ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

30 October 2003 (1)

(Interim measures - Competition - Commission's powers of investigation - Protection of confidentiality - Communications between lawyers and clients - Limits)

In Joined Cases T-125/03 R and T-253/03 R,

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

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

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

applicants,

v

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

defendant,

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

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES

Registrar: J. Plingers, Administrator,

makes the following

Order

1.

On 10 February 2003, the Commission adopted a decision under Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) (the decision of 10 February 2003), amending the decision of 30 January 2003 whereby the Commission ordered, among other undertakings, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd (the applicants) and their respective subsidiaries to submit to an investigation aimed at seeking evidence of possible anti-competitive practices (the decision of 30 January 2003).

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

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

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

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

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

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

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

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

10.

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

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

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

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

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

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

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

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

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

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

20.
By application under the fourth paragraph of Article 230 EC, lodged at the Registry of the Court of First Instance on 4 July 2003, the applicants brought an action for annulment of the decision of 8 May 2003 and for an order that the Commission should pay the costs of the action. By separate document registered on 11 July 2003, the applicants lodged an application for interim measures, requesting the President of the Court of First Instance, in particular, to suspend the operation of the decision of 8 May 2003. That case is Case T-253/03 R.

21.
In their application, the applicants also request that Cases T-125/03 R and T-253/03 R be joined, in application of Article 50 of the Rules of Procedure of the Court of First Instance.

22.
On 1 August 2003, the Commission submitted its observations in writing on the application for interim measures in Case T-253/03 R.

23.
On 7 and 8 August 2003 respectively, the Algemene Raad van de Nederlandse Orde van Advocaten (General Council of the Netherlands Bar), represented by O. Brouwer, lawyer, and the Council of the Bars and Law Societies of the European Union (the CCBE), represented by J.E. Flynn QC, lodged applications for leave to intervene in Cases T-125/03 R and T-253/03 R in support of the forms of order sought by the applicants.

24.
On 12 August 2003, the European Company Lawyers Association (ECLA), represented by M. Dolmans, lawyer, and J. Temple Lang, Solicitor, lodged an application for leave to intervene in Case T-125/03 R in support of the form of order sought by the applicants. On 18 August 2003, ECLA also lodged an application to intervene in Case T-253/03 R, again in support of the form of order sought by the applicants.

25.
On 1 September 2003 and 2 September 2003 respectively, the

Commission and the applicants lodged their observations on the applications for leave to intervene in Cases T-125/03 R and Case T-253/03 R. On 2 September 2003, the applicants also lodged an application for confidential treatment of certain items in the file, on the basis of Article 116(2) of the Rules of Procedure.

26.
On 8 September 2003, at the request of the President of the Court of First Instance in application of Articles 64(3)(d) and 67(3) of the Rules of Procedure, the Commission sent the President, under confidential cover, a copy of the Set B documents and also the sealed envelope containing the Set A documents.

27.
By letters of 4 and 5 September 2003, the Registry requested the applicants for leave to intervene to attend the hearing.

28.
On 15 September 2003, in the presence of a representative of the Registry, the President of the Court of First Instance opened the sealed envelope containing the Set A documents and examined their contents. Following that operation, the documents were again placed in a sealed envelope and a report was drawn up and placed in the file in Cases T-125/03 R and T-253/03 R.

29.
On the same day, both the CCBE and the Algemene Raad van de Nederlandse Orde van Advocaten submitted objections on a number of points in the application for confidential treatment lodged by the applicants under Article 116(2) of the Rules of Procedure. In application of that article, the President of the Court of First Instance on 16 September 2003 granted in part, and provisionally, the applicants' request for confidential treatment, at the stage of the application for interim measures.

30.
On 19 September 2003, the Registry communicated to the applicants for leave to intervene a new non-confidential version of the procedural documents in Cases T-125/03 R and T-253/03 R.

31.
On 23 September 2003, the applicants, the Commission, the Algemene Raad van de Nederlandse Orde van Advocaten, the CCBE and ECLA presented oral argument at a hearing.

Forms of order sought by the parties

32.
In Case T-125/03 R, the applicants request the President to adopt the following measures:

- suspend the operation of the decision of 10 February 2003 and, so far as necessary, the operation of the decision of 30 January 2003, in so far as it has been interpreted by the Commission as legitimating and/or constituting the basis of the Commission's action of seizing and/or reviewing and/or reading documents covered by professional privilege;

- order the Commission to keep the Set A documents in the sealed envelope, which should be given to an independent third party (whose identity should be agreed between the parties within five days of the date of the decision in these interim proceedings) to keep pending the resolution of the dispute to which the main application relates;

- order the Commission to place the Set B documents in a sealed envelope to be given to an independent third party (whose identity is to be agreed between the parties within five days of the date of the decision in these interim proceedings) to keep pending the resolution of the dispute to which the main application relates;

- order the Commission to dispose of any additional copies it may have of the Set B documents and to confirm that they have been destroyed within five days of the decision to be taken;

- order the Commission not to take any steps in reviewing (further) or using the documents in either Set A or Set B pending the resolution of the main dispute;

- order the Commission to pay the costs.

33.
The Commission contends, in Case T-125/03 R, that the President should:

- dismiss the application for interim measures;

- order the applicants to pay the costs;

- order the Algemene Raad van de Nederlandse Orde van Advocaten, the CCBE and ECLA to pay the costs incurred by the Commission in connection with their intervention.

34.
In Case T-253/03 R, the applicants request the President to adopt the following measures:

- suspend the operation of the decision of 8 May 2003;

- order the Commission to keep the Set A documents in the sealed envelope pending the resolution of the dispute to which the main application relates;

- order the Commission to place the Set B documents in a sealed envelope pending the resolution of the dispute to which the main application relates;

- order the Commission to dispose of any additional copies it may have of the Set B documents and to confirm that they have been destroyed within five days of the decision in these proceedings;

- order the Commission not to take any steps in reviewing (further) or using the documents in either Set A or Set B pending the resolution of the main action;

- order the Commission to pay the costs.

35.
The Commission contends in Case T-253/03 R that the President

should:

- dismiss the application for interim measures;

- order the applicants to pay the costs;

- order the Algemene Raad van de Nederlandse Orde van Advocaten, the CCBE and ECLA to pay the costs incurred by the Commission in connection with their intervention.

Law

36.
As a preliminary point, it should be borne in mind that Article 104(2) of the Rules of Procedure provides that an application for interim measures is to state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case (fumus boni juris) for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (order of the President of the Court of Justice of 14 October 1996 in Case C-268/96 P(R) SCK and FNK v Commission [1996] ECR I-4971, paragraph 30). Where appropriate, the judge hearing such an application must also weigh up the interests involved (order of the President of the Court of Justice of 23 February 2001 in Case C-445/00 R Austria v Council [2001] ECR I-1461, paragraph 73).

37.
The measure requested must further be provisional inasmuch as it must not prejudge the points of law or fact in issue or neutralise in advance the effects of the decision subsequently to be given in the main action (order of the President of the Court of Justice of 19 July 1995 in Case C-149/95 P(R) Commission v Atlantic Container Line and Others [1995] ECR I-2165, paragraph 22).

38.
Furthermore, in the context of that overall examination, the judge hearing the application enjoys a broad discretion and is free to

determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be analysed and assessed (order in Commission v Atlantic Container Line and Others, cited at paragraph 37 above, paragraph 23).

1. The joinder of Cases T-125/03 R and T-253/03 R

39.
In their application for interim measures in Case T-253/03 R, the applicants requested that Cases T-125/03 R and T-253/03 R be joined. In its observations in Case T-253/03 R, the Commission opposes the application for joinder on the ground that the main application in Case T-125/03 R is manifestly inadmissible.

40.
Since, however, Cases T-125/03 R and T-253/03 R concern the same facts, involve the same parties and have related subject-matter, it is appropriate to order, under Article 50 of the Rules of Procedure, that they be joined for the purposes of this order.

2. The applications for leave to intervene

41.
As noted at paragraphs 23 and 24 above, the CCBE, the Algemene Raad van de Nederlandse Orde van Advocaten and ECLA have lodged applications to intervene in Case T-125/03 R and in Case T-253/03 R in support of the forms of order sought by the applicants.

42.
The Commission has stated that it had no comments to make on the three applications for leave to intervene. The applicants, moreover, have stated that they supported the applications.

43.
Under the second paragraph of Article 40 of the Statute of the Court of Justice, which, pursuant to the first paragraph of Article 53 thereof, is

applicable to the Court of First Instance, the right of an individual to intervene is subject to the condition that he is able to establish an interest in the result of the case. Representative associations whose object it is to protect their members in cases raising questions of principle liable to affect those members are allowed to intervene (orders of the President of the Court of Justice of 17 June 1997 in Joined Cases C-151/97 P(I) and C-157/97 P(I) National Power and PowerGen [1997] ECR I-3491, paragraph 66, and of 28 September 1998 in Case C-151/98 P Pharos v Commission [1998] ECR I-5441, paragraph 6; orders of the President of the Court of First Instance of 22 March 1999 in Case T-13/99 R Pfizer v Council, not published in the European Court Reports, paragraph 15, and of 28 May 2001 in Case T-53/01 R Post Italiane v Commission [2001] ECR II-1479, paragraph 51).

44.
In the present case, the CCBE, an association governed by Belgian law, stated in its application for leave to intervene that it is authorised by its members to take all steps of whatever nature necessary to realise its objectives, namely, in particular, to act in matters involving the application of the Treaties of the European Union to the profession of lawyer.

45.
It must therefore be held that the CCBE has demonstrated, first, that it represents the interests of the Bars of the European Union and, second, that its objective is to defend the interests of its members. Since, moreover, the present case directly raises questions of principle in relation to the confidentiality of written communications with lawyers, those questions are liable to affect the members of the CCBE, whose function is, inter alia, to define and approve the rules of professional conduct applicable to lawyers.

46.
Furthermore, these proceedings directly raise questions of principle relating to the conditions in which the judge hearing an application for interim measures may order interim measures in respect of the documents which the Commission intends to peruse pursuant to Article 14(3) of Regulation No 17, but which according to the undertakings under investigation are protected by professional privilege. The definition of those conditions is liable to impinge directly on the

interests of the members of the CCBE, in that those conditions limit or extend the provisional legal protection applicable, in particular, to documents originating from those members and regarded by the CCBE as covered by professional privilege.

47.
The CCBE has therefore demonstrated, at this stage, that it has an interest in the applications for interim measures being granted. Consequently, the CCBE must be granted leave to intervene in Cases T-125/03 R and T-253/03 R.

48.
The Algemene Raad van de Nederlandse Orde van Advocaten states that it is the body responsible under Netherlands law for ensuring compliance with the principles governing the profession of lawyer in the Netherlands, for defining the rules of the Netherlands Bar and also for protecting its rights and interests.

49.
The Algemene Raad van de Nederlandse Orde van Advocaten has therefore adduced evidence of such a kind as to demonstrate that its object is the protection of the interests of its members. Since, moreover, the present case touches directly on the status of Netherlands lawyers employed by an undertaking on a permanent basis, it raises questions of principle liable to affect the interests of the members of the Netherlands Bar and those of the Bar itself.

50.
Furthermore, as already held at paragraph 46 above, these proceedings directly raise questions of principle relating to the conditions in which the judge hearing an application for interim measures may order interim measures in respect of the documents which the Commission intends to peruse pursuant to Article 14(3) of Regulation No 17, but which according to the undertakings under investigation are protected by professional privilege. The definition of those conditions is liable to impinge directly on the interests of the members of the Algemene Raad van de Nederlandse Orde van Advocaten, in that those conditions limit or extend the provisional legal protection applicable, in particular, to documents originating from those members and regarded by the Algemene Raad van de

Nederlandse Orde van Advocaten as covered by professional privilege.

51.
The Algemene Raad van de Nederlandse Orde van Advocaten has therefore demonstrated, at this stage, that it has an interest in the applications for interim measures being granted. Consequently, the Algemene Raad van de Nederlandse Orde van Advocaten must be granted leave to intervene in Cases T-125/03 R and T-253/03 R.

52.
Last, ECLA has adduced in its application for leave to intervene evidence establishing that it represents organisations which themselves represent the vast majority of in-house lawyers in Europe. ECLA has also stated that its principal activity is representing the interests of those in-house lawyers and, in particular, defending their position on the question of the confidentiality of written communications with them. ECLA has therefore demonstrated, at this stage, that it represents the interests of its members and that its objective is, in particular, the defence of their interests. Since, moreover, the present case directly concerns the question of the confidentiality of written communications with in-house lawyers, it raises questions of principle liable to have a direct effect on the interests of the members of ECLA.

53.
Furthermore, as already held at paragraphs 46 and 50 above, these proceedings directly raise questions of principle relating to the conditions in which the judge hearing an application for interim measures may order interim measures in respect of the documents which the Commission intends to peruse pursuant to Article 14(3) of Regulation No 17, but which according to the undertakings under investigation are protected by professional privilege. The definition of those conditions is liable to impinge directly on the interests of the members of ECLA, in that those conditions limit or extend the provisional legal protection applicable, in particular, to documents originating from those members and regarded by ECLA as covered by professional privilege.

54.
ECLA has therefore demonstrated, at this stage, that it has an interest

in the applications for interim measures being granted. Consequently, ECLA must be granted leave to intervene in Cases T-125/03 R and T-253/03 R.

3. The application for confidential treatment

55.
At the stage of the application for interim measures, confidential treatment should be granted in respect of the information referred to as such in the letter of 16 September 2003 from the Registry to the applicants, since such information may prima facie be regarded as secret or confidential within the meaning of Article 116(2) of the Rules of Procedure.

4. The application in Case T-125/03 R

Admissibility of the application for interim measures

56.
It is settled case-law that the admissibility of an action before the court adjudicating on the substance should not, in principle, be examined in proceedings relating to an application for interim measures so as not to prejudge the case in the main proceedings. However, where it is contended that the main action from which the application for interim measures is derived is manifestly inadmissible, it may be necessary to establish certain grounds for the conclusion that such an action is prima facie admissible (order of the President of the Court of Justice of 12 October 2000 in Case C-300/00 P(R) Federación de Cofradías de Pescadores de Guipúzcoa and Others v Council [2000] ECR I-8797, paragraph 34; orders of the President of the Court of First Instance of 15 January 2001 in Case T-236/00 R Stauner and Others v Parliament and Commission [2001] ECR II-15, paragraph 42, and of 8 August 2002 in Case T-155/02 R VVG International and Others v Commission [2002] ECR II-3239, paragraph 18).

57.
In this case, the Commission contends that the main action in Case T-

125/03 is inadmissible. It must therefore be determined whether there are none the less grounds for the conclusion that the main action in this case is prima facie admissible.

Arguments of the parties concerning the admissibility of the main action

58.
In Case T-125/03 R, the applicants claim that the Court should annul the decision of 10 February 2003 and, so far as necessary, the decision of 30 January 2003, in so far as it has been interpreted by the Commission as legitimating and/or constituting the basis of the Commission's action (which is not severable from the Decision), of seizing and/or reviewing and/or reading documents covered by [legal professional privilege].

59.
The applicants contend that their action is admissible, in that the decision of 30 January 2003, the decision of 10 February 2003 and the subsequent treatment of both sets of documents in issue in reality constitute one and the same decision of the Commission, the legality of which may be challenged before the Court. Next, as regards locus standi, the applicants observe that the decision of 30 January 2003 and that of 10 February 2003 are directly addressed to them.

60.
The Commission contends that the main action is manifestly inadmissible.

Findings of the President

61.
The fourth paragraph of Article 230 EC provides that [a]ny natural or legal person may ... institute proceedings against a decision addressed to that person ....

62.
It is not disputed, in the present case, that the applicants are addressees of the decisions of 30 January 2003 and of 10 February

2003 and that each of those decisions produces mandatory legal effects liable to affect their interests.

63.
The Commission submits, however, that the legal effects complained of in the main application are not the consequence of the decisions of 30 January 2003 and 10 February 2003, but of measures adopted subsequent to those decisions. The Commission's arguments none the less tend to show, in essence, that, on the substance, none of the pleas put forward by the applicants can be properly invoked in support of the claims for annulment of the decision of 10 February 2003 and, so far as necessary, of the decision of 30 January 2003. These arguments should therefore, at first sight, be taken into account in the context of assessing whether a prima facie case (fumus boni juris) can be made for the main application.

64.
As regards, next, the Commission's arguments that certain of the applicants' pleas seek annulment of only part of the decision of 10 February 2003 amending the decision of 30 January 2003 and should therefore be rejected in so far as annulment of that decision would require the Court to adjudicate ultra petita, it is apparent from the file that in their observations of 3 July 2003 the applicants denied having sought annulment of only part of that decision.

65.
There are therefore grounds on which it may be concluded that the admissibility of the claims for annulment in Case T-125/03 R cannot be precluded.

A prima facie case

66.
The applicants raise three pleas in law against the decision of 10 February 2003 and, so far as necessary, against the decision of 30 January 2003. First, during the investigation, the Commission infringed the general procedural principles laid down in the case-law (Case

155/79 AM & S v Commission [1982] ECR 1575) and also the applicants' right to request interim measures under Article 242 EC, since, first, the Commission's officials read and discussed among themselves certain Set A and Set B documents and, second, they immediately placed the Set B documents in their file. Second, still during the investigation, the Commission substantially infringed the professional privilege protecting communications with lawyers, first by refusing on the spot to regard the Set B documents as covered by professional privilege and, second, by seizing the Set A documents. Third, those same facts also constitute a breach of the fundamental rights forming the very foundation of professional privilege.

67.
It follows from the foregoing that all the pleas which the applicants direct against the decision of 10 February 2003 and, so far as necessary, the decision of 30 January 2003, in reality relate, as the Commission submits, to measures taken subsequent to and, moreover, distinct from those decisions. Contrary to the applicants' contention, the decision of 10 February 2003 and that of 30 January 2003 are clearly severable from the contested operations, especially since they contain no particular reference to the documents in Set A and Set B. Consequently, the individualisation of and the contested treatment given to those documents, by comparison with the other documents covered by the decisions of 10 February 2003 and 30 January 2003, are necessarily the consequence of distinct, subsequent measures.

68.
It is sufficient to recall, in that regard, that, according to a consistent line of decisions, in connection with an investigation based on Article 14 of Regulation No 17, an undertaking cannot plead the illegality of the investigation procedures as a ground for annulment of the measure on the basis of which the Commission carried out that investigation (see, to that effect, Case 85/87 Dow Benelux v Commission [1989] ECR 3137, paragraph 49, and Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 Limburgse Vinyl Maatschappij and Others v Commission [1999] ECR II-931, paragraph 413).

69.
That impossibility merely reflects the general principle that the legality

of a measure must be assessed in the light of the circumstances of law and of fact existing at the time when the decision was adopted, so that the validity of a decision cannot be affected by acts subsequent to its adoption (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ and Others v Commission [1983] ECR 3369, paragraph 16, and Dow Benelux v Commission, cited at paragraph 68 above, paragraph 49).

70.
Without its being necessary to examine the applicants' submissions in greater detail, it must therefore be concluded that even on the assumption that they were well founded, they could not be properly invoked in support of the claims for annulment of the decision of 10 February 2003 and, so far as necessary, the decision of 30 January 2003.

71.
Consequently, the applicants have failed to establish the existence of a prima facie case, which is sufficient ground to dismiss the application in Case T-125/03 R.

5. The application in Case T-253/03 R

72.
It is appropriate, first, to consider whether the applicants have demonstrated the existence of a prima facie case, then, second, to consider whether they have demonstrated the urgency of the interim measures sought and, last, to balance the interests involved.

A prima facie case

Arguments of the parties

73.
The applicants maintain that their action against the decision of 8 May 2003, which is based on three pleas in law, is not unfounded.

74.
First, the applicants maintain that the Commission has infringed the procedural principles laid down in AM & S v Commission, cited at paragraph 66 above, concerning professional privilege. Where an undertaking subject to an investigation on the basis of Article 14(3) of Regulation No 17 relies on the protection of documents covered by professional privilege, the procedure that the Commission must follow consists of the following three stages. First of all, if the undertaking in question relies on professional privilege and on that ground refuses to produce documents, it must demonstrate that the substantive conditions required by the case-law are satisfied, although it is not obliged to reveal the contents of the documents concerned. Second, if the Commission is not satisfied by the explanations given by the undertaking subject to an investigation, it must order, by a decision adopted pursuant to Article 14(3) of Regulation No 17, production of the documents in question. Third, and last, if the undertaking continues to maintain that the documents are covered by professional privilege, it is for the Community Courts to resolve the dispute.

75.
In the present case, the applicants submit that the Commission reversed the order of the stages of that procedure, since, during the investigation, the Commission's officials took possession of and discussed among themselves, for several minutes, certain Set A and Set B documents and, second, placed the Set B documents in the file without placing them in a sealed envelope. The applicants maintain, essentially, that instead of taking copies of the documents in question and adopting the decision of 8 May 2003, the Commission should have left them where they were and adopted a decision ordering the applicants to produce them. That decision could then have formed the subject-matter of an action before the Community Courts. The applicants also contend that the different treatment of the Set A and the Set B documents constitutes a breach of the principle of non-discrimination.

76.
In their second plea, the applicants maintain, essentially, that at the investigation stage the Commission breached the principle of professional privilege, first, by denying all protection to the Set B documents and, second, by exhaustively examining the Set A

documents. The decision of 8 May 2003 also breached the principle of professional privilege in so far as it reflects, in particular, the Commission's refusal to return and destroy the Set A and Set B documents and, moreover, manifests the Commission's intention to open the sealed envelope containing the Set A documents.

77.
The applicants state in that regard that the two Set A documents and the Set B handwritten memoranda are covered by professional privilege, since they are the direct result of the competition law compliance programme which they put in place with the assistance of outside counsel.

78.
The applicants then set out their arguments in respect of each of the documents in question, maintaining, first, that the memorandum forming the basis of the two Set A documents must be regarded as the written basis of a telephone conversation with an external counsel, as evidenced by the handwritten reference to that lawyer's name on one of the two copies of the memorandum.

79.
Next, in the applicants' submission, the Set B handwritten memoranda are also covered by professional privilege, since they were used to prepare the Set A memoranda, which are themselves protected.

80.
As regards, last, the Set B e-mails, the applicants maintain that they constitute written communications between the General Manager of Akcros Chemicals and a member of Akzo Nobel's Legal Department. The latter person is a member of the Netherlands Bar, subject to professional obligations as regards independence and respect for the rules of the Bar comparable to those of an external lawyer. Those rules prevail over his duty of loyalty towards his employer. In that regard, the applicants are agreed that the Community case-law does not at present recognise that the work of in-house lawyers is protected by professional privilege; none the less, they maintain, essentially, that numerous changes in the professional rules of the Member States have occurred since the judgment in AM & S v Commission, cited at paragraph 66 above, tending, in particular, to extend the cover of

professional privilege to the activities of certain in-house lawyers. The applicants also rely, by analogy, on the judgment in Case T-92/98 Interporc v Commission [1999] ECR II-3521, paragraph 41, where the Court of First Instance considered that correspondence between the Commission's Legal Service and its various Directorates-General could not be disclosed. Furthermore, the limitation of professional privilege to written communications with outside counsel constitutes a breach of the principle of non-discrimination and, against the background of the modernisation of competition law, adversely affects an undertaking's assessment of the compliance of its activities with competition law. Last, the communications in question were between two persons in the United Kingdom and the Netherlands respectively, i.e. in two States which recognise that written communications from in-house lawyers are protected by professional privilege when the lawyers belong to a Bar.

81.
Last, in their third plea the applicants submit that the decision of 8 May 2003 breaches the fundamental rights which are the very foundation of professional privilege, namely the rights of defence, respect for private life and freedom of expression, as defined in the case-law of the European Court of Human Rights.

82.
The Commission rejects all of those arguments and contends that none of the pleas put forward by the applicants is able to satisfy the condition relating to a prima facie case.

83.
The Commission thus disputes the applicants' first plea, alleging that it breached the procedural principles applicable when undertakings claim that certain documents are protected by professional privilege. As a preliminary point, the Commission observes that the procedure defined in AM & S v Commission, cited at paragraph 66 above, is not absolute and does not require that, when an undertaking relies on professional privilege, the Commission should be required to refrain from copying the documents in question and subsequently to request them from the undertaking. Still by way of preliminary point, the Commission disputes the applicants' assertion that its officials took possession of the documents in question during the investigation and discussed them among themselves for several minutes.

84.
Next, the Commission contends that the adoption of preventive measures to ensure that the documents will not be destroyed is not inconsistent with the principles laid down in AM & S v Commission, cited at paragraph 66 above. By adopting such measures, the Commission is able to avoid having to request the assistance of the national authorities in making a formal order for production of the documents concerned.

85.
Last, the Commission submits that it did not breach the principle of non-discrimination by treating the Set A and the Set B documents differently, since those documents were not identical.

86.
The Commission also contends that the applicants' second plea is manifestly unfounded.

87.
The Commission contends, first, that the two Set A documents are not covered by professional privilege, since they consist of two copies of the same memorandum, with no indication that it was drafted in the context of or for the purpose of a legal opinion by an outside counsel. The only indication to that effect is a handwritten reference on one of the two copies to the name of a lawyer, which establishes at most that a conversation with that lawyer regarding the memorandum had taken place. The evidence adduced by the applicants is insufficient to demonstrate that the memorandum in question was drawn up with a view to seeking legal advice or that such advice was given.

88.
In any event, the applicants themselves agree that the memorandum reflects internal discussions between the General Manager of Akcros Chemicals and other employees in connection with a competition law compliance programme set up by the applicants. It therefore does not reflect discussions with an outside counsel, contrary to the requirements of case-law (order of the Court of First Instance in Case T-30/89 Hilti v Commission [1990] ECR II-163, publication by way of

extracts, paragraph 18). Furthermore, the fact that a document was drawn up in the context of a competition law compliance programme is not sufficient for that document to be covered by professional privilege, in so far as, by its scope, such a programme exceeds the exercise of the rights of the defence, at least in the absence of an investigation or actual proceedings against the undertaking. Nor does the fact that the document was drawn up on the instructions of an outside counsel in the context of such a programme suffice to bring it within the scope of professional privilege. The Commission concludes its observations on the competition law compliance programme set up by the applicants by stating, first, that the applicants do not claim that that programme is mentioned in the Set A documents; second, that the documents produced by the applicants demonstrate that they sought to divert professional privilege from its purpose; and, third, that the existence of the competition law compliance programme was never mentioned during the investigation of 12 and 13 February 2003.

89.
The Commission also contends that the Set B handwritten memoranda are not protected by professional privilege, since they do not give the impression of being a communication with an external lawyer, do not indicate that the applicants had any intention of having such communication and do not report the text or the content of written communications with an independent lawyer for the purposes of the exercise of the rights of defence. There is no indication that the documents have any link with the competition law compliance programme set up by the applicants; in any event, such a link is not sufficient to protect the documents; and, last, according to the applicants themselves, the memoranda were drafted in preparation for the Set A notes, which are not covered by professional privilege.

90.
As regards, last, the Set B e-mails, the Commission contends that they are clearly not covered by professional privilege, since they neither constitute a communication with an independent lawyer, nor reveal any intention to communicate with an independent lawyer nor, last, report the text or the content of written communications with an independent lawyer for the purpose of the exercise of the rights of defence. The Commission observes in that regard that in Community law correspondence with in-house lawyers is not covered by professional privilege (AM & S v Commission, cited at paragraph 66 above, paragraph 24). Furthermore, the contents of the e-mails in

question show that the applicants' in-house lawyer was acting not as a lawyer but as an employee.

91.
With more specific regard to the question of the protection of written communications with lawyers employed on a permanent basis, the Commission observes that to accept the applicants' arguments would be to create different systems within the European Union, depending on whether or not Member States allow in-house lawyers to be members of a Bar. The Commission also submits that the principles laid down in AM & S v Commission, cited at paragraph 66 above, must not be altered, since, first, in-house lawyers do not enjoy the same independence as outside lawyers, second, the principle established in Interporc v Commission, cited at paragraph 80 above, is not justified on grounds related to professional privilege and, third, to extend the scope of professional privilege would lead to abuse. Last, the Commission claims that the fact that undertakings are increasingly required to undertake self-assessment of the compatibility of their activities with competition law pursuant to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the competition rules laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1) is unrelated to questions of professional privilege. Self-assessment will be increasingly common in connection with the application of Article 81(3) EC, whereas questions associated with professional privilege arise essentially in connection with the application of Articles 81(1) EC and 82 EC.

92.
Third, the Commission contends that the applicants' final plea, whereby they allege that the Commission breached the fundamental rights forming the basis of professional privilege, is unfounded. The applicants have failed to establish a link between the fundamental rights on which they rely and the alleged breach and their rights of defence were not breached in any event, since the Commission followed a procedure consistent in every respect with the principles laid down in AM & S v Commission, cited at paragraph 66 above. Last, the Commission contends that, contrary to what the applicants maintain, the case-law of the European Court of Human Rights which they cite in their application makes no reference to the protection of private life.

Findings of the President

93.
In the present case, the President considers it appropriate to examine the pleas in the following order: first, the second plea in so far as it relates to the Set A documents; then, that plea in so far as it relates to the Set B documents; and, finally, the first plea.

- Second plea, alleging breach of professional privilege, in so far as it relates to the Set A documents

94.
In their second plea, the applicants maintain that the decision of 8 May 2003 breached the professional privilege which, in their submission, covers the Set A documents.

95.
In that regard, Regulation No 17 must be interpreted as protecting the confidentiality of written communications between lawyers and clients provided, first, that such communications are made for the purposes and in the interests of the client's rights of defence and, second, that they emanate from independent lawyers, i.e. lawyers who are not bound to the client by a relationship of employment (AM & S v Commission, cited at paragraph 66 above, paragraph 21).

96.
Furthermore, the principle of protection of written communications between lawyer and client must, in view of its purpose, be regarded as extending also to the internal notes which are confined to reporting the text or the content of those communications (order in Hilti v Commission, cited at paragraph 88 above, paragraph 18).

97.
In the present case, the applicants do not claim that the Set A documents constitute in themselves a communication with an outside lawyer or a document reporting the text or the content of such a communication. They maintain, on the contrary, that both documents are memoranda drafted for the purpose of a telephone conversation with a lawyer.

98.
The President considers that the applicants' plea raises very important and complex questions concerning the possible need to extend, to a certain degree, the scope of professional privilege as currently delimited by the case-law.

99.
It should be observed, first of all, that according to settled case-law, in all proceedings in which sanctions, especially fines or periodic penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law, which must be complied with even if the proceedings in question are administrative proceedings (see, in particular, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P Limburgse Vinyl Maatschappij and Others v Commission [2002] ECR I-8375, paragraph 85, and Case T-348/94 Enso Española v Commission [1998] ECR II-1875, paragraph 80).

100.
Second, the protection of the confidentiality of written communications between lawyer and client is an essential corollary to the full exercise of the rights of the defence, the protection of which Regulation No 17 itself, in particular in the 11th recital in its preamble and in the provisions contained in Article 19, takes care to ensure (AM & S v Commission, cited at paragraph 66 above, paragraph 23).

101.
Third, professional privilege is intimately linked to the conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs (AM & S v Commission, cited at paragraph 66 above, paragraph 24).

102.
In order that a lawyer may effectively and usefully exercise his role of collaborating in the administration of justice by the courts with a view to the full exercise of the rights of the defence, it may prove necessary, in certain circumstances, for the client to prepare working

or summary documents, notably for the purpose of gathering the information which the lawyer may find useful, or indeed indispensable, in understanding the context, the nature and the scope of the facts in respect of which his assistance is sought. Furthermore, the preparation of such documents may prove particularly necessary in matters involving considerable and complex information, which is the case, in particular, of proceedings initiated with a view to imposing sanctions for infringements of Articles 81 EC and 82 EC.

103.
In that context, although Regulation No 17 has given the Commission wide powers of investigation and placed undertakings under an obligation to cooperate in the measures of investigation, it is settled case-law that it is none the less necessary to prevent the rights of the defence from being irremediably impaired during preliminary inquiry proceedings including, in particular, investigations which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable (Joined Cases 46/87 and 227/88 Hoechst v Commission [1989] ECR 2859, paragraph 15, and Case 374/87 Orkem v Commission [1989] ECR 3283, paragraph 33).

104.
If, in the context of investigations ordered under Article 14(3) of Regulation No 17, the Commission were able to copy working or summary documents prepared by an undertaking solely for the purpose of the exercise of the rights of defence by its lawyer, the consequence might prima facie be an irremediable impairment of the rights of defence of that undertaking, since the Commission would have evidence of such a kind as to provide it with immediate information on the defence options available to the undertaking. There is reason to conclude, therefore, that such documents are capable of being covered by professional privilege.

105.
It is therefore necessary to determine whether, in the present case, the Set A documents may belong to such a category.

106.
The applicants claim that the Set A typewritten memoranda were

drafted in the context of a competition law compliance programme set up by outside lawyers. More specifically, the Set A memoranda were drawn up by the General Manager of Akcros Chemicals on the basis of discussions with lower-level employees, initially communicated to his superior and then, finally, discussed with the applicants' external counsel.

107.
The President considers at this stage that, as the Commission has stated, the mere existence of a competition law compliance programme set up by outside lawyers is not prima facie sufficient to establish that a document prepared in the context of such a programme is covered by professional privilege. Owing to their extent, those programmes include tasks which frequently extend far beyond the exercise of the rights of the defence.

108.
Having made that clear, the President none the less considers that, in the present case, it cannot be precluded prima facie that, because of other factors, the Set A typewritten memoranda were in fact drafted for the sole purpose of obtaining legal advice from the applicants' lawyer in the context of the exercise of the rights of the defence.

109.
First, after examining the Set A memoranda, the President found that, in the light of their content, virtually the sole purpose of those documents was prima facie to compile information of the kind which would be communicated to a lawyer for the purpose of obtaining his assistance on questions involving the possible application of Articles 81 EC and 82 EC. The first sentence of the memoranda gives the clear impression that the General Manager of Akcros Chemicals intended to assemble, in the Set A documents, information relating to certain competition law matters. Owing to their content and their scope, moreover, there are serious doubts as to the possibility that the memoranda might have been drafted for a purpose other than the subsequent consultation of a lawyer. Furthermore, even if at this stage their content does not indicate beyond doubt that the documents were drafted for the sole purpose of obtaining the assistance of a lawyer, the President none the less considers that the absence of express reference in the memoranda to seeking legal assistance is not in the present case sufficient reason to reject outright the possibility that

such assistance was in fact the reason why they were drafted.

110.
Second, the applicants produced before the President the minute of a telephone conversation drafted by one of the applicants' lawyers on the day on which the conversation took place. As this minute might itself be protected by professional privilege, it could not be communicated to the Commission. It gives the impression, however, that certain points discussed did in fact relate prima facie to information contained in the Set A documents.

111.
Third, one of the two copies of the Set A memorandum bears handwritten notes mentioning the name of the applicants' counsel and tends to indicate that a telephone conversation did indeed take place with him on the actual day on which he drafted the minute of his telephone conversation referred to in the preceding paragraph.

112.
Consequently, in the circumstances of the present case, the President considers that this evidence tends to confirm the possibility that the Set A memoranda were drafted for the sole purpose of obtaining the assistance of a lawyer.

113.
As regards, last, the condition relating to the exercise of the rights of the defence, it is apparent upon examining the Set A documents that they relate to facts which are prima facie capable of justifying consultation of a lawyer and of being connected either with the investigation currently being carried out by the Commission or with other investigations which the applicants were reasonably able to fear or anticipate and in view whereof they intended to draw up a strategy and prepare in advance, if necessary, the exercise of their rights of defence. Prima facie, however, it remains necessary, for the purpose of examining the present plea, to determine the precise conditions in which such documents may, particularly from a temporal and material viewpoint, constitute a means of exercising the rights of the defence.

114.

It follows from the foregoing, therefore, that, in so far as it concerns the Set A documents, the applicants' second plea raises numerous delicate questions of principle requiring a detailed examination in the main proceedings and that it does not therefore appear, at this stage, to be manifestly unfounded.

- Second plea, alleging breach of professional privilege, in so far as it concerns the Set B documents

115.
As stated at paragraphs 9 and 10 above, the Set B documents consist, first, of handwritten memoranda which, according to the applicants, were taken with a view to drafting the Set A memoranda and, second, of e-mails. It is necessary to examine those three documents in the light of the second plea raised by the applicants, alleging breach of professional privilege by the Commission.

116.
As regards, first, the Set B handwritten memoranda, it is apparent, on the basis of a comparison with the typewritten Set A memoranda, that both have the same overall structure. They also contain, in substance, numerous common points. It cannot be precluded prima facie, therefore, that, like the Set A memoranda, the Set B handwritten memoranda would never have been drafted had the author not envisaged consulting a lawyer about their contents. The applicants' second plea, as regards the Set B handwritten memoranda, is therefore not wholly unfounded.

117.
It is necessary to examine, last, the two Set B e-mails between the General Manager of Akcros Chemicals and the Akzo Nobel's competition law coordinator.

118.
In that regard, it should be pointed out that, in application of the principles laid down in AM & S v Commission, cited at paragraph 66 above, the protection afforded by Community law, especially in the context of Regulation No 17, to written communications between lawyer and client applies only in so far as those lawyers are independent, i.e. not bound to the client by a relationship of

employment (AM & S v Commission, cited at paragraph 66 above, paragraph 21).

119.
In the present case, it is common ground that the e-mails in question were exchanged between the General Manager of Akcros Chemicals and a lawyer employed on a permanent basis by Akzo Nobel. Following AM & S v Commission, cited at paragraph 66 above, those communications are therefore not in principle covered by professional privilege.

120.
None the less, the President considers that the arguments put forward by the applicants and the interveners raise a question of principle which merits very special attention and which cannot be resolved in the present interim proceedings.

121.
On the one hand, as the Commission emphasises, the Member States do not unanimously recognise the principle that written communications with in-house lawyers must be covered by professional privilege. Furthermore, as the Commission also points out, it is necessary to ensure that an extension of professional privilege cannot facilitate abuses which would enable evidence of an infringement of the Treaty competition rules to be concealed and thus prevent the Commission from carrying out its task of ensuring compliance with those rules.

122.
On the other hand, however, the solution in AM & S v Commission, cited at paragraph 66 above, is based, inter alia, on an interpretation of the principles common to the Member States dating from 1982. It is therefore necessary to determine whether, in the present case, the applicants and the interveners have adduced serious evidence of such a kind as to demonstrate that, taking into account developments in Community law and in the legal orders of the Member States since the judgment in AM & S v Commission, cited at paragraph 66 above, it cannot be precluded that the protection of professional privilege should now also extend to written communications with a lawyer employed by an undertaking on a permanent basis.

123.
The President considers that arguments to that effect have been submitted in the present case and that they are not wholly unfounded.

124.
First, the applicants, the Algemene Raad van de Nederlandse Orde van Advocaten and ECLA have adduced evidence which indicates that, since 1982, a number of Member States have adopted rules designed to protect written communications with a lawyer employed by an undertaking on a permanent basis, provided that he is subject to certain rules of professional conduct. That appears to be the position, in particular, in Belgium and the Netherlands. At the hearing, ECLA further stated that in most Member States written communications with in-house lawyers subject to particular rules of professional conduct were protected by professional privilege. The Commission, on the other hand, contended in its observations that it was only in a minority of Member States that communications with in-house lawyers were covered by professional privilege.

125.
Without its being possible at this stage to ascertain and to embark upon a thorough and detailed analysis of the evidence adduced by the applicants and the interveners, that evidence none the less appears prima facie to be capable of showing that the role assigned to independent lawyers of collaborating in the administration of justice by the courts, which proved decisive for the recognition of the protection of written communications to which they are parties (AM & S v Commission, cited at paragraph 66 above, paragraph 24), is now capable of being shared, to a certain degree, by certain categories of lawyers employed within undertakings on a permanent basis where they are subject to strict rules of professional conduct.

126.
The evidence therefore tends to show that increasingly in the legal orders of the Member States and possibly, as a consequence, in the Community legal order, there is no presumption that the link of employment between a lawyer and an undertaking will always, and as a matter of principle, affect the independence necessary for the effective exercise of the role of collaborating in the administration of

justice by the courts if, in addition, the lawyer is bound by strict rules of professional conduct, which where necessary require that he observe the particular duties commensurate with his status.

127.
It must therefore be held that the applicants and the interveners have presented arguments which are not wholly unfounded and which are apt to justify raising again the complex question of the circumstances in which written communications with a lawyer employed by an undertaking on a permanent basis may possibly be protected by professional privilege, provided that the lawyer is subject to rules of professional conduct equivalent to those imposed on an independent lawyer. In the present case, the applicants maintained at the hearing, without being clearly contradicted on that point by the Commission, that the lawyer whom they employed on a permanent basis was in fact bound by professional rules equivalent to those governing independent lawyers of the Netherlands Bar.

128.
Nor does that question of principle appear prima facie to have to be rejected at this stage as a result of the Commission's argument that recognition of professional privilege for written communications with lawyers employed on a permanent basis would give rise to different regimes within the European Union, depending on whether or not in-house lawyers are authorised by the Member States to be members of a Bar.

129.
This complex question must be examined thoroughly, in particular as regards, first, the precise scope of the right which would then be recognised, second, the Community rules and national rules applicable to the professions of lawyer and in-house lawyer and, third, the legal and practical alternatives available to companies established in Member States which do not allow in-house lawyers to be members of a Bar.

130.
It must therefore be concluded that, in the present case, the applicants have, by their second plea, raised a delicate question of principle, which requires a complex legal assessment and must be

reserved for the Court when it adjudicates on the main application.

131.
It is also necessary, in the present case, to examine the first plea put forward by the applicants.

- First plea, alleging breach of the procedural principles laid down in AM & S v Commission and of Article 242 EC

132.
In principle, where the undertaking which is the subject of an investigation under Article 14 of Regulation No 17 refuses, on the ground that it is entitled to protection of the confidentiality of information, to produce, among the business records demanded by the Commission, written communications between itself and its lawyer, it must nevertheless provide the Commission's authorised agents with relevant material of such a nature as to demonstrate that the communications fulfil the conditions for being granted legal protection, although it is not bound to reveal the contents of the communications in question. Where the Commission is not satisfied that such evidence has been supplied, it is for the latter to order, pursuant to Article 14(3) of Regulation No 17, production of the communications in question and, if necessary, to impose on the undertaking fines or periodic penalty payments under that regulation as a penalty for the undertaking's refusal either to supply such additional evidence as the Commission considers necessary or to produce the communications in question whose confidentiality, in the Commission's view, is not protected by law (AM & S v Commission, cited at paragraph 66 above, paragraphs 29 to 31). It is then open to the undertaking subject to the investigation to lodge an application for annulment of the Commission's decision, together where appropriate with an application for interim measures, under Articles 242 EC and 243 EC.

133.
The principles thus recited tend to demonstrate that, in principle, where the representatives of the undertaking under investigation have produced relevant material of such a nature as to demonstrate that a particular document is protected by professional privilege and where the Commission is not satisfied with those explanations, the Commission is not prima facie entitled to examine the document concerned before it has adopted a decision allowing the undertaking

under investigation to bring the matter before the Court of First Instance and, where appropriate, the judge with jurisdiction to order interim measures.

134.
It is apparent, on the contrary, that the mere fact that an undertaking claims that a document is protected by professional privilege is not prima facie sufficient to prevent the Commission from reading that document if, in addition, the undertaking produces no relevant material of such a kind as to prove that it is actually protected by professional privilege.

135.
In the present case, paragraph 6 of the decision of 8 May 2003 states that, when examining the Set A documents, the applicants' representatives, first, had a detailed discussion with the Commission's officials, second, mentioned a manuscript reference to the name of an external lawyer on one of the copies of those memoranda and, third, claimed that the memoranda had been prepared with a view to seeking legal advice. Those statements tend prima facie to indicate that the applicants produced relevant material of such a kind as to prove that the documents should be protected.

136.
As regards, next, the Set B documents, it is apparent from paragraph 7 of the decision of 8 May 2003 and also from the Commission's observations that the applicants' representatives and the Commission's officials also had a detailed discussion about the contents of the three documents, which, too, does not preclude prima facie that the applicants' representatives produced, during that discussion, material of such a kind as to justify the possible protection of the three Set B documents, as in the case of the Set A documents.

137.
However, the applicants' present plea raises a further delicate question. It is necessary to consider, in addition, whether, in the light of the duty of an undertaking subject to an investigation to submit relevant material of such a kind as to prove that a document must in fact be protected, the Commission officials were prima facie entitled, as they did in the present case, to cast a cursory glance over that

document in order to form their own view of its eligibility for protection.

138.
It follows from AM & S v Commission, cited at paragraph 66 above, that the undertaking under investigation is not bound to reveal the contents of the documents in question when it is required to present to the Commission's officials relevant material of such a kind as to prove that the documents merit protection (AM & S v Commission, cited at paragraph 66 above, paragraph 29). Furthermore, if the Commission's officials were able to cast even a cursory glance over the documents concerned, there would be a risk that, in spite of the superficial nature of their examination, they would read information covered by professional privilege. That may be so, in particular, if the confidentiality of the document in question is not clear from external indications such as a lawyer's letterhead or a clear reference by that lawyer to the confidentiality from which the document should benefit. In such a situation, it would frequently happen that the only way in which the Commission's officials would be able to satisfy themselves that the protected information was confidential would be by looking at the information itself. On the other hand, if those officials, without first consulting the documents concerned, simply placed copies of them in a sealed envelope which they removed with a view to a subsequent resolution of the dispute, then prima facie the risks of a breach of professional privilege could be avoided and at the same time the Commission would be able to retain a certain control over the documents forming the subject-matter of the investigation.

139.
The President therefore considers that it is not precluded at this stage that, in the context of an investigation under Article 14(3) of Regulation No 17, the Commission's officials must refrain from casting even a cursory glance over the documents which an undertaking claims to be protected by professional privilege, at least if the undertaking has not given its consent.

140.
In the present case, it follows from the minute of the investigation prepared by the Commission that the applicants' representatives were firmly opposed to a cursory examination of the documents in the file in question and also that it was only when they were reminded of the

possible criminal consequences of obstructing the investigation that they agreed to allow the leader of the investigating team to glance quickly at the documents. At this stage, the President is unable to determine whether the Commission's warnings were sufficient to vitiate the consent of the applicants' representatives. However, the circumstances in which the warnings were formulated do not make it possible to conclude, at this stage, that the applicants gave their unreserved consent to the brief review of the Set A and Set B documents subsequently carried out by the leader of the investigating team, as may be seen from points 14 and 15 of the minute of the investigation.

141.
Furthermore, it is common ground between the parties that it was subsequently, at the stage of the investigation, that the Commission placed the Set B documents in its file, without first adopting a decision under Article 14(3) of Regulation No 17, which would have allowed the applicants to bring the matter before the Court of First Instance and, if appropriate, the judge with jurisdiction to make interim orders.

142.
At this stage, therefore, it appears that the applicants' first plea raises a complex question of interpretation of the procedure defined in AM & S v Commission, cited at paragraph 66 above, and that it cannot be precluded that the Commission failed to observe the procedural principles laid down in that judgment.

143.
The arguments put forward by the Commission do not call in question either the importance of that question of interpretation or the possibility that the Commission acted unlawfully in regard to the Set A and Set B documents.

144.
The Commission contends, first, that in AM & S v Commission, cited at paragraph 66 above, its initial investigation was based on Article 14(2) of Regulation No 17 and that it therefore had no option other than subsequently to order production of the documents concerned on the basis of Article 14(3) of Regulation No 17. The situation is different in the present case, since its decision to carry out an investigation was

based from the outset on Article 14(3) of Regulation No 17.

145.
It should be observed, however, that at paragraph 29 of AM & S v Commission, cited at paragraph 66 above, the Court of Justice drew no distinction according to whether the decision to carry out an investigation, on the basis of which communication of documents is initially demanded, is based on Article 14(2) of Regulation No 17 or on Article 14(3) thereof. The Court of Justice merely referred generally to investigations decided under Article 14 of Regulation No 17. It cannot therefore be inferred prima facie that the outcome must necessarily be different where the initial decision to carry out an investigation is based on Article 14(3) of Regulation No 17 rather than on Article 14(2) thereof.

146.
In any event, the Commission has not shown how the fact that it ordered an investigation on the basis of Article 14(3) of Regulation No 17 would prima facie be sufficient to allow it to read immediately documents potentially protected by professional privilege without having first adopted a second decision which would give the undertaking forming the subject of an investigation the proper opportunity to challenge the Commission's position before the Court of First Instance and, where appropriate, the judge with jurisdiction to make interim orders. Admittedly, the Commission stated at the hearing that the undertaking under investigation could challenge the first decision, adopted under Article 14(3) of Regulation No 17. However, as already held at paragraph 68 above, an undertaking cannot plead the illegality affecting the investigation procedures as a ground for annulment of the measure on the basis of which the Commission carried out that investigation (see, in particular, Dow Benelux v Commission, cited at paragraph 68 above, paragraph 49, and Limburgse Vinyl Maatschappij and Others v Commission, cited at paragraph 68 above, paragraph 413). Furthermore, it is apparent that where, during an investigation, the Commission intends to read immediately documents which the undertaking concerned claims to be covered by professional privilege, it is prima facie unrealistic to consider that that undertaking, which has just learnt of the decision to carry out an investigation, has the actual and effective possibility to challenge it before the Court of First Instance and, in particular, before the judge with jurisdiction to make interim orders, before the Commission reads the documents in question. In such a circumstance,

the interests of the undertaking do not seem to be sufficiently protected by the possibility available under Articles 242 EC and 243 EC to obtain an order suspending the decision or any other interim measure (see, by analogy, AM & S v Commission, cited at paragraph 66 above, paragraph 32).

147.
Second, the Commission maintained in its observations that it was entitled, where there can be no doubt that the document cannot be covered by professional privilege, to place it immediately with the rest of its file, as it did in the case of the Set B documents.

148.
That solution cannot be accepted at this stage without a thorough analysis in the main action. First, as stated at paragraphs 137 to 140 above, it cannot be precluded that the Commission's officials must refrain from casting even a cursory glance over the documents in respect of which an undertaking produces relevant material of such a kind as to prove that they are covered by professional privilege. Second, even on the assumption that the Commission's officials were entitled to do so, the fact would remain that certain documents covered by professional privilege, in particular the documents reporting the contents of a communication with a lawyer, appear to be purely internal documents and do not necessarily give any external indication that they are confidential. Consequently, in such a circumstance, the only way in which the Commission's officials could have no doubt that a document did not have protection would ultimately be to read it in full on the spot and, consequently, to know what is in it before first giving the undertaking under investigation the opportunity to challenge the Commission's decision before the Court of First Instance and, where appropriate, the judge with jurisdiction to make interim orders.

149.
The Commission's arguments therefore do not affect the reality of the question of principle raised by the applicants' first plea, namely the question of the circumstances in which, in procedural terms, the requirements of professional privilege and the material and practical constraints which bind the Commission in matters of investigation must be reconciled.

150.
The condition relating to a prima facie case is therefore satisfied as regards the Set A and Set B documents. It is therefore appropriate to consider whether the applicants have shown an urgent need to order the interim measures requested for each of the documents concerned.

Urgency

Arguments of the parties

151.
The applicants maintain that a distinction must be drawn between the Set A and Set B documents for the purpose of assessing the urgency of ordering the interim measures sought.

152.
First, as regards the Set A documents, the applicants observe that, in the decision of 8 May 2003, the Commission stated that it would not open the sealed envelope before expiry of the period within which an appeal could be lodged against the decision. The applicants state that they are prepared to withdraw their application for interim measures in respect of the Set A documents if the Commission guarantees in writing that the envelope containing those documents will remain sealed until the end of the main proceedings.

153.
Second, the applicants state that the Set B documents have been in the Commission's possession since February 2003 and that the Commission has already read them, so that it is necessary to adopt urgent measures in order to ensure that the Commission does not take irreversible steps on the basis of those documents.

154.
Third, the applicants submit that they could suffer irreparable damage if the effects of the decision of 8 May 2003 were not suspended. In

particular, the status of the documents may have an effect on the applicants' position in the current investigation, since the Set B documents have already been reviewed and since, on the basis of all the documents concerned, the Commission may adopt other measures of investigation or address a statement of objections to the applicants. The applicants acknowledge, in that regard, that procedural irregularities may be invoked in an action against a decision adopted on the basis of Article 81(1) EC but maintain that it is not in the Commission's interest that that evaluation should be made at such a late stage. Furthermore, the applicants contend that the possibility that third parties may have access to the documents may cause them irreparable harm, in particular since authorities other than the Commission may order those third parties to communicate documents to them in the context of discovery procedures. Last, the status of the documents is of the greatest importance in the light of the investigations taking place in Canada, the United States and Japan.

155.
The Commission, on the other hand, contends that there is no urgency in ordering the interim measures sought.

156.
On that point, the Commission states, first, that it will not open the envelope containing the Set A documents until the President has adjudicated on the application in this case. As regards, next, both the Set A and the Set B documents, the Commission states that if the Court should hold in the main proceedings that the decision of 8 May 2003 is unlawful, the Commission would be obliged to remove from its file the documents affected by that illegality and would be prevented from using the information as evidence. The Commission none the less contends that it may base its future strategy on the documents removed from the file, since it is not required to suffer acute amnesia (Case C-67/91 Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others [1992] ECR I-4785, paragraph 39, referring to Dow Benelux v Commission, cited at paragraph 68 above, paragraphs 18 and 19).

157.
The Commission also states that it will not give third parties access to the documents in question before the Court has adjudicated on the main application, thus preventing any risk of disclosure in the hands of

third parties.

158.
Last, the risk that contentious proceedings will be initiated outside the Community is purely hypothetical and as such cannot be taken into account in examining the urgency of ordering interim measures (order of the President of the Court of Justice of 14 December 1999 in Case C-335/99 P(R) HFB and Others v Commission [1999] ECR I-8705, paragraph 67).

Findings of the President

159.
It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the necessity to give interim judgment in order to prevent serious and irreparable harm being occasioned to the party seeking the interim measure. It is for the latter to adduce evidence that it cannot await the outcome of the main proceedings without being required to sustain harm of that nature (see, in particular, orders of the President of the Court of First Instance of 30 April 1999 in Case T-44/98 R II [1999] ECR II-1427, paragraph 128, and of 7 April 2000 in Case T-326/99 R Fern Olivieri v Commission [2000] ECR II-1985, paragraph 136).

160.
It is sufficient, however, particularly where the occurrence of the harm depends on the occurrence of a number of factors, that the harm is foreseeable with a sufficient degree of probability (see, in particular, order of the Court of Justice of 29 June 1993 in Case C-280/93 R Germany v Council [1993] ECR I-3667, paragraphs 22 and 34, and order in HFB and Others v Commission, cited at paragraph 158 above, paragraph 67).

161.
It is appropriate, in the present case, to consider separately, first, whether the condition relating to urgency is satisfied in the case of the Set A documents and, second, whether it is satisfied in the case of the Set B documents.

- Set A documents

162.
As the Commission has not yet had access to the Set A documents, which are in a sealed envelope, it is appropriate to determine whether it is necessary, in order to prevent serious and irreparable harm being caused, to order the Commission not to read those documents and, consequently, to suspend the operation of Article 2 of the decision of 8 May 2003.

163.
In that regard, if the Commission were to read the Set A documents and if the Court of First Instance should subsequently consider, in its judgment in the main proceedings, that the Commission was wrong to refuse to regard those documents as covered by professional privilege, it would be impossible in practice for the Commission to draw all the inferences from that judgment of annulment, since its officials would already have become aware of the contents of the Set A documents.

164.
In that sense, the fact that the Commission was aware of the information in the Set A documents would as such constitute a substantial and irreversible breach of the applicants' right to respect for the confidentiality protecting those documents.

165.
The Commission none the less states that, if the decision of 8 May 2003 were subsequently held to be unlawful, it would be required to remove from its file the documents affected by that unlawfulness and would therefore be unable to use them as evidence.

166.
The President considers that the fact that the Commission would be unable to use the documents as evidence effectively prevents the aggravation of part of the harm which the applicants might sustain, namely the harm associated with the subsequent use as evidence of the documents in question.

167.

On the other hand, the fact that the Commission would be unable to use the Set A documents as evidence would have no impact on the serious and irreparable harm which would result from their mere disclosure. The Commission's argument fails to take account of the particular nature of professional privilege. The purpose of professional privilege is not only to protect a person's private interest in not having his rights of defence irremediably affected but also to protect the requirement that every person must be able, without constraint, to consult a lawyer (see, to that effect, AM & S v Commission, cited at paragraph 66 above, paragraph 18). That requirement, which is formulated in the public interest of the proper administration of justice and respect for lawfulness, necessarily presupposes that a client has been free to consult his lawyer without fear that any confidences which he may impart may subsequently be disclosed to a third party. Consequently, the reduction of professional privilege to a mere guarantee that the information entrusted by a litigant will not be used against him dilutes the essence of that right, since it is the disclosure, albeit provisional, of such information that might be capable of causing irremediable harm to the confidence which that litigant placed, in confiding in his lawyer, in the fact that it would never be disclosed.

168.
Consequently, the prohibition on the Commission's using the information in the Set A documents could at the most only prevent the aggravation of harm which would already be caused by the disclosure of those documents.

169.
It must therefore be held that the condition relating to urgency is satisfied in the case of the Set A documents.

- Set B documents

170.
As a preliminary point, it should be borne in mind that, unlike in the case of the Set A documents, the Commission has already read the three Set B documents, which were not placed in a sealed envelope. It is therefore no longer possible to ensure that the Commission does not read those documents. However, if the decision of 8 May 2003 is annulled in the main proceedings, the Commission will not be able to use that information as evidence.

171.
The applicants none the less contend that interim measures must be adopted as a matter of urgency in order to avoid three types of irreversible harm.

172.
The first of these types of harm relates, first of all, to the fact that the Commission must be prevented from taking irreversible procedural steps on the basis of the Set B documents and, in particular, from carrying out other investigative operations or adopting a statement of objections.

173.
However, in the event that the Commission, as it claims in its observations, should be lawfully entitled to use the information concerned as mere indicia, the harm sustained by the applicants would be already occasioned and irreversible, since the Commission has already read the documents in question. It is not for the judge hearing an application for interim measures to adopt measures designed to make up for harm which is already irreversible (order in Austria v Council, cited at paragraph 36 above, paragraph 113).

174.
Furthermore, if, on the other hand, the Commission should not be authorised to use the documents in question as indicia, it would be required, should the decision be annulled in the main action, to take the necessary measures to comply with the judgment of the Court of First Instance (see, in particular, judgment in Case T-548/93 Ladbroke Racing v Commission [1995] ECR II-2565, paragraph 54) and, consequently, to cancel the measures previously adopted, which would be likely to prevent the occurrence of the harm on which the applicants rely. Consequently, in practice, harm could be established only if the Commission adopted measures based on the information in the Set B documents and the applicants were subsequently unable to demonstrate with sufficient certainty an actual link between the information and the measures adopted. The President considers that the applicants have not demonstrated that it was necessary and possible to order an interim measure to prevent a risk which, in the absence of proof to the contrary, remains hypothetical and,

consequently, must not be taken into account under the head of urgency by the judge hearing the application for interim measures (order in HFB and Others v Commission, cited at paragraph 158 above, paragraph 67).

175.
The applicants rely on a second type of harm relating, in essence, to the fact that, since the Set B documents have been placed in the Commission's file, third parties may demand access to them. There is, they allege, a risk that these third parties will themselves be obliged to communicate the documents in question to other third parties. The Commission must therefore return or destroy all the copies of the Set B documents in its possession.

176.
It must be emphasised, however, that in its observations the Commission stated that it would not allow third parties to have access to the Set A and Set B documents until judgment is given in the main action. The judge hearing the application for interim measures, as he is entitled to do (see order of the president of the Court of Justice of 21 August 1981 in Case 232/81 R Agricola Commerciale Olio and Others v Commission [1981] ECR 2193), takes note, by the present order, of that declaration by the Commission. In those circumstances, the second type of harm relied on by the applicants must be rejected.

177.
As regards, last, the third type of harm on which the applicants rely, it must be stated that they rely only on what they allege to be the great importance of the documents in question as regards investigations under way in Canada, the United States and Japan. In the light of the particularly vague nature of those arguments, it must be concluded that the applicants have not shown the need to prevent irreparable harm. At the hearing, the applicants did indeed state that the real importance of the Set B documents could not be evaluated at that stage. However, even on the assumption that that is actually so, the fact none the less remains that, as the Commission has noted, the applicants have once again relied solely on hypothetical risks.

178.
In the light of the foregoing, the condition relating to urgency is not

satisfied in the case of the Set B documents. Since it is satisfied in the case of the Set A documents, it is necessary to proceed, for those documents alone, to balance the interests involved.

The balance of interests

179.
As regards the balance of interests, the Commission observes that the documents in question may be useful to it after the proceedings, notably in order to enable it to make requests for information. The delay in the investigation should the measures sought be ordered would affect the general interest of the Community and, more generally, of society as a whole in competition investigations being carried out as speedily and efficiently as possible. Speed is also important for the undertakings which are subject to the same investigation as the applicants and which, in the Commission's submission, may well be affected by the uncertainty resulting from suspension of the decision of 8 May 2003. Last, the procedure proposed by the applicants, namely the procedure according to which an investigation should be suspended in respect of a document as soon as an undertaking claims professional privilege, constitutes an unrealistic procedure which would give rise to much abuse. Only the option which allows the Commission to place a document in a sealed envelope where there is doubt as to whether it is protected by professional privilege would allow it to retain a minimum of control over the procedure.

180.
Where, on an application for interim measures, the judge before whom the applicant claims that it will sustain serious and irreparable harm weighs up the various interests involved, he must consider whether the annulment of the contested decision by the court dealing with the main application would make it possible to reverse the situation that would have been brought about in the absence of interim measures and, conversely, whether suspension of the operation of that decision would be such as to prevent its being fully effective in the event of the main application being dismissed (see, to that effect, orders of the President of the Court of Justice of 26 June 2003 in Joined Cases C-182/03 R and C-217/03 R Belgium and Forum 187 v Commission

[2003] ECR I-6887, paragraph 142, and in Commission v Atlantic Container Line and Others, cited at paragraph 37 above, paragraph 50).

181.
In the present case, it is appropriate to take into account, first, the applicants' interest in the Set A documents not being disclosed and, second, the general interest and the Commission's interest in the Treaty competition rules being observed.

182.
First of all, it must be emphasised that an undertaking's interest in the documents which it claims to be protected by professional privilege not being disclosed must be evaluated by reference to the circumstances of each case and, in particular, to the nature and content of the documents concerned. In the present case, after examining the Set A documents, the President considers that their disclosure would be susceptible of causing serious and irreparable harm to the applicants, by virtue not only of their mere disclosure but also of their contents.

183.
However, that interest must be balanced against the Commission's interest and, more generally, that of the general public in competition investigations being carried out with the utmost speed, having regard to the importance of the competition rules for the attainment of the objectives of the EC Treaty.

184.
If the main application is dismissed, the Commission will be able to have access to the Set A documents. Consequently, in principle, on that date, even in the event that the investigation has been delayed, the Commission will none the less be in a position to use the Set A documents for the purpose of completing the investigation.

185.
At the hearing, however, the Commission stated that the uncertainty in which it was placed, as regards the content of the documents in question, caused major problems in allocating its resources and defining its priorities and, consequently, obliged it to suspend its

investigation.

186.
According to settled case-law, however, the rights of the defence, to which professional privilege is a necessary corollary (AM & S v Commission, cited at paragraph 66 above, paragraph 23), constitutes a fundamental right (see, in particular, judgment of the Court of Justice in Limburgse Vinyl Maatschappij and Others v Commission, cited at paragraph 99 above, paragraph 85, and judgment in Enso Española v Commission, cited at paragraph 99 above, paragraph 80). That fundamental nature has the consequence that, in the context of the present balance of interests, given that it is established that the applicants' professional privilege and their rights of defence would be likely to sustain serious and irreparable harm should the Commission read the Set A documents, considerations of administrative efficiency and of resource allocation, in spite of their importance, can in principle prevail over the rights of the defence only if the Commission pleads very special circumstances justifying such harm. Otherwise, it would be possible in almost every case for the Commission to justify a serious interference with the rights of the defence by purely internal administrative considerations, which would be contrary to the fundamental nature of the rights of the defence.

187.
The President considers that the Commission has not demonstrated in the present case the existence of such circumstances, since it has referred to disadvantages that might follow for it, by nature, from any suspension of the operation of a decision refusing to regard certain documents as covered by professional privilege.

188.
Furthermore, in the context of the main application, the Commission has the possibility to lodge with the Court of First Instance, at the same time as its defence, an application pursuant to Article 76a of the Rules of Procedure for the main application to be dealt with under an expedited procedure. Admittedly, the judge dealing with the application for interim measures cannot guarantee that such an application will be granted in this case. None the less, account must be taken of the fact that if that application is granted, it will have the consequence of allowing judgment to be given speedily and, consequently, of rendering the Commission's present position less

uncertain. In the particular circumstances of the present case, the President considers that the existence of that possibility does not give the Commission a greater interest in the application for interim measures being dismissed.

189.
Nor has the Commission adduced precise and specific evidence capable of proving and evaluating the disadvantages which, in its submission, may affect the undertakings subject to the same investigation as the applicants should the operation of Article 2 of the decision of 8 May 2003 be suspended.

190.
In the light of the foregoing, the balance of the interests in issue tilts in favour of suspending the operation of the provisions of the decision of 8 May 2003 whereby the Commission decides to open the sealed envelope containing the Set A documents, namely Article 2 of that decision.

191.
Last, since the Set A documents will in all probability constitute an essential factor in the Court's assessment of the main application and since it has been established in the present order that the Commission must not read those documents before judgment is given in the main proceedings, it is appropriate to order that the Set A documents be kept at the Court Registry until the date of that judgment.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. Cases T-125/03 R and T-253/03 R are joined for the

purposes of this order.

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

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

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

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

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

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

8. The remainder of the application for interim measures in

Case T-253/03 R is dismissed.

9. The costs in Cases T-125/03 R and T-253/03 R are reserved.

Luxembourg, 30 October 2003.

H. Jung

Registrar

B. Vesterdorf

President

1: Language of the case: English.