of the confidentiality of information, to produce, among the business records demanded by the Commission, written communications between itself and its lawyer, and the Commission is not satisfied that proof of the confidential nature of the documents has been supplied, it is for the Commission to order, pursuant to Article 14 (3) of the abovementioned regulation, 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.

In Case 155/79

AM & S EUROPE LIMITED, represented by J. Lever, QC, of Gray's Inn, C. Bellamy, Barrister, of Gray's Inn, and G. Child, Solicitor, of Messrs Slaughter and May, London, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d'Eich,

applicant,

supported by

THE UNITED KINGDOM, represented by W. H. Godwin, Principal Assistant Treasury Solicitor, acting as Agent, assisted by the Rt. Hon. S. C. Silkin, QC, of the Middle Temple, and by D. Vaughan, QC, of the Inner Temple, with an address for service in Luxembourg at the British Embassy, 28 Boulevard Royal,

and

THE CONSULTATIVE COMMITTEE OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN COMMUNITY, represented by D. A. O. Edward, QC, of the Scots Bar, and J.-R. Thys, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of T. Biever and L. Schiltz, 83 Boulevard Grande-Duchesse Charlotte,

interveners,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, J. Temple Lang, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, M. Cervino, Jean Monnet Building, Kirchberg,

defendant,

supported by

THE FRENCH REPUBLIC, represented by N. Museux, acting as Agent, and A. Carnelutti, acting as Assistant Agent, with an address for service in Luxembourg at the French Embassy, 2 Rue Bertholet,

intervener,

APPLICATION for:

(a) a review by the Court under Article 173 of the EEC Treaty of the legality of Article 1 (b) of Commission Decision No 79/670/EEC of 6 July 1979 (OJ L 199, p. 31) which provides for the production by the applicant, for examination by the Commission, of certain documents for which the applicant claims legal privilege; and

(b) a declaration under Article 174 of the EEC Treaty that Article 1 (b) of the Decision of 6 July 1979 is void; alternatively, a declaration that it is void in so far as it requires the applicant to produce for examination by the Commission the whole of each of those documents.

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: Sir Gordon Slynn
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

AM & S Europe Limited (hereinafter referred to as AM & S) is a company incorporated in England. It has a subsidiary which owns and operates a zinc smelter at Avonmouth.

On 10 February 1978 the Member of the Commission responsible for competition policy directed investigations to be made of various undertakings, including the applicant, pursuant to Article 14 of Regulation No 17 of the Council.

On 20 and 21 February 1979 three officials of the Commission carried out an investigation at the applicant's premises in Bristol the purpose of which, as stated in the mandates which the officials produced, was to investigate "... competitive conditions concerning the production and distribution of zinc metals and its alloys and zinc concentrates in order to verify that there is no infringement of Articles 85 and 86 of the EEC Treaty".

At the conclusion of that investigation those officials left the premises of AM & S taking with them copies of a certain number of documents and leaving with AM & S a written request for further specified documents.

By letter of 26 March 1979 AM & S sent to the Commission photocopies of certain documents but at the same time refused to make available others which its legal advisers considered were covered by legal privilege, that is to say, the principle of legal professional privilege or confidentiality as understood in common law jurisdictions. The applicant further suggested that contact might be made with its solicitors should the Commission need further confirmation regarding the documents for which privilege was claimed.

The Commission did not accept that invitation. Instead, by decision of 6 July 1979 taken under Article 14 (3) of Regulation No 17, it required AM & S to submit to a fresh investigation at its premises at Bristol and Avonmouth and to produce certain business records which were divided into three groups (Article 1 (a), (b) and (c) of the decision). Article 1 (b) concerns "all documents for which legal privilege is claimed, as listed in the appendix to AM & S Europe Limited's letter of 26 March 1979 to the Commission".

On 25, 26 and 27 July 1979 two officials of the Commission proceeded to carry out a further investigation at AM & S's premises in Bristol pursuant to the decision of 6 July 1979.

On that occasion AM & S made it clear that it was unwilling to show to the inspectors the entirety of the documents for which privilege was claimed but that, without prejudice to any argument that it might wish to raise disputing the rights

of the Commission to look at any part of the documents which the applicant regarded as covered by privilege, AM & S was prepared to permit part of the documents to be seen so that the inspectors might reasonably satisfy themselves that the documents were indeed privileged. The solicitors for AM & S offered, moreover, to come to Brussels in order to put their arguments to appropriate departments of the Commission.

The Commission's inspectors thereupon stated that they would stop the investigation as far as it concerned the documents for which privilege was claimed but that the Commission reserved all rights relating to those documents. As for the meeting sought by the solicitors for AM & S, they stated that for various reasons a meeting could not be held until after 7 September 1979.

On 23 August 1979 the solicitors for AM & S wrote to the Director of Directorate A of Directorate-General IV (Competition) to ask him to fix a date for a meeting at which the question of the privileged documents might be discussed.

Following upon that letter a meeting was arranged which took place in Brussels on 18 September 1979 and at which were present counsel for AM & S and its solicitors and, for the Commission, Mr Riboux, Head of Division, in the absence of the Director of Directorate A, along with other officials.

At that meeting AM & S expressed its desire to reach agreement on a procedure whereby two conflicting interests might be reconciled, namely, (i) the Commission's desire to be satisfied that a document was indeed privileged and (ii) the need to maintain the secrecy of communications passing between legal advisers and clients for the purpose of obtaining legal advice. The procedure suggested was, in essence, that of allowing to be seen certain parts of the document in question which, according to AM & S, would enable its character to be clearly identified.

The Commission representatives refused to accept the proposal made by AM & S. They stated that they were bound by the decision of 6 July 1979, which they interpreted as meaning that an inspector must have the right, if he chose to exercise it, to read the whole of a document.

By application of 4 October 1979, which was registered at the Registry of the Court of Justice on the same date, AM & S commenced the present action.

By applications lodged on 15 February and 5 March 1980 respectively the United Kingdom and the French Republic asked to intervene in the proceedings.

By order of 27 February 1980 the Court granted the United Kingdom's application to intervene and by order of 12 March 1980 granted that of the French Republic.

By application lodged on 3 March 1980 the Consultative Committee of the Bars and Law Societies of the European Community asked to intervene in the proceedings. That application to intervene was granted by order of the President of the Court of 7 May 1980.

After hearing the report of the Judge-Rapporteur and the views of the

Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it invited the parties and the governments which had submitted observations "to express their views at the hearing as to the existence and scope of the principle of professional privilege in Community competition law, on which the Consultative Committee of the Bars and Law Societies, intervening, has given a full statement of its views".

II — Conclusions of the parties

AM & S claims that the Court should:

1. Declare Article 1 (b) of the decision of 6 July 1979 void;
2. Alternatively, declare Article 1 (b) of the decision of 6 July 1979 void in so far as it necessarily requires the disclosure to the Commission's inspector of the whole of each of the documents for which the applicants claim protection on grounds of legal confidence;
3. In either event, order the Commission to pay the costs;
4. Order such other relief as may be lawful or equitable in all the circumstances.

The *Commission of the European Communities* contends that the Court should:

1. Reject the application;
2. Order AM & S to pay the costs.

III — Submissions and arguments of the parties

In its application *AM & S* stresses at the outset that the matter which is the subject of the dispute is one of procedure. That matter is the extent to which, if at all, the Commission is entitled to look at a document in order to determine whether a claim to privilege for certain documents passing between lawyer and client is a valid claim.

This procedural issue arises in connection with the principle that the confidential relationship between lawyer and client is entitled under Community law to protection from disclosure.

According to AM & S, the aforementioned principle is not in dispute in the present case. The parties are at issue, not over the principle, but over the procedure to be adopted in order to apply it.

In that regard, AM & S submits that until, on the initiative of the Commission, the Council of Ministers makes a regulation for the verification of claims for protection on grounds of legal privilege it is incumbent on both the party claiming protection and the Commission to take reasonable steps to agree upon a means of verification without the Commission being entitled to see the contents of the material for which protection is claimed. In the ultimate event of disagreement between the parties, it is only the Court of Justice which is in a position to inspect the documents and adjudicate on the dispute.

Indeed, if the Commission could inspect those documents and use the knowledge gained thereby, the confidentiality of the documents would be destroyed and the protection rendered largely valueless. In the Member States where parties to an action have the right to see each other's documents some procedure is provided for the independent verification of claims

to privilege for documents relating to legal advice and assistance.

The procedure suggested by AM & S would only very rarely oblige the parties concerned to call upon the Court to adjudicate upon the nature of a document for which privilege is claimed.

Moreover, even the Commission's position does not rule out the possibility of the Court having ultimately to rule upon the character of a document where the undertaking concerned refuses on the ground that the document is privileged to give a copy of it to the Commission and the Commission seeks by means of a decision to compel the undertaking to do so.

In such a case, however, even if the Court were to uphold the claim to privilege for the document, the protection would already have been rendered nugatory by the fact that the Commission had in any event gained knowledge of the content of the document.

What is involved, therefore, is the defining of a verification procedure given that, as AM & S readily accepts, the undertaking in question may not confine itself simply to claiming that a document is privileged but must also provide proof of its claim.

That procedure could be specified by the Community institutions, if necessary by means of a Council regulation.

At the present time, in the absence of any Community provision dealing with such a procedure, AM & S suggests that the undertaking concerned may demonstrate that the document is privileged by showing a part of the document to the Commission in order to establish its nature. For example, a British undertaking might show the Commission the "backsheet" of the "Instructions to Counsel" sent by the solicitor to counsel and the heading to the first page thereof. If that were thought insufficient, the task of verifying the documents could be entrusted to a reputable, experienced and wholly independent lawyer chosen by agreement between the parties. No doubt other possibilities exist, such as a statutory declaration or affidavit and so forth. If, on the other land, an undertaking were to decline to adduce, in whatever manner may be appropriate, sufficient proof to establish that the document was protected, it would have little prospect of successfully contesting a Commssion decision imposing a fine or penalty upon it. In these circumstances few undertakings would risk making unwarranted claims to privilege and applications to the Court of Justice for an adjudication on claims for protection would not occur very frequently.

On the other hand, were the Court to uphold the Commission's argument, there would be no possibility whatever of maintaining the confidentiality even of documents of which the protected nature is wholly indisputable.

The second submission advanced by AM & S is concerned with the principle of proportionality, which has long been recognized in the Community case-law and which the Commission is said to have infringed by demanding the production in their entirety of documents for which protection has been claimed when the public interest involved would have been fully, satisfactorily and practicably met by other means, without the inspector having had to be given access to the contents of the documents.

The *Commission* submits a defence falling into two parts.

In the first part the Commission examines the question of the protection of legal confidence in Community law in order to show that, contrary to the argument of AM & S, that principle is nowhere an absolute rule with fixed, clear limits which overrides other legal principles when they conflict, but one of several legal principles which can be differently regulated and reconciled according to circumstances.

In the second part the Commission sets forth its point of view in regard to the manner in which verification of the nature of the documents for which protection has been claimed should be carried out and raises numerous objections, including those of a practical nature, to the procedure suggested by AM & S.

First part: The question of protection of legal confidence in Community law

The Commission's proposal for the first regulation implementing Articles 85 and 86 of the EEC Treaty, which was to become Regulation No 17, contained no provisions on the subject of privilege or "secret professionnel". Although an amendment to the effect of including a provision protecting legal confidence in the proposal had been approved by the Parliament, the Council did not accept that suggestion in the final version of Regulation No 17. It is therefore clear that the Community legislature considered the question whether legislation should provide for protection of legal confidence and decided that it should not.

The lack of any legislation dealing with the question seems to have caused no real difficulty in practice for many years. However, the subject was debated more frequently after the accession of the three new Member States in 1973.

On 22 June 1978, in answer to a written question (No 63/78) by Mr Couste, a member of the European Parliament, the Commission, after recalling that Community legislation did not provide for any protection for legal papers, stated that the Commission, wishing to act fairly, follows the rules in the competition law of certain Member States and is willing not to use any such papers as evidence of infringements of the competition rules but that, subject to review by the Court of Justice, it is for the Commission to determine the nature of such papers.

On the other hand, it is true that in a paper delivered by Dr Ehlermann, Director-General, and Dr Oldekop, a member of the Legal Service of the Commission, to the conference held in June 1978 in Copenhagen by the Fédération Internationale du Droit Européen (FIDE) the existence of a general principle of Community law ensuring professional privilege within certain limits was envisaged.

The Commission's decision of 6 July 1979 was of course based on the view of the position under existing Community law set out in the answer to the question by Mr Couste.

It is, in fact, extremely difficult to detect a single principle of protection of legal confidentiality which is valid for all the

Member States. Even the report on this matter compiled by Mr D. A. O. Edward QC and published by the Consultative Committee of the Bars and Law Societies of the European Community points out, *inter alia*, that the protection of advice given by a lawyer in the hands of his client is only ensured in the common law jurisdictions whereas in the six original Member States protection is only given to documents in the possession of the lawyer and that protection is not absolute in all cases.

According to the Commission, there are two basic reasons possible for accepting a doctrine of protection of legal confidence in Community law. The first is based on the view that there is a general principle of law governing the right to obtain legal advice which implies, as a consequence, some protection for the documents relating to that advice. The second is that the interest of the Communities in permitting undertakings to obtain legal advice on their obligations under Community rules must outweigh the interest in being able to use as evidence documents relating to that advice.

As to the first argument, even if there is a general principle of law on the right to obtain legal advice, the extent of the legal protection which should be given to documents relating to legal advice is not at all clear. The Commission, for its part, considers that that extent cannot be deduced from the principle itself but must be determined by practical considerations in the light of all the circumstances. The protection given to communications between lawyer and client varies considerably from one Member State to another and there is no absolute or unqualified rule. The extent to which protection is given, and whether it is given at all, depends on the purpose for which disclosure of the document is required. The greater the importance of that purpose the less the document is protected.

As for the second argument, it is based on the assumption that most undertakings honestly wish to comply with Community law and that most lawyers honestly help their clients to comply with its provisions. That assumption is no doubt correct in the majority of cases but there are certainly exceptions. The question whether compliance with Community law is more effectively obtained by disclosure or by protection from disclosure cannot be decided by reference to general principles but according to circumstances.

Since that argument presupposes that abuse is very rare it would, according to the Commission, be greatly strengthened were the Bars and national law societies explicitly to recognize that it is contrary to professional ethics and a matter for disciplinary action for a lawyer to help his clients to make arrangements which are reasonably clearly contrary to the law which is to be complied with — in this case, Community law.

Another important factor which must be taken into account is the extent to which lawyers consider that they have a duty to ensure that their clients disclose all the documents which they are obliged to

disclose. If lawyers in all the Member States regarded themselves as bound so to act, it would be reasonable to give wider scope to the protection of legal confidence.

But, at the present time, there is reason to think that the position of the legal profession in the Community, or at least a part of it, on the two questions mentioned above is not as clear and unqualified as the Commission would wish.

The Commission then observes that even in the United Kingdom it is accepted that the extent of the protection of legal confidence must depend on circumstances. To that effect the Commission cites a passage from the Law Reform Committee's report on privilege in civil proceedings and the judgment of the House of Lords in *Waugh* v *British Railways Board* [1979] 3 WLR 150; 2 All. ER 1169 from which it appears that the principle of protection only overrides the principle that all relevant evidence should be submitted to a court if the document was written for the *dominant* purpose of obtaining legal advice.

In its answer to Mr Cousté's question the Commission gave the assurance that it would not use as evidence strictly legal papers written with a view to seeking or giving opinions on points of law to be observed which are in the possession of the undertaking as well as documents relating to the defence. By so doing the Commission in practice treats as protected all documents which would be protected under the British and Irish doctrine of privilege, even where such documents would not be protected under the priciple of "secret professionnel" or the corresponding rules observed in the other Member States. In the absence of any Community provision expressly governing this field, the Commission's assurance is a very considerable benefit to undertakings compared with their position under the law of certain Member States.

The Commission considers that it was not possible for it to go further without opening the door to abuses.

Second part: The issues in this case

The Commission states first of all that it agrees with AM & S that the dispute concerns entirely a question of procedure and not the question whether any particular document falls within the scope of the protection of legal confidence but that that is entirely without prejudice to the position which it may adopt on the substantive question in any given case.

That said, the Commission then sets forth its objections in principle to the argument advanced by AM & S. In the Commission's view, the protection of legal confidence is not an absolute or rigid rule with clear limits which overrides other legal considerations, but one of several objectives which have to be reconciled as far as possible in particular situations. In particular, two other principles are important, namely, that all relevant evidence should be submitted to the Court and that, if a claim is made that some undoubtedly relevant evidence should not be disclosed to the Court, that claim should be upheld only if it is clearly proved. Observance of both principles may only be ensured by the procedure followed by

the Commission. Since the Commission does not use a protected document as evidence of an infringement and since, moreover, it undertakes not to permit its decision to turn on knowledge acquired through reading the document, the interests of an undertaking cannot be affected in any way by an examination of the document which is carried out for the sole purpose of seeing whether it may be used or not.

It is because existing Community legislation, in contrast to the position in certain Member States, does not make provision for any procedure of independent verification, that the Commission has gone so far in giving all the assurances which it believes can reasonably be required.

According to the Commission, no method which does not involve an examination of the documents for which protection is claimed can be satisfactory. AM & S appears, in fact, to accept that where the attitude of the undertaking is one of refusal the documents may be examined by the Court. However, the weakness of the argument of AM & S lies precisely in the fact that the Court of Justice is not a court which may decide questions of fact.

It is true that, if an undertaking refused to disclose a document and the Commission adopted a decision ordering disclosure of that document, the undertaking could bring a direct action under Article 173 of the Treaty before the Court of Justice but the Court could only decide the issue whether the reasons given for the decision were sufficient and not whether the document was protected.

Not having been able to see the document, the Commission would not be in a position to state the grounds upon which it considered that the document is not protected and its decision would therefore be liable to be declared void. In practice, the undertaking would often be allowed to determine for itself whether a document was disclosed or not, because the undertaking would decide what to tell the Commission about the document and the Commission would have no method of verifying what it said.

However, it is not certain that if an undertaking were quite simply to refuse to produce the document that would be sufficient ground for a decision by the Commission. Assuming that it were, it is none the less the case that the dispute brought before the Court would concern the stated grounds of the decision and not whether the document was protected. The truth of the statements made by the undertaking could only be tested by the Court if the Court were to look at the document. However, AM & S has not explained how it would be competent for the Court to examine the document itself in the context of proceedings concerning the validity of a decision of the Commission.

The Commission submits that no procedure could be satisfactory in which the issues before the Court would not be the real issue between the Commission and the undertaking, that is to say, whether a document is protected. The dispute cannot, however, be put directly before the Court by means of any of the remedies available under the Treaty as it now stands.

The argument advanced by AM & S implies that, should the case arise, the Court would act as a court of first instance. But, as AM & S concedes, where an undertaking and the Commission cannot agree on whether a

document is protected, the matter may only be brought before the Court under Article 173 which makes provisions for a procedure in which the Court is not called upon to decide questions of fact. Moreover, even if that contradiction could be resolved, it is none the less the case that the Court would be acting as a court deciding questions of fact, which does not accord with its role as defined by the EEC Treaty.

If proof of that statement were needed it may be found in the Order of the President of the Court in Case 109/75R *National Carbonising Company Limited* v *Commission* [1975] ECR 1193. That order states that "it would in fact be contrary to the balance between the institutions which derives from the Treaty for the judge hearing the proceedings for the adoption of interim measures to substitute himself for the Commission in the exercise of a power which belongs primarily, subject to review by the Court, to the Commission ...". In the Commission's opinion the same principle applies to any other preliminary question, including disclosure of documents.

The Commission then turns to the facts of the case in order to illustrate some of the difficulties to which the theory propounded by AM & S would give rise in practice.

According to the argument of AM & S, the Commission's inspector should confine himself to reading the title page or cover and the heading of the first page of the document for which protection is claimed. However, it must be borne in mind that many documents have neither covers nor headings and that documents which have them do not necessarily correspond, in all their parts, to their covers or headings. In addition, the adoption of a procedure such as that proposed by AM & S would allow dishonest persons to conceal under a misleading cover or title documents which in truth are in no way protected by legal privilege.

In general, irrespective of the way in which documents may be drawn up, the Commission considers that simply looking at some superficial parts of a document would not give a true impression of its nature and therefore that, put shortly, it would be the undertaking which would decide whether or not a document is protected.

Several practical reasons lead the Commission to reject the procedure suggested by AM & S.

The first is that that procedure could easily be abused by dishonest undertakings.

Secondly, if the Commission could only rely on statements made by the undertaking's lawyer, it would be placed in the invidious and indeed impossible position of having to decide whether it could trust this lawyer or that lawyer. That would be so unless and until all the Bars of the Member States accept that certain conduct directed towards protecting the client's interest at all costs is unprofessional and a matter for professional discipline.

Thirdly, if the inspector were to consider (as well he might) that what he had been allowed to see was insufficient to convince him that the contents of the document were protected, the issue to be brought before the Court would not be whether the document was protected but, rather, whether that portion of the

document which had been disclosed was sufficient to convince a reasonable person that the document was entitled to protection. That also raises a question of fact and not of law.

Finally, it may be necessary to decide related questions which can be resolved only if the document can be read as a whole.

Such would be the case where, in order to decide whether a document is protected, it is necessary to check:

Whether the person who wrote it or the person to whom it is addressed is a lawyer qualified to practise;

Whether the lawyer was assisting or participating in illegal activites, so that protection would not apply;

Whether he was acting as lawyer or in some other capacity;

Whether the document had been written exclusively, primarily or only partly for the purposes of legal advice or litigation.

Therefore the Court, even if it was in a position to look at the document in question under the procedure suggested by AM & S, would also be compelled in some cases to act as a tribunal of first instance to decide related questions of fact which could only be resolved by the production of evidence and the hearing of witnesses.

The Commission considers that it is worth stressing all these aspects because, in practice, the Court will be called upon to adjudicate on every document for which protection is claimed even if it should subsequently transpire that the document is of wholly insignificant importance.

AM & S attempts to counter that objection, which it has already foreseen, by stating that the Court would not be involved in numerous and trivial cases because "the Commission would in practice almost certainly wish to propose a Council regulation so that a proper statutory machinery for verification would be obtained" but in so saying, AM & S admits, in effect, that the procedure which it suggests would indeed be "intolerable" unless it were changed by regulation.

Finally, in regard to the submission which AM & S bases on the alleged infringement of the *principle of proportionality*, the Commission states that it claims for its inspector only the right to see the document in so far as necessary for the purpose of verifying that the claim to privilege is justified. It may often be the case that the inspector will consider that it is not necessary to look at the whole document.

The principle of proportionality requires that the means used must not go beyond what is necessary to achieve the objective sought. It cannot, on the other hand, be a justification for making verification ineffective or impossible, nor can it be used as a guise for permitting the undertaking itself to decide whether a document is protected.

In its *reply*, AM & S observes that, despite some equivocation, the Commission appears to accept the existence of a principle of Community law concerning legal confidence. In these circumstances the protection of legal confidence constitutes a substantive rule

of law and may not depend on the Commission's discretion. If it were not so, the "right" to protection would be devoid of legal content.

It is not necessary in this case to determine the scope and extent of that principle. That may be done in the context of another action, should the question arise.

It is common ground between the parties that the Commission will not use protected documents as evidence.

Thus the only question which falls for decision in this case concerns the appropriate procedure for verification of claims for protection and on that issue the difference between the parties is narrow, but crucial.

In regard to the procedure proposed by the Commission, AM & S considers that that procedure still does not ensure protection of legal confidence, even though the Commission has stated in its defence that its inspectors will be instructed not to use the knowledge gained from protected documents.

First, such an assurance by a body which combines the investigating, prosecuting and adjudicating roles is no substitute for objective rules of law for the protection of legal rights.

Moreover, it puts the Commission's inspectors in an almost impossible position. They are, in effect, required to put out of their heads certain material gained from the documents which they have seen, whereas they are employed to discover facts, to draw inferences, to follow up clues and to build up a case.

In any event, the Commission has not stated what would be the legal consequences of an inspector's, consciously or subconsciously, disregarding the assurance given by the Commission. Moreover, even if there were any legal consequences, an undertaking would not normally be in a position to establish that the inspector had used the protected knowledge.

AM & S is also of the view that the Commission has not considered the practical implications of the assurance which it has offered, late in the day, in an effort to deal with one of the defects in its position.

It could be, for example, that after having looked at a document the Commission's inspector may decide that that document is not protected. In those circumstances, even if it considered the document to be covered by legal privilege, the undertaking cannot prevent the Commission from using it as it sees fit.

Further, if the protection of legal confidence is to be safeguarded by rules of law, those rules must ensure, not only that the law is upheld, but that the law is seen to be upheld. That is not so if the documents which an undertaking claims are protected must be inspected by the Commission, that is to say, by the very party against whom the protection is claimed.

AM & S makes the observation that it is a denial of the principle of protection of legal confidence to permit protected documents to be inspected, in breach of legal confidence, by the same prosecuting authority against whom the law seeks to uphold the protection.

Unquestionably, in the present state of Community law, the procedure suggested by AM & S is an improvised procedure, but that arises quite simply from the omission to date by the Commission to exercise its power of initiative and to propose a regulation providing, in a manner that conforms to the law of the Community, for a procedure for use in these cases.

As for the objections raised by the Commission in regard to the procedure put forward by AM & S, those objections are unreal and unfounded.

To the first of those objections it may be answered that it is not correct that the argument of AM & S makes the undertaking itself the only arbiter of whether or not a document is protected. AM & S observes that the Commission has a *prima facie* right to see documents held by an undertaking and that the undertaking will not therefore be able to attack a Commission decision requiring it to produce certain documents unless it has provided the Commission with sufficient material to satisfy the Commission that those documents are protected, or in the last resort, has agreed to permit an independent third party to verify the relevant facts.

If an enterprise were to challenge a decision taken by the Commission on the basis of a verification carried out by an independent third party, the Court would have to rule on whether the documents are protected but it would deliver that ruling as a court of review and not a court of first instance. If an undertaking were to decline to agree to have resort to an independent third party, it would not be open to it subsequently to contest a Commission decision ordering it to produce the documents. It could merely challenge the Commission's final decision in application of Article 85 or Article 86 of the EEC Treaty by claiming that that decision is based on a wrongful use of protected documents.

On the other hand, the Commission's standpoint has the disadvantage of not giving an undertaking any effective means of redress if the inspector wrongly decides that a document is not protected.

The Commission's second objection consists in saying that the argument of AM & S would compel the Court to act as a court of first instance.

In fact, under the procedure proposed by AM & S it is still the Commission which takes the decision whether the documents are protected or not, but on the basis of a description of the documents verified, if the Commission so requires, by a third party of unimpeachable quality and repute. It is therefore impossible to see how that solution compels the Court to act as a court of first instance. Nor is it correct that under that solution the document itself would never have to be disclosed: at the first stage it would, if the Commission so required, have to be disclosed to the independent third party and, if the contents were relevant when the matter reached the Court, the Court could request their disclosure pursuant to measures of inquiry.

Finally, according to the Commission, the procedure described by AM & S could be abused by unscrupulous lawyers or could lead to some kind of

malpractice. So far as that argument is concerned, it should be noted first of all that the question whether legal privilege protects documents involving improper conduct by a lawyer is a question of substance and not of procedure. In any event, that question may be resolved by laying down (as the Court might do, were the issue before it) that improper conduct by a lawyer removes any protection of legal confidence. The next question is whether adoption of the procedure advocated by AM & S would increase the risk of concealment or suppression of documents which the Commission is legally entitled to inspect. AM & S considers, on the contrary, that if an undertaking or its lawyers intend unscrupulously to keep documents back, they will do so by destroying or removing the documents in question and not by giving the documents a misdescription which will be bound to be exposed on the carrying-out of the verification by an independent third party.

However, if it is deontological considerations which are the Commission's main concern, AM & S suggests in the alternative that in Member States which have appropriate deontological rules the verification procedure should at least conform to those rules.

Such a solution would at the same time avoid serious difficulties that would arise for national authorities. Under Article 14 of Regulation No 17, the competent authority of the Member State in whose territory an investigation is being made may, and sometimes must, assist the officials of the Commission in carrying out their duties. In the United Kingdom, however, it would be wholly contrary to fundamental principles of national law if the competent authorities were required to render assistance under Article 14 (5) or (6) of Council Regulation No 17 to enable the Commission's inspectors to breach the confidential relationship between lawyer and client.

Finally, AM & S disputes certain points raised by the Commission in its defence.

Thus AM & S observes that, whilst the Commission accepts the existence of the principle of "secret professionnel" in Community law, it states that that principle is not expressly mentioned in Regulation No 17. However, it was unnecessary to make any express provision concerning "secret professionnel" because that concept was already recognized in the laws of all the Member States and had automatically become part of the fundamental rights of the Community legal order. That position was in no way altered following the accession of the United Kingdom and Ireland since all common law jurisdictions follow the general principle that a general Act must not be read as repealing the common law relating to a special and particular matter unless there is something in the general Act to indicate an intention to deal with that matter.

In regard to the assertion that for many years the absence of Community legislation on the protection of legal confidence seems to have caused no real difficulty in practice, AM & S points out that the Commission did not take any decisions imposing fines until 1969 and that the gradual realization by undertakings of the problem of legal

confidence took place particularly in the 1970s when, on the one hand, the Commission began to "flex its muscles" in the field of competition and, on the other hand, since Community law was becoming increasingly complex, undertakings felt an increased need to obtain detailed written legal advice. With the accession of the common law countries, in which the protection of legal confidence has a long historical tradition, it was inevitable that the issue should have assumed increasing prominence in recent years. The procedure proposed by AM & S is indeed one which would not give rise to difficulty, as is demonstrated by the national systems, such as those of the United Kingdom, where similar procedures operate.

As for the distinction between *lex lata* and *lex ferenda*, it is true that, in the relatively undeveloped stage of the Community legal order at the present time, the law must be ascertained in the light of general principles and of a consideration of practical consequences: but that fact does not mean that one is speaking *de lege ferenda* and not *de lege lata*.

The references in the Edward Report to diversity of substantive rules of national law in the field of legal confidence result in part from the fact that that report, as the CCBE now recognizes, does not take full account of the methods of interpretation and application of legal texts in the original six Member States. On a matter of detail, AM & S states that it is not correct that the concept of "secret professionnel" in national law can never protect advice or information communicated by a lawyer to his client and it cites in this regard several decisions given by national courts.

As to the justification for protecting legal confidence, it appears clear that the Commission accepted that principle because it considers that the advantage accruing to the Community of an undertaking's being able to obtain legal advice outweighs any other advantage which may result from using confidential legal papers as evidence. By contrast, however, the procedure proposed by the Commission has the result of discouraging undertakings from obtaining written legal advice and even more so from preserving that advice.

In its *rejoinder* the *Commission* disputes in turn the contentions by AM & S that:

(1) in Community law there is no procedure for deciding whether a document is protected;

(2) the assurances given by the Commission on several occasions are only statements of intention and, moreover, may not be observed without putting the Commission's inspectors in an "impossible" position;

(3) there would be no safeguards for undertakings if an inspector improperly used information obtained through looking at a document in order to decide whether it is privileged or if he wrongly decided that a document is not protected,

(4) the procedure advocated by the Commission is not such as to give the public the impression that legal

confidence is protected even if in fact the procedure were to protect it.

On the first point, the Commission observes that the procedure to be followed in a case such as the present is merely the procedure used in the context of Regulation No 17 where an inspector and an undertaking do not agree on whether a given document or file is covered by an investigation decision taken under Article 14 of that regulation. That procedure must be used unless and until it is altered by Community legislation.

In regard to the matter of the assurances which it has given, the Commission, after having pointed out that they are not mere statements of intention but statements which clarify and confirm the law, states that those assurances do not place its inspectors in any dilemma.

In fact, under the system operated by the Commission, an official never performs in turn the functions of inspector and rapporteur in the same case. Consequently, an inspector never has the opportunity of using knowledge acquired through looking at a protected document. If he were to attempt to use it as a basis for a statement in his report on the evidence he had collected, he could not, of course, indicate that his knowledge was obtained from a protected document. And the rapporteur would therefore be obliged to reject the statement as being unsupported. If, on the other hand, he used it to guide him to other, unprotected, evidence two possibilities would arise, namely, that those documents are within the scope of the investigation decision and are in the offices in which the investigation is to take place, in which event it may be supposed that the inspector would have found them anyway, or that they are not in those offices, in which event the inspector could not obtain them in disregard of the scope of the investigation decision.

In regard to the contention that an undertaking has no opportunity of preventing an inspector from improperly using knowledge derived from a protected document or from wrongly deciding that a document is not protected, it is clear that the undertaking's interests are adversely affected only by a decision whereby the Commission holds that the undertaking has infringed the Treaty. However, that decision may be contested by the undertaking concerned and if it were proved that the decision is based on information contained in a protected document the decision may be declared void by the Court of Justice.

Finally, the fact that the inspector who sees a document is not the person who subsequently decides whether there is sufficient evidence that the undertaking has infringed the Treaty not only ensures that the principle that legal confidence should be protected is in fact observed but makes clear even to the public at large that there is no possible opportunity for abuse.

Having thus answered the criticisms made by AM & S, the Commission, in its turn, criticizes the procedure proposed by AM & S.

According to the Commission, every procedure for verification of claims to protection must meet two requirements:

(1) it must ensure that documents which are protected are not improperly used as evidence;

(2) it must enable claims to be properly decided.

The Commission considers that "its procedure", as already described, satisfies both the first and second requirement whereas the procedure contended for by AM & S only satisfies the first. Indeed, the need for an agreement between the Commission and the undertaking implies that the latter may refuse to agree to conditions which do not suit it or, even more so, delay giving its agreement or make its agreement subject to a body of conditions of a different character. If confronted with such an attitude, the only answer open to the Commission is to adopt a decision stating, without any evidence, that the document is not protected.

Yet another serious objection is that, if the procedure contended for by AM & S had to be operated, the Commission would have to negotiate an agreement with every enterprise making a claim that any document in its possession was protected and with whoever was chosen to act as the independent third party. It stands to reason that those negotiations would be time-consuming for the Commission and greatly hinder it in its work.

The fundamental flaw in the proposal of AM & S is that it would make it necessary in certain circumstances for the Commission to adopt a decision declaring the document to be unprotected, without the Commission ever being in a position to know the facts. Everything would then be reduced to a device for raising the issue before an appeal tribunal. But Community law should not depend on such procedural contrivances.

AM & S acknowledges, it is true, that a purely formal claim to privilege is insufficent to prevent the Commission looking at the document and that the Commission must nevertheless be allowed to see certain parts of the document in order that it may reasonably satisfy itself that the document is protected. The Commission, however, is of the view that the nature of a document can only be properly established by its content, since the heading and a description of its subject-matter are not always conclusive.

AM & S then states that it is possible to resort to an independent third party and that, in any event, if the Commission were to disagree with the conclusion reached by the third party, a decision might be taken holding the document to be unprotected.

In that regard, the Commission asks how it would be able to find reasons for a decision disagreeing with the finding of the third party when AM & S has not suggested that the third party should give reasons for his conclusion and still less that he should include in such reasons the evidence and the arguments favourable to the Commission.

Finally, AM & S states that the Court of Justice may look at the document and that in that event the Court is not acting as a court of first instance. The Commission knows of no procedure provided for in the Treaty in the context of which the Court has such jurisdiction. Moreover, even if the Court could look

at the document, it would necessarily be the first court or judicial body to examine the principal evidence allowing the question whether or not the document is protected to be decided. But, according to well-settled case-law of the Court, it is the Commission and not the Court which must be the tribunal of first instance in all competition questions.

In these circumstance the conclusion must be reached that the procedure suggested by AM & S is not capable of permitting the soundness of a claim to protection to be verified. It may be added, in answer to all of the arguments of AM & S, that that procedure does not prevent possible dishonest conduct by lawyers and that, as appears from the legislation of the United Kingdom and the decisions of its courts, the fundamental principles of law in Britain are not in conflict with the procedure described by the Commission.

As for the submission based on infringement of the principle of proportionality, the Commission observes that the procedure which it applies is "objective", provides for an effective review by the Court and allows it to be seen that justice has been done. Those, however, are precisely the requirements which AM & S considers must be met if the principle of proportionality is to be observed.

Intervening in support of AM & S, the *United Kingdom* states that it is not correct in principle, and that the relevant Community rules do not require, that verification of the soundness of a claim to legal privilege should be carried out using procedures which either allow the party seeking disclosure of a document to see that document before the verification has been effected and with the view to making that verification itself or allow the party resisting disclosure to determine the validity of its own claim without any possibility of independent review.

From that it follows that, provided Community legislation permits, the verification procedures should:

(i) provide for the party claiming privilege to disclose sufficient details of the character of the documents concerned and the nature of the claim (without disclosing the documents themselves) to enable the party seeking disclosure to raise any apparent legal issues before the Court of Justice and to enable the Court to determine those issues;

(ii) provide that the parties may by agreement submit any dispute (whether in respect of law or application of the law) to the decision of an independent person or body, who would, for the sole purpose of so deciding, be entitled to inspect the document in question;

(iii) enable the parties, so far as may be necessary, to have the assistance of the Court to make a final determination, and enable the Court to inspect the document for that purpose alone.

The United Kingdom considers that the relevant Community legislation permits such procedures.

Since the present case is concerned solely with a question of procedure, it is not

necessary to consider the existence or scope of the principle that legal confidence should be protected or the limitations to which it may be subject. The United Kingdom considers none the less that it is important to state its position on the substantive law and to make clear that the protection of legal confidence is part of Community law within the meaning of Article 164 of the Treaty. It therefore rejects any possible interpretation to the effect that observance by the Commission of legal confidence is merely an example of "fair play" and not a legal obligation to which that institution is subject under Community law.

It is true that there is no harmonized concept of legal professional privilege in all the Member States. That, however, does not prevent the principle itself from being accepted throughout the Community and from forming part of Community law.

The basis of the principle lies in the recognition of the fact that the interests of justice and good administration require that persons should be able to seek and obtain legal advice. That can only be done on condition that there is a confidential relationship between the lawyer and his client. That aim cannot be pursued if the confidential relationship is weakened or destroyed or even if it were thought that it might be. On the other hand, any abuse of the protection accorded to that relationship must be prevented.

For those reasons the United Kingdom is of the view that the procedure to be followed must respect that confidential relationship otherwise legal confidence cannot be protected.

The procedure must:

(i) be fair and be seen to be fair;

(ii) be carried out by persons who are qualified and impartial;

(iii) exclude any risk (and even the appearance of a risk) of information obtained in the course of verification being used in breach of legal privilege.

The United Kingdom thereafter considers, in the light of the above-mentioned criteria, the procedures proposed by the Commission and AM & S respectively.

In regard to the procedure suggested by the Commission, the United Kingdom observes, on the one hand, that in order to determine whether a document is protected, the Commission's inspectors may be called upon to resolve very complicated legal issues which they may not be sufficiently qualified to decide and that, on the other hand, since they are at the same time investigators they cannot appear in the eyes of the parties concerned to be impartial persons. That procedure therefore does not ensure the purpose of the privilege and does not appear to be capable of ensuring it either.

The assurance given by the Commission that its inspectors will not use the knowledge gained from looking at protected documents does not alter that state of affairs. In fact, a person who has acquired certain knowledge is never able to obliterate it, with the result that it is impossible to exclude that person's using that knowledge, if not deliberately, then at least subconsciously. Moreover, it is impossible to discover whether the knowledge has been used or not.

On the other hand, the procedure proposed by AM & S respects not only the principle of legal privilege but also the interests of justice, the duties of the Commission and the interests of the

Community. That procedure would also make applications to the Court less frequent.

Finally, it should be remembered that the powers conferred on the Commission by Regulation No 17 are limited to that which is "necessary" for the attainment of the results provided for and the fact that a document or information has some significance for the purposes of an inquiry does not inevitably involve an obligation to make disclosure. In cases such as the present, a principle of very great importance, that of legal confidence, lies on the other side of the scales. In these circumstances, in establishing whether communication is truly necessary, regard must be had to the principles of proportionality or the balancing of conflicting principles.

It would also be possible, in so far as there is no sufficient corpus of Community legislation in this field, to apply, in regard to the Commission, national laws on the protection of legal confidence in so far as those laws may be pleaded against national authorities.

It is true that such a solution would produce some divergences (but not arbitrary discrimination) in the treatment of undertakings, but at the same time it would provide the necessary impetus for the search for a Community solution to the problem.

Intervening in support of the Commission, the *French Republic* is of the opinion that in its present state Community law contains no provisions conferring protection on documents passing between a legal adviser and his client.

The legal privilege claimed by AM & S, whilst being comparable in certain respects with certain doctrines of Member States other than the United Kingdom, is not, however, a principle "common to the laws of all the Member States".

It follows that the Commission's inspectors must be in a position to exercise fully and in normal course the powers which they possess under Article 14 of Regulation No 17, which authorizes them, *inter alia*, to "examine the books and other business records". However, nothing allows acceptance of the view of AM & S to the effect that documents of a legal nature drawn up "for the purpose of ... obtaining or giving legal advice" do not constitute business records within the meaning of the aforementioned Article 14.

It is to be noted, moreover, that this case does not raise the question of protection from disclosure of documents in the possession of a lawyer or of communications between lawyers, but only of documents in the possession of the undertaking.

According to the French Republic, a principle of national law such as "legal privilege" cannot stand in the way of the direct and uniform application in all the Member States of the provisions of Regulation No 17. If it were accepted that papers covered by such "privilege" may constitute an exception to Article 14, a distortion would be created which is incompatible with Article 189 of the EEC Treaty and with the well-settled case-law of the Court on the uniform and directed applicability of regulations in the law of the Member States. Undertakings would then be treated differently

depending upon whether the law of the Member State where they are established does or does not confer (or confers subject to stricter limits) protection for certain documents. In fact, the laws applying in the various Member States to documents passing between an adviser and his client are very different. To be persuaded of this, it is sufficient to note the difference which exists between the concept of the "secret professionnel", common to the laws of the six original Member States, and that of "legal professional privilege" as that has been laid down by decisions of the British courts.

Even though a certain amount of protection is to be found in the laws of all the Member States, it varies so much in its content that it is difficult to elevate that protection into a "principle common to the laws of the Member States" and even more questionable to turn it into a rule of law capable of altering the meaning of Community texts, which long-standing practice of the Commission has observed.

In the context of the EEC Treaty, the role of the Commission is that of seeing that competition in the common market is not distorted. The Community has therefore an interest in seeing the Commission exercise its powers of investigation in accordance with the applicable system of Community rules. That interest is not protected under the system proposed by AM & S, which may be shown to be contrary to the Treaty not only because it creates a new procedure based on rules of law which do not exist at the present time in Community law (the opportunity of claiming an exception to the duty to disclose all business records provided for by Article 14 of Regulation No 17; the need for an agreement between the parties on the procedure to be followed in verifying the nature of the documents and the opportunity for the undertaking to judge at first instance whether or not a document is of "privileged nature") but also because it would alter the institutional balance of the Treaty.

Under the scheme proposed by AM & S, the Court of Justice would be vested with jurisdiction to rule whether a document sought by the Commission ought, or ought not, to be "protected". Under the scheme established by Regulation No 17 for competition matters, however, it is for the Commission to investigate matters connected with the question whether free competition has been infringed and it is difficult to maintain that that power of investigation does not include that of examining documents in their entirety and of deciding whether the claiming of some protection or other is, or is not, well-founded. The only power which the Court has in this field is that of reviewing the legality of Commission decisions where an application within the meaning of Article 173 of the Treaty is brought.

Showing itself conscious of the fact that in several Member States legal rules protect the confidentiality of information passing between an adviser and his client, the Commission has acted within the framework of the powers conferred on it by Regulation No 17. But it would be contrary to that regulation to infer from it that the Commission may not have access to the whole contents of a

document in order to check whether the protection claimed is well-founded. To decide otherwise would be to open the door to abuses, which are always possible.

In short, the French Republic considers that it is not in accordance with Community law to make the legal adviser and the undertaking which is the subject of competition proceedings the arbiters of whether or not a document is protected.

Intervening in support of AM & S, the *Consultative Committee of the Bars and Law Societies of the European Community* (hereinafter referred to as "the CCBE") observes that, as both parties accept, the question raised in this case is concerned only with procedure and consists in ascertaining the appropriate method for verifying whether a document may be protected by legal privilege.

However, the conclusions reached by the parties are different because AM & S and the Commission are not at one on the definition of the principle of substantive law in the context of which the question is raised.

According to AM & S, Community law has in fact a principle of legal privilege which affords a right to protection for confidential documents. The Commission's position, on the other hand, is less clear-cut. Some of its statements appear to concede the existence of a principle recognizing a right which affords protection against the disclosure of documents concerning legal advice; others appear to deny the existence of a single, generally accepted, clear principle of protection. The argument which the Commission advances in order to demonstrate the merit of its own procedure appears, moreover, to presuppose a right to protection against the use of certain documents, but not against their disclosure. It is accordingly not possible, or it is at least unsafe, to proceed on the assumption that the Commission concedes the existence of a doctrine or principle of legal privilege in Community law.

In the view of the CCBE, the procedural question may only be answered once it has been decided whether the principle relied upon exists.

In that regard, the CCBE contends that there is a doctrine or principle of legal privilege in Community law. It can hardly be denied that, in the form of protection against the disclosure of confidential communications between lawyer and client, the principle of legal privilege forms part of the law of every Member State.

The argument of the Commission and the French Republic that there is no doctrine or principle common to all the Member States because the method and scope of protection can be shown to be different cannot be accepted. If the argument were correct, it would be necessary to deny the existence of common principles in the field of human rights as well.

In truth, the mere existence of procedural differences, or even of differences as to the limits of application, does not by itself prove that there is no principle common to all the Member States.

The argument of distortion put forward by the French Republic is not valid either. If it is assumed that there is a principle of legal privilege in the law of some Member States but not in that of others, its acceptance as a principle of Community law leads to the result that it

applies to all undertakings in the Community whereas its rejection would have the result of depriving undertakings in some countries of a right recognized by their national law.

Since the aim of Community law is to find the best solution having regard to national laws, it is necessary to examine the spirit, orientation and general tendency of the national laws on legal privilege.

The CCBE submits that on this matter there can be no doubt. As appears from the Edward Report, not only do all Member States afford some protection to confidential relations between lawyer and client, but there is a remarkable consistency in the explanations of the *ratio legis* and a clearly discernible tendency to extend rather than to reduce the scope of that protection. Finally, a study of comparative law shows that the protection of legal confidence is a characteristic feature of democratic systems and that, on the other hand, it has little place in the law of absolutist or totalitarian States.

To a marked and increasing extent, legal privilege is seen as a practical guarantee of fundamental, constitutional or human rights. This conclusion has been reached both by legal writers and decisions of the courts, in particular the decisions of the European Court of Human Rights.

The CCBE therefore submits:

that the confidentiality of communication between lawyer and client is recognized as a fundamental, constitutional or human right, accessory or complementary to other such rights which are expressly recognized; and that as such, this right should be recognized and applied as part of "the law" in terms of Article 164 of the EEC Treaty;

or alternatively,

that, in so far as it cannot be affirmed that such a right exists independently, a doctrine or principle of legal privilege protecting the confidential character of communications between lawyer and client is a necessary corollary of fundamental, constitutional or human rights which are expressly recognized and protected; and that as such, a doctrine or principle of legal privilege should be recognized and applied as part of Community law;

and that, in either case, the law affords protection, as of right, against disclosure of confidential communications between lawyer and client.

If those submissions are correct, it is irrelevant that Regulation No 17 makes no reference to the protection of legal privilege. As part of "the law", the right to such protection must be assumed to form part of the legal context in which that regulation was adopted.

If there is no principle of legal privilege in Community law, a lawyer could be required to give evidence or to disclose documents in direct violation of his obligations under national law.

The only way of escape from that conclusion is to assume that the principle of legal privilege is part of the general law subsumed in the Treaty and in all Community legislation.

The nuances of the application of that principle in the various Member States depend on the fact that legal privilege is not, in any Member State, a static concept but is continually evolving particularly because of modern developments in the methods of communication between lawyer and client. The general tendency of the national laws of the Member States, is, however, in the direction of protecting the confidential character of the lawyer-client relationship in itself and not any particular means of communication. That approach allows the problem of the differing scope or limits of legal privilege in the various Member States to be resolved, since a document is protected by reason of its confidential character and not by reason of its having certain physical characteristics or being in the possession of a particular person.

In regard to the question at issue, the CCBE considers that it is not a matter of whether the theory of AM & S is correct but whether the theory of the Commission is correct.

In that regard, the CCBE adopts the practical and legal objections formulated by AM & S. The CCBE considers in particular the position which would arise if a Commission inspector wrongly decided that a document is not protected. In that event, the document would have been put on the Commission's file. That fact that, in that way, the document may be read by anyone having access to the file amounts in itself to a breach of legal confidence.

Moreover, however, the Commission's theory may be found wanting if tested by criteria of principle.

First, if legal privilege is a right, its existence or non-existence in a particular case ought to be determined by a person whose constitutional function is to determine such questions, namely, in the absence of agreement between the parties concerned or a regulation which duly safeguards fundamental rights, by a judicial tribunal.

Secondly, if the purpose of legal privilege is to preserve the confidentiality of communications, the procedure adopted must be such as to guarantee that confidentiality to the maximum extent consistent with the need to be satisfied that the claim of confidentiality is justified. Moreover, that procedure must not only guarantee confidentiality but must be seen to guarantee it.

Thirdly, bearing in mind that the Commission and its inspectors have a positive duty of investigation, the procedure adopted should not be such as to create for them another duty (verification of privilege) which is potentially in conflict with that duty.

Fourthly, in so far as the Commission has an interest in disclosure of the documents in question, the maxim *nemo debet iudex esse in causa propria* applies.

The foregoing considerations apply with all the greater force if legal privilege is considered as enhancing fundamental, constitutional or human rights since the general interest in the right which the procedural safeguard is designed to protect is greater than any public or private interest in the result of the particular case.

It is characteristic of procedural safeguards for such rights that the

consequences of their non-observance cannot be elided on pragmatic grounds or by reference to whether non-observance has produced injustice or prejudice in the particular case. Consequently, so far as legal privilege is concerned, it is necessary to prevent not only actual misuse of confidential information, but the mere opportunity for misuse.

Subject always to its stand on the issue of principle, the CCBE has the following observations on the practicability of procedures alternative to that of the Commission.

A distinction must be drawn between a requirement to produce documents and a requirement to disclose their contents. Taking as an example the practice adopted by the Scottish courts, it is possible to produce documents in a sealed envelope which may be opened only by the person called upon to decide whether the documents are confidential.

In the absence of agreement between the parties or a regulation which safeguards fundamental rights, there is no alternative to a disputed claim of privilege being submitted for decision to a judicial tribunal.

That tribunal would not necessarily be the Court of Justice since it ought to be possible, by invoking the assistance of national authorities, to bring a disputed question of legal privilege before an appropriate national court, which would be bound to apply Community law in deciding the question. But even if it should be that observance of the law may only be ensured by an application to the Court of Justice for recognition of a claim of privilege, it ought to be accepted that that Court has jurisdiction by virtue of Article 164 of the Treaty which provides that: "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed". Moreover, from a practical point of view, Article 49 of the Rules of Procedure allows the Court to appoint an expert to examine the documents in question.

In so far as it is appropriate for the CCBE to propose a procedure, it suggests first a procedure involving an examination carried out by an "expert", who could confine himself to describing the documents or, on the other hand, could give an opinion as to whether the documents were entitled to protection or not.

If an "expertise" were not possible in the framework of the Community rules in force at the present time, a dispute about documents could always be settled by the parties agreeing to arbitration on the same basis as suggested above.

The CCBE therefore suggests for consideration a procedure which would:

(a) involve the immediate production of disputed documents in a sealed package which would put them out of the control of the undertaking under investigation, while not requiring disclosure of their contents to the inspectors; and

(b) provide for arbitration where agreement is possible within a reasonable time and an "expertise" where it is not.

The CCBE states that it is ready to discuss with the Commission the methods and criteria of selection of a panel of independent "experts/arbitres", and the rules and criteria to be followed by them.

If a regulation is necessary, the CCBE believes that it should be limited to matters of procedure and should not attempt to define the doctrine of legal privilege, its scope or its limits.

In Appendix IV to its observations, the CCBE, after pointing out that the issues raised by the Commission in regard to rules of professional conduct for lawyers are irrelevant to this case, sets forth the reasons for which it is not prepared to take the steps in regard to the definition of rules of professional conduct which the Commission desiderates.

IV — Oral procedure

1. AM & S Europe Limited, the Commission of the European Communities, the United Kingdom, the French Republic and the Consultative Committee of the Bars and Law Societies of the European Community presented oral argument at the sitting on 19 November 1980.

The Advocate General delivered his opinion at the sitting on 20 January 1981.

2. However, noting that for fortuitous reasons the composition of the Court on that occasion was not the same as it had been at the commencement of the proceedings and for the oral procedure, the Court re-opened the oral procedure by order of 21 January 1981.

The Advocate General delivered his opinion at the sitting on 28 January 1981.

3. On 4 February 1981 the Court made an order as follows:

"1. The oral procedure in Case 155/79 shall be re-opened; the parties shall be notified of the date of the hearing.

2. The applicant shall send to the Court, within three weeks after notification of this order and under confidential seal, the documents referred to in Article 1 (b) of the contested decision and listed in the appendix to AM & S Europe Limited's letter of 26 March 1979 to the Commission.

3. The Court shall, before the date of the hearing, draw up a report on those documents in the form which it considers appropriate so as not to prejudice its final decision; this report shall be notified to the parties.

4. The applicant, defendant and interveners shall be heard at the hearing on questions which shall be specified at a later date."

4. On 9 March 1981 the applicant lodged at the Court a sealed envelope containing a number of documents, in accordance with paragraph 2 of the above-mentioned order. The envelope was opened on 2 April 1981 by the Judge-Rapporteur and the Advocate General in the presence of the Assistant Registrar. Minutes of the proceedings were taken and the nature of the documents contained in the sealed envelope was recorded therein.

5. The report on those documents, drawn up pursuant to paragraph 3 of the above-mentioned order, was forwarded by the Court in a sealed envelope to the

main parties and to the interveners with a covering letter dated 17 July 1981. The letter notified the main parties and the interveners that the hearing was to be held on 27 October 1981. They were invited to state orally at that hearing their views on the legislation, academic opinion and case-law in the various Member States relating to the existence and extent of the protection granted — in investigative proceedings instituted by public authorities for the purpose of detecting offences of an economic nature, especially in the field of competiton — to correspondence passing between:

1. Two lawyers;

2. An independent lawyer and his client;

3. A lawyer and an undertaking, where the lawyer is bound to the undertaking by a permanent contractual relationship or as an employee;

4. A legal adviser of an undertaking and an employee of that undertaking or of an associated undertaking;

5. Employees of the same undertaking or of different undertakings linked to each other as associated undertakings, where the correspondence passing between those employees mentions legal advice given either by an independent lawyer or by a lawyer or legal adviser in the service of one of those undertakings or in the service of other undertakings associated in the same group.

Finally, the letter stated that as the composition of the Court had been altered since the first sitting on 19 November 1980 the parties might, if they considered it appropriate, put afresh on 27 October 1981 the arguments relating to fact and to law which they had advanced during the first sitting.

6. In a letter dated 21 August 1981 W. H. Godwin, Principal Assistant Treasury Solicitor, acting as Agent for the United Kingdom Government, intervening, requested clarification from the Court of the words "lawyer" (avocat) and "legal adviser" (juriste) used in the letter of 17 July 1981 and asked whether the word "parties" in the last paragraph of the letter included the interveners. He requested also a copy of the letter in French.

The Court replied by the letter on 3 September 1981, confirming that the word "parties" included the interveners, and enclosing a copy of the letter of 17 July 1981 in French.

7. On 10 September 1981 Messrs Slaughter and May, solicitors for the applicant, requested the Court by telex message to allow the applicant, the defendant and the Consultative Committee of the Bars and Law Societies of the European Community, one of the interveners, to lodge a written memorandum on the questions put by the Court in its letter of 17 July 1981 and to allow them until 31 December 1981 to do so.

In a letter of 11 September 1981 Mr D. Edward, President of the Consultative Committee of the Bars and Law Societies of the European Community in his capacity as representative of that body informed the Court of exceptional circumstances which might prevent him from attending the sitting.

The Court replied to the telex message and the letter referred to above by letter dated 23 September 1981, confirming the date fixed for the sitting as 27 October 1981.

8. The Agents for the Government of the French Republic, N. Museux and A. Carnelutti, asked the Court for permission to lodge a written memorandum in reply to the questions put in the letter of 17 July 1981 in preparation for the hearing on 27 October 1981; the Court informed them by letter dated 9 October 1981 that it was open to them to send the document to all the parties to the case and to ask their agreement to its being lodged at the hearing, and that if there was no objection from the parties the document would be accepted by the Court.

9. AM & S Europe Limited, the Commission of the European Communities, the United Kingdom, the French Republic and the Consultative Committee of the Bars and Law Societies of the European Community presented oral argument at the sitting on 27 October 1981.

The Advocate General delivered his opinion at the sitting on 26 January 1982.

Decision

1 By application lodged at the Court Registry on 4 October 1979 Australian Mining & Smelting Europe Limited (hereinafter referred to as "AM & S Europe"), which is based in the United Kingdom, instituted proceedings pursuant to the second paragraph of Article 173 of the EEC Treaty to have Article 1 (b) of an individual decision notified to it, namely Commission Decision No 79/760/EEC of 6 July 1979 (OJ L 199, p. 31), declared void. That provision required the applicant to produce for examination by officers of the Commission charged with carrying out an investigation all the documents for which legal privilege was claimed, as listed in the appendix to AM & S Europe's letter of 26 March 1979 to the Commission.

2 The application is based on the submission that in all the Member States written communications between lawyer and client are protected by virtue of a principle common to all those States, although the scope of that protection and the means of securing it vary from one country to another. According to the applicant, it follows from that principle which, in its view, also applies "within possible limits" in Community law, that the Commission may not when undertaking an investigation pursuant to Article 14 (3) of Regulation No 17 of the Council of 6 February 1962 (OJ, English Special Edition 1959-1962, p. 87), claim production, at least in their entirety, of written communications between lawyer and client if the undertaking claims protection and

takes "reasonable steps to satisfy the Commission that the protection is properly claimed" on the ground that the documents in question are in fact covered by legal privilege.

3 On the basis of that premise the applicant contends that it is a denial of the principle of confidentiality to permit an authority seeking information or undertaking an investigation, such as the Commission in this instance, against which the principle of protection is relied upon, to inspect protected documents in breach of their confidential nature. However, it concedes that "the Commission has a *prima facie* right to see the documents ... in the possession of an undertaking" by virtue of Article 14 of Regulation No 17, and that by virtue of that right "it is still the Commission that takes the decision whether the documents are protected or not, but on the basis of a description of the documents" and not on the basis of an examination of the whole of each document by its inspectors.

4 In that respect the applicant accepts that initially the undertaking claiming protection must provide the Commission with sufficient material on which to base an assessment: for example, the undertaking may provide a description of the documents and show the Commission's inspectors "parts of the documents", without disclosing the contents for which protection is claimed, in order to satisfy the Commission that the documents are in fact protected. Should the Commission remain unsatisfied as to the confidential nature of the documents in question the undertaking would be obliged to permit "inspection by an independent third party who will verify the description of the contents of the documents".

5 The contested decision, based on the principle that it is for the Commission to determine whether a given document should be used or not, requires AM & S Europe to allow the Commission's authorized inspectors to examine the documents in question in their entirety. Claiming that those documents satisfy the conditions for legal protection as described above, the applicant has requested the Court to declare Article 1 (b) of the above-mentioned decision void, or, alternatively, to declare it void in so far as it requires the disclosure to the Commission's inspector of the whole of each of the

documents for which the applicant claims protection on the grounds of legal confidence.

6 The United Kingdom, intervening, essentially supports the argument put forward by the applicant, and maintains that the principle of legal protection of written communications between lawyer and client is recognized as such in the various countries of the Community, even though there is no single, harmonized concept the boundaries of which do not vary. It accepts that the concept may be the subject of differing approaches in the various Member States.

7 As to the most suitable procedure for resolving disputes which might arise between the undertaking and the Commission as to whether certain documents are of a confidential nature or not, the United Kingdom proposes that if the Commission's inspector is not satisfied by the evidence supplied by the undertaking, an independent expert should be consulted, and, should the dispute not be resolved, the matter should be brought before the Court of Justice by the party concerned following the adoption by the Commission of a decision under Regulation No 17.

8 The view taken by the Consultative Committee of the Bars and Law Societies of the European Community (hereinafter referred to as "the Consultative Committee"), which has also intervened in support of the applicant's conclusions, is that a right of confidential communication between lawyer and client (in both directions) is recognized as a fundamental, constitutional or human right, accessory or complementary to other such rights which are expressly recognized, and that as such that right should be recognized and applied as part of Community law. After pointing out that the concept is not a static one, but is continually evolving, the Consultative Committee concludes that if the undertaking and the Commission cannot agree as to whether a document is of a confidential nature or not, the most appropriate procedure would be to have recourse to an expert's report, or to arbitration. Assuming, moreover, that the Court is the sole tribunal with jurisdiction to settle such a dispute it ought in that case to be necessary for it only to determine whether or not the contested documents are of a confidential nature on the basis of an expert's report obtained pursuant to an order under Article 49 of the Rules of Procedure.

9 To all those arguments the Commission replies that even if there exists in Community law a general principle protecting confidential communications between lawyer and client, the extent of such protection is not to be defined in general and abstract terms, but must be established in the light of the special features of the relevant Community rules, having regard to their wording and structure, and to the needs which they are designed to serve.

10 The Commission concludes that, on a correct construction of Article 14 of Regulation No 17, the principle on which the applicant relies cannot apply to documents the production of which is required in the course of an investigation which has been ordered under that article, including written communications between the undertaking concerned and its lawyers.

11 The applicant's argument is, the Commission maintains, all the more unacceptable inasmuch as in practical terms it offers no effective means whereby the inspectors may be assured of the true content and nature of the contested documents. On the contrary, the solutions which the applicant proposes would have the effect, particularly in view of the protracted nature of any arbitration procedure (even assuming that such a procedure were permissible in law) of delaying considerably, or even of nullifying, the Commission's efforts to bring to light infringements of Articles 85 and 86 of the Treaty, thereby frustrating the essential aims of Regulation No 17.

12 The Government of the French Republic, intervening in support of the conclusions of the Commission, observes that as yet Community law does not contain any provision for the protection of documents exchanged between a legal adviser and his client. Therefore, it concludes, the Commission must be allowed to exercise its powers under Article 14 of Regulation No 17 without having to encounter the objection that the documents whose disclosure it considers necessary in order to carry out the duties assigned to it by that regulation are confidential. To permit the legal adviser and the undertaking subject to a proceeding in a matter concerning competition to be the arbiters of the question whether or not a document is protected would, in the opinion of the French Government, not be compatible with Community law and would inevitably create grave inconsistencies in the application of the rules governing competition.

13 It is apparent from the application, as well as from the legal basis of the contested decision, that the dispute in this case is essentially concerned with the interpretation of Article 14 of Regulation No 17 of the Council of 6 February 1962 for the purpose of determining what limits, if any, are imposed upon the Commission's exercise of its powers of investigation under that provision by virtue of the protection afforded by the law to the confidentiality of written communications between lawyer and client.

14 Once the existence of such protection under Community law has been confirmed, and the conditions governing its application have been defined, it must be determined which of the documents referred to in Article 1 (b) of the contested decision may possibly be considered as confidential and therefore beyond the Commission's powers of investigation. Since some of those documents have in the meantime been produced to the Commission by the applicant of its own volition, the documents to be considered now are those which were lodged in a sealed envelope at the Court Registry on 9 March 1981, pursuant to the Court's order of 4 February 1981 re-opening the oral procedure in this case.

(a) The interpretation of Article 14 of Regulation No 17

15 The purpose of Regulation No 17 of the Council which was adopted pursuant to the first subparagraph of Article 87 (1) of the Treaty, is, according to paragraph (2) (a) and (b) of that article, "to ensure compliance with the prohibitions laid down in Article 85 (1) and in Article 86" of the Treaty and "to lay down detailed rules for the application of Article 85 (3)". The regulation is thus intended to ensure that the aim stated in Article 3 (f) of the Treaty is achieved. To that end it confers on the Commission wide powers of investigation and of obtaining information by providing in the eighth recital in its preamble that the Commission must be empowered, throughout the Common Market, to require such information to be supplied and to undertake such investigations "as are necessary" to bring to light infringements of Articles 85 and 86 of the Treaty.

16 In Articles 11 and 14 of the regulation, therefore, it is provided that the Commission may obtain "information" and undertake the "necessary" investigations, for the purpose of proceedings in respect of infringements of the rules governing competition. Article 14 (1) in particular empowers the Commission to require production of business records, that is to say,

documents concerning the market activities of the undertaking, in particular as regards compliance with those rules. Written communications between lawyer and client fall, in so far as they have a bearing on such activities, within the category of documents referred to in Articles 11 and 14.

17 Furthermore, since the documents which the Commission may demand are, as Article 14 (1) confirms, those whose disclosure it considers "necessary" in order that it may bring to light an infringement of the Treaty rules on competition, it is in principle for the Commission itself, and not the undertaking concerned or a third party, whether an expert or an arbitrator, to decide whether or not a document must be produced to it.

(b) Applicability of the protection of confidentiality in Community law

18 However, the above rules do not exclude the possibility of recognizing, subject to certain conditions, that certain business records are of a confidential nature. Community law, which derives from not only the economic but also the legal interpenetration of the Member States, must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client. That confidentiality serves the requirements, the importance of which is recognized in all of the Member States, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it.

19 As far as the protection of written communications between lawyer and client is concerned, it is apparent from the legal systems of the Member States that, although the principle of such protection is generally recognized, its scope and the criteria for applying it vary, as has, indeed, been conceded both by the applicant and by the parties who have intervened in support of its conclusions.

21 Whilst in some of the Member States the protection against disclosure afforded to written communications between lawyer and client is based principally on a recognition of the very nature of the legal profession, inasmuch

as it contributes towards the maintenance of the rule of law, in other Member States the same protection is justified by the more specific requirement (which, moreover, is also recognized in the first-mentioned States) that the rights of the defence must be respected.

21 Apart from these differences, however, there are to be found in the national laws of the Member States common criteria inasmuch as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.

22 Viewed in that context Regulation No 17 must be interpreted as protecting, in its turn, the confidentiality of written communications between lawyer and client subject to those two conditions, and thus incorporating such elements of that protection as are common to the laws of the Member States.

23 As far as the first of those two conditions is concerned, in Regulation No 17 itself, in particular in the eleventh recital in its preamble and in the provisions contained in Article 19, care is taken to ensure that the rights of the defence may be exercised to the full, and the protection of the confidentiality of written communications between lawyer and client is an essential corollary to those rights. In those circumstances, such protection must, if it is to be effective, be recognized as covering all written communications exchanged after the initiation of the administrative procedure under Regulation No 17 which may lead to a decision on the application of Articles 85 and 86 of the Treaty or to a decision imposing a pecuniary sanction on the undertaking. It must also be possible to extend it to earlier written communications which have a relationship to the subject-matter of that procedure.

24 As regards the second condition, it should be stated that the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer's role as collaborating in the administration of justice 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. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose. Such a conception reflects the legal traditions common to the Member States and is also to be found in legal order of the Community, as is demonstrated by Article 17 of the Protocols on the Statutes of the Court of Justice of the EEC and the EAEC, and also by Article 20 of the Protocol on the Statute of the Court of Justice of the ECSC.

25 Having regard to the principles of the Treaty concerning freedom of establishment and the freedom to provide services the protection thus afforded by Community law, in particular in the context of Regulation No 17, to written communications between lawyer and client must apply without distinction to any lawyer entitled to practise his profession in one of the Member States, regardless of the Member State in which the client lives.

26 Such protection may not be extended beyond those limits, which are determined by the scope of the common rules on the exercise of the legal profession as laid down in Council Directive 77/249/EEC of 22 March 1977 (OJ L 78, p. 17), which is based in its turn on the mutual recognition by all the Member States of the national legal concepts of each of them on this subject.

27 In view of all these factors it must therefore be concluded that although Regulation No 17, and in particular Article 14 thereof, interpreted in the light of its wording, structure and aims, and having regard to the laws of the Member States, empowers the Commission to require, in the course of an investigation within the meaning of that article, production of the business documents the disclosure of which it considers necessary, including written communications between lawyer and client, for proceedings in respect of any infringements of Articles 85 and 86 of the Treaty, that power is, however, subject to a restriction imposed by the need to protect confidentiality, on the conditions defined above, and provided that the communications in question are exchanged between an independent lawyer, that is to say one who is not bound to his client by a relationship of employment, and his client.

28 Finally, it should be remarked that the principle of confidentiality does not prevent a lawyer's client from disclosing the written communications between them if he considers that it is in his interests to do so.

(c) The procedures relating to the application of the principle of confidentiality

29 If an 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 authorized agents with relevant material of such a nature as to demonstrate that the communications fulfil the conditions for being granted legal protection as defined above, although it is not bound to reveal the contents of the communications in question.

30 Where the Commission is not satisfied that such evidence has been supplied, the appraisal of those conditions is not a matter which may be left to an arbitrator or to a national authority. Since this is a matter involving an appraisal and a decision which affect the conditions under which the Commission may act in a field as vital to the functioning of the common market as that of compliance with the rules on competition, the solution of disputes as to the application of the protection of the confidentiality of written communications between lawyer and client may be sought only at Community level.

31 In that case it is for the Commission 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 in law.

32 The fact that by virtue of Article 185 of the EEC Treaty any action brought by the undertaking concerned against such decisions does not have suspensory effect provides an answer to the Commission's concern as to the effect of the time taken by the procedure before the Court on the efficacy of the supervision which the Commission is called upon to exercise in regard to compliance with the Treaty rules on competition, whilst on the other hand the interests of the undertaking concerned are safeguarded by the possibility which exists under Articles 185 and 186 of the Treaty, as well as under Article 83 of the Rules of Procedure of the Court, of obtaining an order suspending the application of the decision which has been taken, or any other interim measure.

(d) The confidential nature of the documents at issue

33 It is apparent from the documents which the applicant lodged at the Court on 9 March 1981 that almost all the communications which they include were made or are connected with legal opinions which were given towards the end of 1972 and during the first half of 1973.

34 It appears that the communications in question were drawn up during the period preceding, and immediately following, the accession of the United Kingdom to the Community, and that they are principally concerned with how far it might be possible to avoid conflict between the applicant and the Community authorites on the applicant's position, in particular with regard to the Community provisions on competition. In spite of the time which elapsed between the said communications and the initiation of a procedure, those circumstances are sufficient to justify considering the communications as falling within the context of the rights of the defence and the lawyer's specific duties in that connection. They must therefore be protected from disclosure.

35 In view of that relationship and in the light of the foregoing considerations the written communications at issue must accordingly be considered, in so far as they emanate from an independent lawyer entitled to practise his profession in a Member State, as confidential and on that ground beyond the Commission's power of investigation under Article 14 of Regulation No 17.

36 Having regard to the particular nature of those communications Article 1 (b) of the contested decision must be declared void in so far as it requires the applicant to produce the documents mentioned in the appendix to its letter to

the Commission of 26 March 1979 and listed in the schedule of documents lodged at the Court on 9 March 1981 under numbers 1 (a) and (b), 4 (a) to (f), 5 and 7.

37 Nevertheless, the application must be dismissed inasmuch as it is directed against the provisions in the above-mentioned Article 1 (b) relating to documents other than those referred to above, which are likewise listed in the above-mentioned appendix and schedule and which have not yet been produced to the Commission.

Costs

38 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Under Article 69 (3) the Court may order that the parties bear their own costs in whole or in part where each party succeeds on some and fails on other heads or where the circumstances are exceptional.

39 Since the parties to the action and the interveners have failed on some heads they must bear their own costs.

On those grounds,

THE COURT

hereby:

1. **Declares Article 1 (b) of Commission Decision No 79/760 of 6 July 1979 void inasmuch as it requires the applicant to produce the documents which are mentioned in the appendix to the letter from the applicant to the Commission of 26 March 1979 and listed in the schedule of documents lodged at the Court on 9 March 1981 under numbers 1 (a) and (b), 4 (a) to (f), 5 and 7;**

2. **For the rest, dismisses the application;**

3. **Orders the parties to the action and the interveners to bear their own costs.**

	Mertens de Wilmars	Bosco	Touffait
Due	Pescatore	Mackenzie Stuart	O'Keeffe
Koopmans	Everling	Chloros	Grévisse

Delivered in open court in Luxembourg on 18 May 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

ORDER OF THE COURT
4 FEBRUARY 1981

AM & S Europe Limited
v Commission of the European Communities

Case 155/79

In case 155/79

AM & S EUROPE LIMITED

against

COMMISSION OF THE EUROPEAN COMMUNITIES