (6) of Regulation No 1/2003), just as, conversely, Commission officials may take part in investigations conducted by the national competition authorities by lending support to the latter (Article 13(2) of Regulation No 17 or the second subparagraph of Article 22(2) of Regulation No 1/2003). However, this does nothing to change the division of competences relating to the ordering and conduct of investigations or the legal provisions applicable, including the rules on legal professional privilege.

130. Consequently, the principle of legal certainty in relation to the rights of defence, in particular in relation to the rules of legal professional privilege applicable to a particular search, is satisfied.

131. The appellants raise the objection that it is unacceptable that the fate of the self-same internal company document should depend on whether it is a national competition authority or the Commission which attempts to take it away in the course of a search.

132. Although that objection expresses an entirely understandable concern, it is none the less untenable from a legal point of view.

133. Neither the principle of legal certainty nor the rights of defence require that EU law and national law should apply the same standards in their respective spheres of application and thus

ensure the same protection by way of legal professional privilege. The general legal principles of EU law and the protection afforded to fundamental rights at European Union level are applicable only within the scope of application of EU law. (108) Conversely, national legal principles and the protection of fundamental rights at national level may not extend beyond national spheres of competence.

134. It would certainly simplify the legal position if the procedural provisions applicable to searches conducted under competition law and the associated rules on legal professional privilege were harmonised throughout the European Union. As EU law currently stands, however, such total harmonisation does not exist. Whether it should be introduced is a question of legislative policy which it is for the European Union legislature alone to decide; the undertakings concerned certainly cannot bring about such harmonisation themselves by reference to the rights of defence and the principle of legal certainty. (109)

135. Finally, the appellants, supported *inter alia* by Ireland, submit that a legal professional privilege applicable at national level to internal company or group communications with enrolled in-house lawyers could be eroded through the system for the exchange of information between European competition authorities under Article 12 of Regulation No 1/2003.

136. As the Commission contends, without being contradicted in this regard, there was no exchange of information between the competition authorities in this case. The argument based on Article 12 of Regulation No 1/2003 is therefore nugatory.

137. The question of whether and, if so, to what extent Article 12 of Regulation No 1/2003 is even capable of giving rise to an exchange of documents and information which fall within the scope of legal professional privilege can therefore be left unanswered for the purposes of this appeal. At this point, I would merely note in passing that that provision – in particular its reference to 'confidential information' – is indeed open to an interpretation which, on the one hand, is compatible with fundamental rights and, on the other hand, for the purposes of sincere cooperation (Article 4(3) TEU), does not require any competition authority involved to do anything which would be at odds with the provisions applicable to it in respect of legal professional privilege. (110)

138. All things considered, the claim that the General Court infringed the principle of legal certainty in relation to the rights of defence is therefore unfounded.

(ii) The right to unimpeded advice, defence and representation

139. The alleged infringement of the rights of defence is also said to exist – in particular by Ireland, ACCA and ECLA – in the fact that it is less attractive for undertakings to seek legal advice from an enrolled in-house lawyer if internal company or group communications with that lawyer are not protected by legal professional privilege. These parties to the proceedings consider that this constitutes, in particular, an infringement of Article 6(3)(b) and (c) of the ECHR, according to which everyone charged with a criminal offence has the right to have adequate time and the facilities for the preparation of his defence and to defend himself in person or through legal assistance of his choosing. (111) Some of the parties to the proceedings also refer incidentally in this regard to Article 8 of the ECHR as well as to Articles 47 and 48 of the Charter of Fundamental Rights.

140. That submission does not hold water.

141. With regard first of all to the ECHR, the European Court of Human Rights does not as yet appear to have expressed support for the recognition of legal professional privilege in respect of internal company or group communications with enrolled in-house lawyers. On the contrary, the findings of the ECtHR in its judgment in *André and Otherv.France*, concerning the role of the lawyer as an organ of the administration of justice ('*auxiliaire de justice*') and as an intermediary between the courts and individuals subject to the law ('*intermédiaire*') point to an understanding of the independence of lawyers which is not dissimilar to that on which the Court of Justice of the European Union based its judgment in *AM &* S. (112)

142. In those circumstances, EU law as it currently stands does *not* afford a lower level of protection than the ECHR in restricting legal professional privilege to communications with external lawyers. Consequently, the requirement of consistency in the first sentence of Article 52(3) of the Charter of Fundamental Rights likewise does not necessitate an extension of the protection afforded by legal professional privilege under EU law to internal company or group communications with enrolled in-house lawyers.

143. It is true that, with respect to the protection of fundamental rights, the ECHR merely guarantees a minimum standard which EU law is at liberty to exceed at any time (the second sentence of Article 52(3) of the Charter of Fundamental Rights). Ireland has rightly referred to this fact. None the less, for the reasons that follow, it would not be appropriate to extend the scope of the protection afforded by legal professional privilege under EU law to internal company or group communications with enrolled in-house lawyers.

144. First of all, it is doubtful to begin with whether the second sentence of the second paragraph of Article 47 of the Charter of Fundamental Rights (in conjunction, where appropriate, with Article 48(2)) is even open to the interpretation that it guarantees for undertakings a right to be advised, defended and represented by their own salaried enrolled in-house lawyers.

145. However, even assuming that the right to be advised, defended and represented under the Charter of Fundamental Rights also extends to the consultation of a company's or a group's own enrolled in-house lawyers, this by no means rules out the possibility that certain objectively justified restrictions may apply when the services of enrolled in-house lawyers are used. After all, the degree of protection offered by a fundamental right may vary depending on the circumstances. (113)

146. For example, in-house lawyers are not always allowed to represent their own employer – that is to say the undertaking in whose legal department they work – in court. (114) Moreover, the fact that not all lawyers are permitted to appear before all national courts does not constitute an infringement of a fundamental right, (115) although it undoubtedly restricts the choice available to potential clients when searching for the most suitable counsel.

147. In the same vein, the extent of the protection afforded to communications between a client and his lawyer may vary depending on whether or not there is a relationship of employment between the two of them. This does not mean that communications between an undertaking and its enrolled in-house lawyers are entirely unprotected. Like any normal communication between private individuals, the former fall within the scope of the protection afforded to the *general* confidentiality of written correspondence and communications provided for in Article 7 of the Charter of Fundamental Rights (Article 8 of the ECHR). The dispute revolves around whether internal company or group communications with enrolled in-house lawyers also attract, in addition, the *special protection* against seizure provided by legal professional privilege for the

purpose of facilitating the exercise of the rights of defence and ensuring the proper administration of justice.

148. ECLA rightly submits in this regard that, in the light of their crucial importance, the fundamental rights at issue here must in principle be interpreted extensively. However, even on an extensive interpretation, the legal professional privilege inferred from those rights must not be extended beyond the scope of its actual spirit and purpose. Legal professional privilege not only serves to ensure the rights of defence of the client but is also an expression of the lawyer's status as an independent legal adviser and 'collaborat[or] in the administration of justice' who gives legal advice 'to all those who need it'. (116) Consequently, the freedom to engage in unimpeded and reliable communications with his client which legal professional privilege creates for a lawyer must be exercised by him in such a way as to ensure the proper administration of justice. In order to be able to avoid conflicts of interest between his professional obligations and the aims and wishes of his client, a lawyer must not enter into a relationship of dependence with his client. (117)

149. An enrolled in-house lawyer, however, is in just such a relationship of dependence. As I have already said, an enrolled in-house lawyer is not only part and parcel of the structures of the undertaking in whose legal department he works as an employee but is also more economically dependent on and identifies much more strongly with that undertaking than an external lawyer would. (118) There is therefore a structural danger that an enrolled in-house lawyer – even if, as is usually the case, he is himself of good character and has the best intentions – will encounter a conflict of interests between his professional obligations and the aims and wishes of his company.

150. The susceptibility of an enrolled in-house lawyer to conflicts of interest also makes it difficult for him to raise an effective opposition to any abuses of legal professional privilege. Such abuse may, for example, consist in handing over evidence and information to an undertaking's legal department, under cover of a request for legal advice, for the sole or primary purpose, ultimately, of preventing the competition authorities from gaining access to that evidence and information. At worst, the functional departments of an undertaking may be tempted to misuse the company's or group's internal legal department as a place for storing illegal documents such as cartel agreements and records of meetings between the parties to those cartels and of the modus operandi of a cartel.

151. In view of the specific conflicts of interest and risks of abuse which may arise within an undertaking or a group of undertakings, it seems appropriate to me *not* to extend the protection afforded by legal professional privilege to internal company or group communications with enrolled in-house lawyers. The same arguments which I articulated above in connection with the Charter of Fundamental Rights are also applicable, in my view, to the corresponding provisions of the ECHR.

152. By reference to the case-law of the ECtHR, Ireland submits that the confidentiality of the relationship between a client and his lawyer outweighs the mere possibility of abuse. (119) In this regard, however, Ireland overlooks the fact that the case-law which it cites relates to the conventional communications between a client and his external lawyer, in which the aforementioned risks of abuse specifically linked to internal company or group communications with enrolled in-house lawyers do not generally arise and there is as a rule no fear of conflicts of interest in any other regard either.

153. ECLA raises the objection that the independence of an enrolled in-house lawyer should not be assessed in the abstract by reference to his status as an employee but must be examined

specifically on a case-by-case basis, taking into account in particular his ethical obligations as a member of a Bar or Law Society. That argument must be dismissed for the reasons already given. (120) Ethical obligations alone are not sufficient to secure for enrolled in-house lawyers an independence comparable to that of self-employed lawyers, since they provide no information on the practices actually employed by an undertaking in its day-to-day business. Furthermore, ECLA disregards the fact that enrolled in-house lawyers are usually far more economically dependent on and identify personally much more strongly with their employer than a self-employed lawyer typically does in relation to his client. In the light of those fundamental differences, there are objective grounds for making a generalisation and drawing a distinction between enrolled in-house lawyers and external lawyers in relation to legal professional privilege.

154. The claim relating to infringement of the right to unimpeded advice, defence and representation is therefore unfounded.

(iii) Further fundamental rights

155. Certain parties to the proceedings, in particular Ireland and ECLA, claim that other fundamental rights have also been infringed, namely the fundamental right to property and the freedom to choose an occupation. (121) Ireland and ECLA submit that the freedom to choose an occupation is affected because the lack of legal professional privilege for internal company or group communications makes it difficult for an enrolled in-house lawyer to pursue his profession and puts him at a disadvantage in relation to self-employed lawyers. ECLA takes the view that the fundamental right to property is affected because the refusal to grant legal professional privilege to internal communications with enrolled in-house lawyers forces undertakings to seek external legal advice in certain circumstances and thus to incur considerable additional expenditure.

– Admissibility of the claims

156. In so far as Ireland, as intervener, submits that the freedom to choose an occupation has been infringed, that claim is inadmissible from the outset. It is settled case-law that an intervener is not prohibited from using arguments different from those used by the party it is supporting, provided that he thereby seeks to support the forms of order sought by that party. (122) It may not, however, raise submissions different from those of the party which it is supporting. (123) Since Akzo and Akcros, as appellants, have not made any claim as to infringement of the right to property and the right to choose an occupation, Ireland, as intervener, is precluded from claiming infringement of those fundamental rights in these appeal proceedings.

157. It is true that ECLA, as an intervener in the proceedings at first instance, and unlike Ireland, has the status of 'another party to the proceedings' in the appeal, and, as a result, is no longer subject to the specific restrictions applicable to interveners (Articles 115 and 116(1) of the Rules of Procedure). However, ECLA too must not, in its response, go beyond the subject-matter of the proceedings at first instance (Article 116(2) of the Rules of Procedure). As the infringement of the right to property and the right to choose an occupation alleged by ECLA was not introduced into the subject-matter of the proceedings at first instance either by Azko and Akros or by ECLA itself, the raising of these claims now, on appeal, is inadmissible. (124)

– Merits of the claims

158. The claims raised by Ireland and ECLA are unfounded in substance also.

159. With regard first of all to the *freedom to choose an occupation*, it cannot be assumed that the fact that legal professional privilege does not afford protection to internal company or group communications makes it excessively difficult or indeed impossible for enrolled in-house lawyers to pursue their occupation. First, as many parties to these appeal proceedings have submitted, the importance of internal company legal advice in the European Union has grown steadily in recent years, even though, in most Member States, in-house lawyers cannot rely on legal professional privilege. Secondly, the principal field of activity for in-house lawyers – including those who are members of a Bar or Law Society – is not advising and representing their employer in judicial and quasi-judicial proceedings but giving general legal advice without specific reference to the exercise of the rights of defence.

160. With regard next to the *right to property*, it is not clear how the law governing legal professional privilege at European Union level can have the effect of infringing that fundamental right. The refusal to grant legal professional privilege to internal company or group communications with enrolled in-house lawyers does not lead to the restriction or removal of proprietary rights by the organs of the European Union. If an undertaking decides to spend money on external legal advice, it does so of its own motion. It is true that the framework of legislation on legal professional privilege may have some bearing on that decision. However, the connection with the undertaking's proprietary interests is far too indirect and remote for it to be possible to speak of an interference with that fundamental right.

161. The claims relating to fundamental rights raised by Ireland and ECLA must therefore be dismissed as inadmissible *per se* and, in any event, as unfounded.

(c) Interim conclusion

162. Since, then, the second plea in law is also unfounded, the third plea in law, raised very much in the alternative, must be considered.

3. The principles of conferral and national procedural autonomy (third plea in law)

163. By their third plea in law, Akzo and Akros, supported by a number of interveners at first and second instance, argue that the Member States alone are competent to determine the precise scope of legal professional privilege. In this regard, they rely in particular on the national procedural autonomy of the Member States. They also rely on the competence of the Member States to lay down the rules governing the profession of lawyer as well as on the principle of conferral.

(a) The principle of the procedural autonomy of the Member States and the alleged *renvoi* of EU law to national law

164. It is submitted first of all that legal professional privilege falls within the scope of the rights of defence and is therefore part of procedural law. In the absence of any rules in this regard under EU law, it is left to the Member States, by virtue of their procedural autonomy, to determine the scope of legal professional privilege. To the same effect, other parties to the proceedings, in particular ECLA and CCBE, maintain that, with respect to legal professional privilege, EU law contains a *renvoi* to the national law governing the profession of lawyer. EU law does lay down the requirement that lawyers should be independent. However, it is left to the provisions of national law to define which lawyers in the Member State concerned are to be regarded as independent lawyers for the purposes of legal professional privilege.

165. That submission is not convincing.

166. Neither Article 14(1) to (3) of Regulation No 17 nor the general principle of the protection of legal professional privilege contains any form of *renvoi* to national law. It is true that, in *AM & S*, the Court refers to the legal systems of the Member States. It does so, however, with the declared aim of developing uniform standards across the European Union for the protection of legal professional privilege, despite all the differences between the national provisions on this matter. (125)

167. Indeed, the interpretation and application of legal professional privilege in a uniform manner across the European Union is essential for the purposes of investigations conducted by the Commission in antitrust proceedings.

168. The uniform application of EU law would be adversely affected if decisions on the lawfulness of acts adopted by the organs of the Union were made by reference to provisions or principles of national law; the lawfulness of such acts – in this case, the lawfulness of search measures carried out by the Commission as European competition authority – can be judged only in the light of EU law. (126) The introduction of special criteria stemming from the legislation or constitutional law of a particular Member State would damage the substantive unity and efficacy of EU law as well as of the internal market. (127)

169. Differences in the substance and scope of legal professional privilege depending on the Member State in which the Commission conducts an investigation would ultimately lead to a legal patchwork which would not be compatible with the principle of the internal market. The very purpose of making the Commission the supranational competition authority was to subject all undertakings in the European Union to uniform rules in the field of competition law and to create equal conditions of competition (a 'level playing field') for them in the internal market.

170. The fact that legal professional privilege under EU law is in the nature of a fundamental right also supports the proposition that its scope of application should be interpreted in a uniform manner. The fundamental rights applicable within the ambit of EU law must be substantively the same for all citizens of the European Union and for all undertakings affected by EU law. In antitrust proceedings, all undertakings in regard to which the Commission conducts an investigation must enjoy the same protection in relation to their fundamental rights under EU law irrespective of the place in which a search is carried out.

171. Contrary to the view of the CCBE, the determination of the substance and scope of legal professional privilege in proceedings under competition law cannot be left to the Member States in accordance with the principle of subsidiarity. For, on the one hand, the law governing antitrust proceedings (Regulation No 17 or Regulation No 1/2003) forms part of the competition rules necessary for the functioning of the internal market, the determination of which falls within the exclusive competence of the European Union (Article 3(1)(b) TFEU); the principle of subsidiarity is therefore not applicable in this field (Article 5(3) TEU). On the other hand, exercise of the rights conferred on an individual by the Treaty – in this case, reliance on legal professional privilege – must not be dependent on considerations of subsidiarity. (128)

172. 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 direct coercion (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 searches under antitrust legislation is determined exclusively in accordance with EU law.

173. All things considered, the argument advanced by the appellants and the parties to the proceedings intervening in their support to the effect that the substance and scope of legal professional privilege are dictated by national law must therefore be dismissed.

(b) The principle of conferral

174. The appellants and some of the parties intervening in their support, in particular ECLA, rely incidentally on the principle of conferral. They submit that the European Union does not have competence to determine which lawyers are to benefit from legal professional privilege in respect of communications with their clients.

175. Under the principle of conferral, the European Union is to act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein (first sentence of Article 5(2) in conjunction with the first sentence of Article 5(1) TEU, formerly Article 5(1) EC). (129) All competences not conferred upon the European Union in the Treaties remain with the Member States (Article 4(1) and the second sentence of Article 5 (2) TEU).

176. There is no foundation for the assertion that the European Union does not have competence to determine the scope of legal professional privilege in relation to investigations conducted by the Commission in antitrust proceedings.

177. Article 14 of Regulation No 17, which lays down the Commission's powers of investigation in antitrust proceedings, is based on Article 87 of the EEC Treaty (now Article 103 TFEU). (130) Indeed, as Article 3(1)(b) TFEU now makes clear, the competence of the European Union is exclusive in nature.

178. Legal professional privilege, which sets limits on the Commission's powers of investigation, (131) is itself based, as I have already said, on a general legal principle of EU law which is in the nature of a fundamental right. (132) The determination of its substance and its scope is one of the essential tasks of the Court of Justice of the European Union, which has jurisdiction to ensure that in the interpretation and application of the Treaties the law is observed (second sentence of Article 19(1) TEU).

179. The line of argument put forward by the appellants and a number of the parties supporting them to the effect that the European Union lacks competence must therefore be rejected.

180. ECLA, together with a number of other parties to the proceedings, submits incidentally that it would be an encroachment upon the competence of each Member State to regulate the profession of lawyer if EU law were not guided by the relevant national rules on the protection afforded by legal professional privilege to communications with in-house lawyers.

181. That objection does not hold water either. It is certainly indisputable that, as EU law currently stands, Member States are competent to regulate the exercise of the profession of lawyer. (133) In exercising that competence, however, they must, here as in other areas of law, (134) take into account the relevant provisions of EU law and respect the competences of the European Union. (135)

182. As I said earlier, it falls within the – exclusive – competence of the European Union to lay down the competition rules necessary for the functioning of the internal market and the substance and limits of the powers of investigation available to the Commission as European competition authority. The latter measures are not specifically in the nature of rules governing

the exercise of a profession, either by virtue of their subject-matter or by virtue of the objectives they pursue. They may at most have indirect effects on the activities of the undertakings concerned as well as on those of the lawyers instructed by them. However, such effects are only general and have an impact in the same way as numerous other rules applied by the European Union and the Member States in a wide variety of legal fields – tax law, criminal law, balance sheet law and public procurement law spring immediately to mind – may periodically affect the day-to-day business of undertakings and lawyers. This cannot be regarded as an encroachment upon the competence of each Member State to regulate the exercise of the profession of lawyer.

183. In short, the submissions advanced by a number of parties to the proceedings with respect to the division of competences are therefore unfounded.

(c) Further arguments

184. Finally, I shall turn to a further two arguments which have been raised against the judgment under appeal.

185. First of all, ECLA argues that EU law must not 'withdraw' or 'erode' the protection afforded by legal professional privilege to communications with in-house lawyers under national law.

186. It should be noted in this regard that national law may grant such protection only within its corresponding scope of application, that is to say, in particular, in relation to investigations conducted by national competition authorities in antitrust proceedings initiated by them. In the context of such national proceedings and search measures, any protection afforded by legal professional privilege is neither 'withdrawn' nor 'eroded' by EU law; on the contrary, it continues to apply without restriction. The case-law in *AM & S* applies only to competition proceedings and investigations conducted by the Commission; it does not affect the law governing national proceedings.

187. Generally speaking, it is inherent in multi-level structures such as the European Union that rules which are substantively different may exist at local, regional, national and supranational level, although their spheres of application will differ. As I have already said, harmonisation of the legal position at European Union level and at national level must remain a matter for the European Union legislature alone. (136)

188. Secondly, ACCA submits that EU law must extend the protection afforded by legal professional privilege even to communications with in-house lawyers who are members of a Bar or Law Society in a third country.

189. That claim must be rejected. Even if – contrary to the solution which I have proposed – legal professional privilege were to be extended to internal company or group communications with in-house lawyers who are members of a Bar or Law Society within the European Economic Area, the inclusion, in addition, of lawyers from third countries would not under any circumstances be justified.

190. For, unlike in the relationship between the Member States, in the relationship with third countries there is, generally speaking, no adequate basis for the mutual recognition of legal qualifications and professional ethical obligations to which lawyers are subject in the exercise of their profession. In many cases, it would not even be possible to ensure that the third country in question has a sufficiently established rule-of-law tradition which would enable lawyers to exercise their profession in the independent manner required and thus to perform their role as

collaborators in the administration of justice. It cannot be the task of the Commission or the Courts of the European Union to verify, at considerable expense, that this is the case on each occasion by reference to the rules and practices in force in the third country concerned, particularly since there is no guarantee that there will be an efficient system of administrative cooperation with the authorities of the third country on every occasion.

(d) Interim conclusion

191. The third plea in law is therefore also unfounded.

4. Summary

192. Since none of the pleas in law raised by Akzo and Akros is well founded and none of the arguments advanced by the interveners can be upheld, the appeal must be dismissed in its entirety.

193. If, however, the Court were to come to the conclusion that internal company or group communications with enrolled in-house lawyers are covered by legal professional privilege, it would have to set aside the judgment under appeal and then refer the case back to the General Court for further clarification of the facts (Article 61 of the Statute of the Court of Justice). It would then be necessary to establish whether, on the basis of their content and context, the two emails at issue served the exercise of the rights of defence.

V – Costs

194. If, as I propose in this case, the appeal is dismissed, the Court will make a decision as to costs (first paragraph of Article 122 of the Rules of Procedure) the details of which are set out in Article 69 in conjunction with Article 118 of the Rules of Procedure.

195. It follows from the first subparagraph of Article 69(2) in conjunction with Article 118 of the Rules of Procedure that the unsuccessful party is to be ordered to pay the costs if they have been applied for. The second subparagraph of Article 69(2) of the Rules of Procedure provides that, where there are several unsuccessful parties, the Court is to decide how the costs are to be shared. As the Commission has applied for costs and the appellants have been unsuccessful in their submissions, the latter must be ordered to bear the costs; they must pay these costs jointly and severally since they brought the appeal jointly. (137)

196. Ireland, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland, on the other hand, must each bear their own costs, in accordance with the first subparagraph of Article 69(4) of the Rules of Procedure.

197. Other parties to the proceedings who support an appeal by making submissions to the Court may also be ordered to bear their own costs, by analogous application of the third subparagraph of Article 69(4) of the Rules of Procedure. (138) As CCBE, ARNOVA, ECLA, ACCA and IBA have made submissions in support of the appeal brought by Akzo and Akros and those submissions have been unsuccessful, it seems appropriate – in derogation from what was said in point 195 – that they should each be ordered to pay their own costs.

VI – Conclusion

198. In the light of the foregoing considerations, I propose that the Court should rule as follows:

(1) The appeal is dismissed.

(2) Ireland, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland shall each bear their own costs.

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

(4) The remainder of the costs of the proceedings shall be borne jointly and severally by Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd.

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1 – Original language: German.

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2 – The term used in the language of the case.

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3 – I use the term 'enrolled in-house lawyer' here and hereafter to mean a lawyer who works as an employee in the legal department of a company or group of companies and who has also been admitted to a Bar or Law Society in accordance with the applicable provisions of national law.

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4 – This case has generated keen interest in the legal profession (see, *inter alia*, Gray, M., 'The Akzo Nobel Judgment of the Court of First Instance', *Irish Journal of European Law* 14 (2007), p. 229-242; Prieto, C., 'Pouvoirs de vérification de la Commission et protection de la confidentialité des communications entre avocats et clients', *La semaine juridique – édition générale* 2007, II-10201, p. 35-37; Cheynel, B., 'Heurs et malheurs du, "*legal privilege*" devant les juridictions communautaires', *Revue Lamy de la Concurrence – Droit, Économie, Régulation* 2008, No 14, p. 89-93; Mykolaitis, D., 'Developments of Legal Professional Privilege under the Akzo/Akcros Judgment', *International Trade Law and Regulation* 2008, p. 1-6; Weiß, W., 'Neues zum legal professional privilege', *Europarecht* 2008, p. 546-557). The anticipation of a final decision seems to have been so intense in certain quarters that legal commentators were writing on what they took to be a Court judgment as early as last year (Brüssow, R., 'Das Anwaltsprivileg des Syndikus im Wirtschaftsstrafverfahren', in: Arbeitsgemeinschaft Strafrecht des Deutschen Anwaltvereins [ed.], *Strafverteidigung im Rechtsstaat*, Baden-Baden 2009, p. 91-106; in this regard, see also Huff, M., 'Recht und Spiel', in: *Frankfurter Allgemeine Zeitung* No 183, 10 August 2009, p. 28).

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5 – Regulation 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).

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6 – 'The appellants'.

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7 – Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2007] ECR II-3523.

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8 – Council Regulation (EEC) No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959–1962, p. 87).

9 – On the replacement of Regulation No 17 by Regulation No 1/2003, see Article 43(1) in conjunction with Article 45 of Regulation No 1/2003.

10 – In this regard and in relation to the following points, see paragraphs 1 to 14 of the judgment under appeal.

11 – Commission Decision C (2003) 85/4 of 30 January 2003, as amended by Commission Decision C (2003) 559/4 of 10 February 2003.

12 – The UK competition authority.

13 – The investigation took place in the context of antitrust case COMP/38.589 concerning plastic additives, in particular heat stabilisers; for further information in this regard, see the statement published by the Commission on 14 February 2003 (MEMO/03/33).

14 – C(2003) 1533 final.

15 – See point 7 of this Opinion, above.

16 – See point 16 of this Opinion, above.

17 – Order of the President in Joined Cases T-125/03 R and T-253/03 R *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2003] ECR II-4771.

18 – Order of the President in Case C-7/04 P[R] *Commission* v *Akzo and Akcros* [2004] ECR I-8739.

19 – The original of the appeal, initially sent by fax, was lodged at the Registry of the Court of Justice on 8 December 2007.

20 – Orders of the President of the Fifth Chamber of the General Court of 4 November 2003 and of 10 March 2004, and of the President of the First Chamber of the General Court of 26 February 2007.

21 – Order of the President of 8 July 2008 in Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission and Others*.

22 – See the six orders of the President of 5 February 2009 in Case C-550/07 P *Akzo NobelChemicals and Akcros Chemicals* v *Commission and Others* and – in relation to the second application by the LSEW – the order of the President of 17 November 2009 in Case C-550/07 P Akzo *Nobel Chemicals and Akcros Chemicals* v *Commission and Others*.

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23 – Orders of the Court of First Instance (now: the General Court) (Fifth Chamber) of 28 May 2004.

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24 – Antitrust case COMP/38.589 – 'Heat stabilisers'; see in this regard the Commission's press release of 11 November 2009 (IP/09/1695).

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25 – With regard to the requirement of an interest in bringing appeal proceedings, see Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 13, and my Opinion in Case C-413/06 P *Bertelsmann & Sony* v *Impala* [2008] ECR I-4951, point 74.

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26 – *Rendo and Others* v *Commission* (cited in footnote 25, paragraph 13); Case C-174/99 P *Parliament* v *Richard* [2000] ECR I-6189, paragraph 33; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 21; Case C-277/01 P *Parliament* v *Samper* [2003] ECR I-3019, paragraph 28; Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-00000, paragraph 33; and Case C-519/07 P *Commission* v *Koninklijke Friesland Campina* [2009] ECR I-00000, paragraph 63.

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27 – See to this effect Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 30 and 31.

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28 – If Commission officials have taken note of the content of the document, the interference with a fundamental right may go on after the document has been returned or destroyed. In those circumstances, the interest in bringing proceedings likewise continues in being.

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29 – Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19; *Unión de Pequeños Agricultores* v *Council* (cited in footnote 26, paragraph 39); Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37; and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 335.

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30 – European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR', signed in Rome on 4 November 1950). The Court has consistently held that the ECHR has special significance in determining the standard of fundamental rights which the European Union must observe; see, *inter alia*, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 29, with further references); see also Article 6(3) TEU.

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31 – The Charter of Fundamental Rights of the European Union was solemnly proclaimed first in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) and then again in Strasbourg on 12 December 2007 (OJ 2007 C 303, p. 1).

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32 – See, for example, Case 155/79 *AM & S* v *Commission* [1982] ECR 1575, in particular paragraph 18. See also the Opinion of Advocate General Léger in Case C-309/99 *Wouters and Others* [2002] ECR I-1577, point 182; and the Opinion of Advocate General Poiares Maduro in *Ordre des barreaux francophones et germanophone and Others* (cited in footnote 30, point 39). In addition, see the order in Case T-30/89 *Hilti* v *Commission* [1990] ECR II-163, paragraphs 13 and 14.

33 – This is the case in the United Kingdom and Ireland, which operate 'common law' legal systems.

34 – Legal professional privilege is enshrined in constitutional law in particular in Bulgaria (Article 30(5) of the Bulgarian Constitution) and Spain (Article 24(2) of the Spanish Constitution); furthermore, legal professional privilege is also based on constitutional provisions in Italy, Portugal and Romania, among others, and on statutory provisions with the status of constitutional law in Sweden.

35 – It is true that the case-law of the European Court of Human Rights (ECtHR) usually refers only to Article 8 of the ECHR; in this regard, see, for example, *Campbell* v *the United Kingdom*, 25 March 1992, Series A No. 233; *Niemietz v.Germany*, 16 December 1992, Series A No. 251-B; *Foxleyv.the United Kingdom*, No. 33274/96, 20 September 2000; *Smirnovv.Russia*, No. 71362/01, 7 June 2007, ECHR 2007-VII; and *André and Otherv.France*, No. 18603/03, 24 July 2008. However, mention is sometimes also made of Article 6 of the ECHR (see, for example, *Niemietzv.Germany*, op. cit., § 37, and *Foxleyv.the United Kingdom*, op. cit., § 50).

36 – It is true that, at the time when the Commission decisions at issue were adopted, the Charter of Fundamental Rights did not yet produce binding legal effects comparable to primary law. However, as a material legal source, it shed light even then on the fundamental rights which are guaranteed by EU law (see, *inter alia*, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37; Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 38; and point 108 of my Opinion in the latter case.

37 – *AM & S* (cited in footnote 32, paragraphs 20 and 23); see to the same effect the judgment of the ECtHR in *André and Otherv.France* (cited in footnote 35, § 41).

38 – A lawyer is more commonly described in German legal terminology as '*Organ der Rechtspflege*' (organ of the administration of justice); however, in so far as is relevant here, there is no substantive difference between that term and the phrase 'collaborating in the interests of justice' used by the Court of Justice in *AM & S*.

39 – *AM & S* (cited in footnote 32, paragraphs 20, 23 and 24); similarly, the judgment of the ECtHR in *Niemietzv.Germany* (cited in footnote 35, § 37).

40 – *Ordre des barreaux francophones et germanophone and Others* (cited in footnote 30, paragraph 32).

41 – The Commission's powers of investigation in reviewing mergers of European companies under Article 13 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation, OJ 2004 L 24, p. 1) are similar to, and only slightly less extensive than, those under Article 20 of Regulation No 1/2003.

42 – Cited in footnote 32.

43 – I am referring to paragraphs 10 to 43 of the appeal here.

44 – *AM & S* (cited in footnote 32, paragraphs 21 and 22).

45 – In so far as the Commission calls into question the connection with the rights of defence in this case, it does so only in the context of the appellants' *interest in bringing proceedings*; see in this regard points 33 to 45 of this Opinion, above.

46 – Ireland goes further than this, in that it seems to want to extend the protection afforded by legal professional privilege even to in-house lawyers whose 'independence' is guaranteed by provisions of employment law alone (paragraph 12 of the statement in intervention).

47 – A Netherlands enrolled in-house lawyer.

48 – The term '*Cohen advocaat*' refers to the name of the president of a working group set up ahead of the reform of the Netherlands rules governing professional ethics.

49 – *AM & S* (cited in footnote 32, paragraphs 21 and 27).

50 – Opinion of Advocate General Sir Gordon Slynn in *AM & S* (cited in footnote 32, at p. 1655).

51 – *AM & S* (cited in footnote 32, paragraph 24).

52 – *AM & S* (cited in footnote 32, paragraphs 21 and 27).

53 – See also the Opinion of Advocate General Léger in *Wouters and Others* (cited in footnote 32, point 181): '[The independence of lawyers] must also be demonstrated vis-à-vis the client, who may not become his lawyer's employer.'

54 – Paragraph 168 of the judgment under appeal.

55 – Namely the *professioneel statuut voor de advocaat in dienstbetrekking* (rules of professional practice applicable to enrolled in-house lawyers).

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56 – The background to this discussion was the differing views of the parties on the 'incentive structure' for the activities of enrolled in-house lawyers and external lawyers.

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57 – This is the case in particular in Germany. In the Netherlands, too, according to information provided to the Court at the hearing, an *advocaat in dienstbetrekking* is permitted to work for external clients.

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58 – The situation is different only where an enrolled in-house lawyer, in addition to his work in the legal department of an undertaking or group of undertakings, also works for external clients unconnected with his employer. His communications with such external clients are protected by legal professional privilege because he is independent of them.

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59 – Paragraphs 44 to 48 of the appeal.

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60 – Case C-334/03 *Commission* v *Portugal* [2005] ECR I-8911, paragraph 24; and Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 57; see to similar effect, previously, Joined Cases 117/76 and 16/77 *Ruckdeschel and Others* [1977] ECR 1753, paragraph 7; Case 215/85 *Raiffeisen Hauptgenossenschaft* [1987] ECR 1279, paragraph 23; and Case C-85/97 *SFI* [1998] ECR I-7447, paragraph 30.

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61 – Protocol No 12 to the ECHR was opened for signature in Rome on 4 November 2000 and entered into force on 1 April 2005. It has not as yet been signed by all the Member States of the European Union and has been ratified by only a small number of them (Spain, Luxembourg, the Netherlands, Romania, Cyprus and Finland); see in this regard the status of ratifications published on the Council of Europe's website at <http:conventions.coe.int> (last visited on 21 February 2010). This low level of commitment moderates the significance of the protocol for the purposes of the resolution of this case.

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62 – 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; Case C-127/07 *Arcelor Atlantique et Lorraine and Others* ('*Arcelor*') [2008] ECR I-9895, paragraph 23; and Case C-558/07 *S.P.C.M and Others* [2009] ECR I-0000, paragraph 74.

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63 – See to this effect *Arcelor* (cited in footnote 62, paragraph 26).

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64 – See points 48 and 49 of this Opinion, above.

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65 – See the comments made on the first part of the first plea in law, in particular points 61 to 72 of this Opinion.

66 – *AM & S* (cited in footnote 32, paragraph 18).

67 – See once again in this regard the comments made on the first part of the first plea in law, in particular points 66 to 71 of this Opinion.

68 – Paragraph 52 of ECLA's response.

69 – Paragraph 52 of the Akzo and Akcros' appeal.

70 – Paragraph 170 in conjunction with paragraph 177 of the judgment under appeal.

71 – See to the same effect the first paragraph of Article 220 EC and Article 164 of the EEC Treaty.

72 – See for example – in relation to the withdrawal of administrative measures giving rise to individual rights – Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* v *Common Assembly of the ECSC* ('*Algera*') [1957] ECR 39, at p. 55, and – in relation to the protection of fundamental rights at European Union level – Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 4.

73 – See, for example, *Internationale Handelsgesellschaft* (cited in footnote 72, paragraph 4); Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 13; Case 44/79 *Hauer* [1979] ECR 3727, paragraph 15; Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 13; Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraphs 68 and 69; *Advocaten voor de Wereld* (cited in footnote 62, paragraph 45); and Case C-555/07 *Kücükdeveci* [2010] ECR I-0000, paragraph 20.

74 – See, for example, *Algera* (cited in footnote 72, at p. 56); *AM & S* (cited in footnote 32, paragraphs 18 to 21); and Joined Cases C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies* v *Council and Commission* ('*FIAMM*') [2008] ECR I-6513, paragraphs 170, 171 and 176.

75 – See to this effect, for example, *Internationale Handelsgesellschaft* (cited in footnote 72, paragraph 4) and the Opinions of Advocate General Roemer in Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, at p. 989, and of Advocate General Poiares Maduro in *FIAMM* (cited in footnote 74, points 55 and 56).

76 – See to this effect the Opinions of Advocate General Roemer in *Zuckerfabrik Schöppenstedt* v *Council* (cited in footnote 75, at p.1989) and of Advocate General Poiares Maduro in *FIAMM* (cited in footnote 74, points 55 and 56).

77 – Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 75, and *Kücükdeveci* (cited in footnote 73, paragraph 21).

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78 – The prohibition of age discrimination is enshrined in particular in Article 6 of the Finnish Constitution and – specifically in relation to employment – in Article 59(1) of the Portuguese Constitution.

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79 – Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303 p. 16); see in this regard *Kücükdeveci* (cited in footnote 73, paragraph 21).

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80 – Again, see expressly to this express effect now *Kücükdeveci* (cited in footnote 73, paragraph 22).

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81 – Fundamental in this regard are Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 54; Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 38; and Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraphs 29 and 30, the latter confirmed in Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865.

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82 – In particular, as was discussed at the hearing, the Commission has no power to use direct force under Article 14 of Regulation No 17 or Articles 20 and 21 of Regulation No 1/2003.

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83 – This is the case in particular in Bulgaria, the Czech Republic, Estonia, Greece, France, Italy, Cyprus, Luxembourg, Hungary, Austria, Romania, Slovenia, the Slovak Republic, Finland and Sweden. With specific regard to the legal position in Cyprus, it should also be noted that, while practising advocates may be members of an undertaking's board of directors, they may not work as employees or managing directors of that undertaking.

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84 – Although German law allows in-house lawyers to be members of a Bar or Law Society (Syndikusanwälte), it does not grant them legal professional privilege in respect of internal company communications with their employer. In-house lawyers in Greece, on the other hand, despite being unable to become members of a Bar or Law Society, appear in certain circumstances to enjoy a comparatively extensive professional privilege.

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85 – Denmark, Spain, Latvia, Lithuania, Malta and Romania fall into this category. Moreover, the legal position in Belgium is at present extremely unclear. It is true that specific legal provisions on the professional status of *juristes d'entreprise* (society of in-house lawyers), who are subject to particular professional ethical obligations if registered with the *Institut des juristes d'entreprise* (bar association for in-house lawyers) (IJE), have been in force since the year 2000. However, the professional privilege applicable to Belgian *juristes d'entreprise* appears – not least because Article 5 of the Law of 1 March 2000 makes no reference to Article 456 of the Belgian Code pénal (Criminal Code) – to be less extensive than that applicable to *avocats* (lawyers) and, furthermore, does not currently appear to be recognised by the Belgian competition authority (*Auditoriat du Conseil de la concurrence*) as covering internal company communications with in-house lawyers (see in this regard

Marchandise, P., and Sabbe, S., 'Akzo, "op zijn Belgisch": de renaissance van het surrealisme?', *TBM-RCB* 2009, p. 54; Cattaruzza, J., 'Reactie IBJ op het gewijzigd standpunt van het Auditoriaat inzake vertrouwelijkheid adviezen bedrijfsjurist', *TBM-RCB* 2008, p. 42); the matter awaits clarification by the Belgian courts.

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86 – This appears to be the case, for example, in Finland and Slovenia. In Belgium also, the position currently adopted by the competition authorities (see footnote 85 above) can ultimately be explained by their having drawn on the case-law of the courts of the Union, in particular the judgment, under appeal here, in Joined Cases T-125/03 and T-253/03.

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87 – This includes the United Kingdom and Ireland, but not Cyprus (see footnote 83 above); the legal position in Malta seems unclear. It must be noted incidentally that, in some non-Member States from the common-law area, in particular the United States of America, the protection afforded by legal professional privilege can also in certain circumstances be extended to in-house lawyers (see in this regard, fundamentally, the judgment of the US Supreme Court in *Upjohn* v *United States*, 449 U.S. 383 (1981); see also Walkowiak, V.S., 'Attorney-client privilege in civil litigation', American Bar Association, Illinois, 2008, p. 7). This does not, however, appear to be an unbroken trend in the common-law world; thus, for example, the Australian Federal Court, despite its essential recognition of 'legal professional privilege for in-house counsel', seems to have been subjecting the independence of in-house lawyers to increasing scrutiny of late (see the decisions of the Federal Court of Australia in *Telstra* v *Minister for Communications, Information Technology and the Arts [No 2]* [2007] FCA 1445 and *Rich* v *Harrington* [2007] FCA 1987).

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88 – The other Member States are, more specifically, Greece, Portugal and Poland. With respect to Poland, it must be pointed out that Polish law recognises the separate profession of *radcowie prawni* (legal adviser), whose members are subject to similar professional ethical obligations as *adwokaci* (lawyers); when employed as salaried in-house lawyers, they are covered by a professional privilege similar to legal professional privilege.

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89 – See in particular the Netherlands and Poland. The current legal position in Belgium is also based on a more recent law, although, as I have already mentioned, the substance of that position is at present unclear (see footnote 85 above). In France, a '*réforme des professions du droit*' (reform of the legal professions) is under discussion (see in this regard *inter alia* the report of the *Darrois-Kommission*, presented to the French President on 8 April 2009), although this does not yet appear to have led to a change in the current law relating to legal professional privilege, nor even to a draft law with regard to that specific question; draft Law No 2383 on the modernisation of the legal professions (*projet de la loi de modernisation des professions judiciaries et juridiques réglementées*), introduced in March 2010, in any event concerns only some other partial aspects of that reform and does not concern legal professional privilege.

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90 – With regard to Regulation No 1/2003, see Parliamentary Document A5-0229/2001 final (Evans Report), specifically Amendment 10 relating to Article 14(3) of the Commission's proposal for a regulation COM(2000) 582 final; with regard to Regulation No 139/2004, see Parliamentary Document A5-0257/2003 final (Della Vedova Report), specifically Amendment 5 relating to the 34th recital and Amendment 25 relating to Article 13(1) of the Commission's proposal for a regulation COM(2002) 711 final.

91 – In the case of Regulation No 1/2003, the Parliament as a whole did not itself support the amendments proposed by its own members. With regard to Regulation No 139/2004, while the amendments were approved by the Parliament, the Council did not include them in the Regulation.

92 – The term used in the language of the case.

93 – Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77, p. 36).

94 – See in particular Articles 2 and 6 of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17).

95 – *AM & S* (cited in footnote 32, paragraph 26).

96 – Article 23(2) in conjunction with Article 2(1)(3)(b) of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15); see to the same effect Article 6(3)(2) in conjunction with Article 2a(5) of the earlier Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77), as amended by Directive 2001/97/EC (OJ 2001 L 344, p. 76); see also in this regard *Ordre des barreaux francophones et germanophone and Others*, cited in footnote 30.

97 – Recital 19 in the preamble to Directive 2005/60.

98 – The FATF (or *Groupe d'action financière*, GAFI) is an inter-governmental body which was established in Paris in 1989 by the then 'G 7' countries and now has 35 members, including the European Commission.

99 – The interpretative notes are contained in the '40 Recommendations' which the FATF published in 2003 (available at http://www.fatf-gafi.org, last visited on 10 February 2010). Under point (e) of the glossary to those recommendations, employees are excluded from the meaning of '[d]esignated non-financial businesses and professions'.

100 – On the question of independence, see, in addition, my comments on the first plea in law, in particular points 61 to 72 of this Opinion.

101 – *AM&S* (cited in footnote 32, paragraphs 21 and 22); see also *Ordre des barreaux francophones et germanophone and Others* (cited in footnote 30, paragraphs 32 and 35), where the Court makes clear the link between legal professional privilege and judicial proceedings or the preparation for such proceedings; see in addition my comments on the first plea in law (point 54 of this Opinion, above).

102 – Paragraph 172 (*in fine*) of the judgment under appeal.

103 – Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 30; Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 37; and Case C-201/08 *Plantanol* [2009] ECR I-00000, paragraphs 43 and 44.

104 – Case C-226/08 *Stadt Papenburg* [2010] ECR I-00000, paragraph 45; similarly, see Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20; and Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 79.

105 – Case C-158/06 *ROM-projecten* [2007] ECR I-5103, paragraph 25; and Case C-345/06 *Heinrich* [2009] ECR I-00000, paragraph 44.

106 – *AM&S* (cited in footnote 32); see in this regard my comments on the first plea in law (points 52 to 75 of this Opinion, above).

107 – See, incidentally, recital 5 in the preamble to Regulation No 1/2003, which states that proof of an infringement of Articles 81(1) and 82 EC (now Articles 101(1) and 102 TFEU) must be furnished 'to the requisite legal standard', without prejudice to the national legal provisions on the standard of proof.

108 – See to this effect Article 51 of the Charter of Fundamental Rights, as well as Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraph 31; *Mangold* (cited in footnote 77, paragraph 75); and Case C-427/06 *Bartsch* [2008] ECR I-7245, paragraphs 15 and 25.

109 – In any event, reliance on the rights of defence would not on its own be capable of harmonising the legal position in every case. On the contrary, for most Member States, whose national law currently does not extend the protection of legal professional privilege to internal company or group communications, any change in the case-law established in *AM & S* would lead to a compartmentalisation of the legal position at national and EU levels.

110 – On the interpretation of acts of the European Union in a manner compatible with the fundamental freedoms, see, for example, *Ordre des barreaux francophones et germanophone and Others* (cited in footnote 30, paragraph 28) and Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-00000, paragraphs 47 and 48; see to similar effect Case C-413/06 P *Bertelsmann & Sony* v *Impala* [2008] ECR I-4951, paragraph 174.

111 – It is true that the European Union, as the Commission rightly objects, is not directly bound by Article 6 of the ECHR because it has not as yet acceded to that convention. None the less, that provision is the expression of fundamental principles based on the rule of law which are also recognised as general legal principles in Union law (see *inter alia* Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 21; and Joined Cases C-204/00 P, C-205/00 P,

C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 68. In addition, rights contained in the Charter of Fundamental Rights which correspond to rights guaranteed by the ECHR have the same meaning and scope as those laid down in the ECHR (first sentence of Article 52(3) of the Charter of Fundamental Rights).

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112 – Judgment in *André and Otherv. France* (cited in footnote 35, § 42 *in fine*); indeed, at the beginning of that judgment (§ 15), the ECtHR, under the heading '*5. Le droit communautaire*' (5. Community Law) cites extracts *inter alia* from *AM & S* (cited in footnote 32, paragraphs 18 to 24).

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113 – Thus, for example, the ECtHR extends the protection of Article 8 of the ECHR to business premises but at the same time points out that that protection need not necessarily be as extensive as it would in the case of private premises (the judgment in *Niemietzv.Germany*, cited in footnote 35, § 31, final clause, reads: '[the entitlement of Contracting States to interfere] might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case'; see, similarly, the phrase 'to a certain degree' in § 29 of the same judgment; see also ECtHR, *Société ColasEstand Others v. France*, judgment of 16 April 2002, No. 3791/97, ECHR 2002 -III, §§ 41 and 49). Similarly, the German Bundesverfassungsgericht (Federal Constitutional Court) has held, with regard to protection of the right to a private life, that the public authorities have access to all but 'the core of a person's private life' (Order of 14 September 1989, BVerfGE 80, 367, which contains a detailed definition of the protection afforded to personal diary records against seizure by the prosecution services).

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114 – In Germany, for example, Paragraph 46(1) of the Bundesrechtsanwaltsordnung (Rules governing the profession of lawyer in the Federal Republic of Germany) prohibits a Syndikusanwalt from representing his employer in his capacity as lawyer before courts and tribunals; a Syndikusanwalt may therefore appear only before courts not subject to the statutory requirement of representation by a lawyer, as may everyone – including non-lawyers. The Courts of the European Union apply a similar practice: with regard to applications signed by directors of the applicants who are members of a Bar or Law Society, see the orders in Case T-79/99 *Euro-Lex* v *OHIM* [1999] ECR II-3555, paragraphs 28 and 29; Case T-184/04 *Sulvida* v *Commission* [2005] ECR II-85, paragraphs 9 and 10; and Case T-40/08 *EREF* v *Commission* [2009] ECR II-00000, paragraphs 25 and 26, against which an appeal is pending (Case C-75/10 P *EREF* v *Commission*); with regard to an appeal signed by the applicant himself, see also the order in Case C-174/96 P *Lopes* v *Court of Justice* [1996] ECR I-6401, paragraph 11.

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115 – ECtHR *Meftah and Others v. France*, judgment of 26 July 2002 (Application No 32911/96, ECHR 2002-VII, §§ 45 to 48 and the case-law cited there).

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116 – *AM&S* (cited in footnote 32, paragraph 18).

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117 – See also the Opinion of Advocate General Léger in *Wouters and Others* (cited in footnote 32, point 181).

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118 – See my comments on the first part of the first plea in law, in particular points 61 to 72 of this Opinion.

119 – 'The mere possibility of abuse is outweighed by the need to respect the confidentiality attached to the lawyer-client relationship' (ECtHR, *Campbell v. United Kingdom*, cited in footnote 35, § 52 *in fine*).

120 – See in this regard my comments on the first plea in law in points 64 to 71 of this Opinion.

121 – Ireland relies in this regard on Article 15 of the Charter of Fundamental Rights, ECLA on Article 1 of the First Additional Protocol to the ECHR.

122 – Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, at p. 18; Case C-185/00 *Commission* v *Finland* [2003] ECR I-14189, paragraph 91; and Case C-113/07 P Selex *Sistemi Integrati* v *Commission andEurocontrol* [2009] ECR I-00000, paragraph 54.

123 – Case C-155/91 *Commission* v *Council* [1993] ECR I-939, paragraphs 23 and 24; and Case T-114/02 *Babyliss* v *Commission* [2003] ECR II-1279, paragraph 417; see also, to much the same effect, Case C-301/06 *Ireland* v *Parliament* [2009] ECR I-00000, paragraph 34 in conjunction with paragraph 57, in which the Court did not consider the submission in respect of fundamental rights put forward by the Slovak Republic in its capacity as intervener.

124 – Settled case-law; see, more recently, Case C-202/07 P *France Télécom* v *Commission* [2009] ECR I-00000, paragraphs 59 and 60; Case C-97/08 P *Akzo Nobel and Others* v *Commission*, cited in footnote 26, paragraph 38; and Case C-554/08 P *Carbone-Lorraine* v *Commission* [2009] ECR I-00000, paragraph 32.

125 – *AM & S* (cited in footnote 32, in particular paragraphs 18 to 22, especially paragraph 21); to the same effect, see also the Opinion of Advocate General Warner in that case (pp. 1630 and 1631) See in addition the settled case-law on the autonomous interpretation of Community- or Union-law concepts, for example Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-8817, paragraph 24; and Case C-66/08 *Kozlowski* [2008] ECR I-6041, paragraph 42.

126 – *Internationale Handelsgesellschaft* (cited in footnote 72, paragraph 3) and *Hauer* (cited in footnote 73, paragraph 14).

127 – *Hauer* (cited in footnote 73, paragraph 14).

128 – See to this effect, in relation to the exercise of the fundamental freedoms of the internal market, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 81.

129 – See also Opinion 2/94 ('ECHR accession') [1996] ECR I-1759, paragraphs 23 and 24; and Case C-403/05 *Parliament* v *Commission* [2007] ECR I-9045, paragraph 49.

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130 – Articles 20 and 21 of Regulation No 1/2003, which will apply to future cases, also have a basis in the Treaties, that is to say Article 83 EC (now Article 103 TFEU).

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131 – *AM & S* (cited in footnote 32, in particular paragraphs 18 and 22).

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132 – See point 47 of this Opinion, above.

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133 – Case 107/83 *Klopp* [1984] ECR 2971, paragraph 17; and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 99.

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134 – See *inter alia* Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21, concerning direct taxation; Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161, paragraph 24, concerning the organisation of education systems and the content of teaching; and Case C-169/07 *Hartlauer* [2009] ECR I-00000, paragraph 29, concerning the organisation of social security systems.

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135 – See to that effect *Klopp* (cited in footnote 133, paragraphs 17 and 18); see also the Opinion of Advocate General Poiares Maduro in Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, point 82.

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136 – See in this regard points 133 and 134 of this Opinion, above.

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137 – See to the same effect Joined Cases C-122/99 P and C-125/99 P *D and Sweden* v *Council* [2001] ECR I-4319, paragraph 65; in that case, D and the Kingdom of Sweden had in fact brought two separate appeals but were none the less ordered to pay the costs jointly and severally.

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138 – See to that effect, for example, Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraph 56; Joined Cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P *International Power and Others* v *NALOO* [2003] ECR I-11421, paragraph 187; and Case C-141/08 P *Foshan Shunde Yongjian Housewares & Hardware* v *Council* [2009] ECR I-00000, paragraph 118.