

ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

28 May 2004^{*}

In Case T-253/03,

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

Akcros Chemicals Ltd, established in Surrey,

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

applicants,

supported by

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

^{*} Language of the case: English.

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

and

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

interveners,

v

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

defendant,

APPLICATION lodged by the **Section on Business Law of the International Bar Association** for leave to intervene in support of the form of order sought by the applicants in the present case, the object of which is an application for annulment of Decision C (2003) 1533 final of 8 May 2003 rejecting a claim of legal professional

privilege for certain documents seized in the context of an investigation pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

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

Registrar: H. Jung,

makes the following

Order

1 On 30 January 2003, the Commission adopted, on the basis of Article 14(3) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), Decision C (2003) 85/4 ordering, among other undertakings, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd ('the applicants') and their respective subsidiaries to submit to an investigation aimed at seeking evidence of possible anti-competitive

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

- 2 On the basis of those decisions, on-the-spot investigations were carried out at the premises of the applicants in Eccles, Manchester (United Kingdom) on 12 and 13 February 2003. During that investigation, the Commission officials copied a large number of documents. In the course of the investigation, the applicant's representatives informed the Commission officials that certain documents might be covered by the professional privilege protecting communications with lawyers. When the documents in question were examined, a dispute arose in respect of five documents, which were treated in two different ways. The Commission officials did not reach a definitive conclusion on the spot as to whether two of the documents should be privileged. They therefore made copies of those documents and placed them in a sealed envelope, which they removed at the close of the investigation. As regards the other three documents in question, the Commission official responsible for the investigation took the view that they were not protected by legal professional privilege and, therefore, made copies, which were placed with the rest of the file without being separated in a sealed envelope.

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

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

- 5 On 8 May 2003, the Commission adopted Decision C (2003) 1533 final on the basis of Article 14(3) of Regulation No 17 ('decision of 8 May 2003'). In Article 1 of that decision, the Commission refused the applicants' request that the documents in question be returned to them and that the Commission confirm that all copies of those documents in its possession had been destroyed. Moreover, in Article 2 of the decision of 8 May 2003, the Commission stated that it intended to open the sealed envelope containing two of those documents.

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

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

- 8 On 25 November 2003, the Section on Business Law of the International Bar Association ('the SBL'), represented by J. Buhart, lawyer, lodged an application for leave to intervene in support of the form of order sought by the applicants.
- 9 In its application for leave to intervene, the SBL submits that it has a major interest in the outcome of the present case. It argues that the dispute raises issues of principle relating to legal professional privilege and that, therefore, a judgment against the applicants would directly affect those of its members who are in-house lawyers. The SBL points out that, on 31 May 2002, it approved a resolution supporting the principle of legal privilege for in-house lawyers in all jurisdictions. The SBL takes the view that it has a direct and specific interest in the outcome of the proceedings and that its application for leave to intervene satisfies the requirements laid down in the case-law which allows leave to intervene to be granted to representative associations the objects of which include protection of their members' interests. Finally, the SBL asks the Court to order the Commission to pay the costs, including those arising in connection with its application for leave to intervene.
- 10 The application for leave to intervene was served on the parties in accordance with the first subparagraph of Article 116(1) of the Rules of Procedure of the Court of First Instance.
- 11 In observations submitted on 18 December 2003, the applicants took the view that the SBL had demonstrated that it had an interest in the result of the case and asked the Court to grant its application for leave to intervene. By a separate document submitted on the same day, the applicants applied for confidential treatment vis-à-vis the SBL.

- 12 In observations submitted on 9 December 2003, the Commission claimed that the SBL had failed to provide sufficient information clearly establishing its legal existence or, at least, its capacity to act before a court of law in its own name, as is required under Article 44(5)(a) of the Rules of Procedure. It was not apparent from the SBL's by-laws, for instance, that it had standing to bring an action before the Court. The Commission concluded by asking the Court to order the SBL to pay the costs incurred by the Commission in connection with the application for leave to intervene. In a separate document submitted on the same day, the Commission stated that it did not request confidential treatment vis-à-vis the SBL.
- 13 In its observations, which were lodged on 7 January 2004, the CCBE claimed that the SBL's application for leave to intervene was inadmissible. In particular, the CCBE expressed doubts as to whether the SBL satisfied the basic requirements for legal personality (order of 11 December 1973 in Joined Cases 41/73, 43/73 to 48/73, 50/73, 111/73, 113/73 and 114/73 *Générale sucrière and Others v Commission* [1973] ECR 1465, paragraph 3), particularly since it is unable to represent its members autonomously. The CCBE pointed out that the SBL is merely a constituent part of the International Bar Association ('the IBA'), which the SBL has no power to represent. The CCBE also argued that the SBL is not a representative association the object of which is to defend its members' interests.
- 14 The other interveners did not raise any objections to the application for leave to intervene.
- 15 In accordance with the third subparagraph of Article 116(1) of the Rules of Procedure, the President of the Fifth Chamber referred the application for leave to intervene to the Chamber.

Findings of the Court

- 16 The SBL is one of three sections of the IBA, which is a body representing lawyers worldwide and which comprises bar associations and law societies and associations of in-house lawyers, as well as individual lawyers. For its part, the SBL is composed of individual lawyers, in particular more than 12 500 practitioners of international commercial law, including both independent practitioners and in-house lawyers (more than 3 000) established in 185 countries.
- 17 Under the second paragraph of Article 40 of the Statute of the Court of Justice, which is applicable to the Court of First Instance pursuant to the first paragraph of Article 53 of that statute, the right to intervene in cases before the Court is open not only to the Member States and the institutions of the Community but also to any person establishing an interest in the result of the case.
- 18 It is settled case-law that representative associations the object of which is to protect their members in cases raising questions of principle liable to affect those members may be granted leave to intervene (orders of the President of the Court of Justice of 17 June 1997 in Joined Cases C-151/97 P(I) and C-157/97 P(I) *National Power and PowerGen* [1997] ECR I-3491, paragraph 66, and of 28 September 1998 in Case C-151/98 P *Pharos v Commission* [1998] ECR I-5441, paragraph 6; orders of the President of the Court of First Instance of 22 March 1999 in Case T-13/99 R *Pfizer v Council*, not published in the ECR, paragraph 15, and of 28 May 2001 in Case T-53/01 R *Poste Italiane v Commission* [2001] ECR II-1479, paragraph 51). More specifically, an association may be granted leave to intervene if it represents an appreciable number of undertakings active in the sector concerned, its objects include that of protecting its members' interests, the case may raise questions of principle affecting the functioning of the sector concerned and the interests of its members may therefore be affected to an appreciable extent by the forthcoming judgment (see, to that effect, the order of 8 December 1993 dismissing the application for leave to intervene submitted by Yves Saint Laurent Parfums SA in Case T-87/92 *Kruidvat v Commission* [1993] ECR II-1375, paragraph 14).

- 19 The Court observes that, under Article II of its by-laws, the objectives of the SBL are to promote an interchange between its members of information and views on laws, practices and professional responsibilities relating to business and financial activities throughout the world, to facilitate communication between its members and to undertake such related projects as may be approved by the 'Section Council'.
- 20 The Court notes that the SBL's by-laws do not provide, among the objectives, for the protection of its members' interests or the representation of those members. The objective of the SBL is in fact merely to promote exchanges of information and contact between its members and to organise conferences intended to facilitate the study of certain areas of law. In its application for leave to intervene, the SBL states that its task is to provide the in-house lawyers among its members with a forum for discussions and guidance on how to function effectively within undertakings while at the same time meeting business objectives in accordance with the highest professional standards.
- 21 Moreover, the Court observes that, under Section 1 of Article III of its by-laws, the SBL's members are formally members of the IBA, of which the SBL is one of the sections. Thus, according to Article I of its by-laws, the SBL was created within the IBA. It should be noted that Section 6 of Article VII provides that the SBL may not take action in the name of or purporting to represent the IBA without the prior authority or specific approval of the IBA 'Council'. In its application for leave to intervene, the SBL stated that the application was not filed on behalf of the IBA or any other section thereof.
- 22 Accordingly, the Court finds that the SBL is not a representative association the object of which is to protect the interests of in-house lawyers within the meaning of the case-law cited above (see paragraph 18 above).

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

24 The application for leave to intervene is therefore dismissed.

Costs

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

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

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby orders:

- 1. The application for leave to intervene lodged by the Section on Business Law of the International Bar Association is dismissed.**
- 2. There is no need to rule on the application lodged by the applicants for confidential treatment vis-à-vis the Section on Business Law of the International Bar Association.**
- 3. The Section on Business Law of the International Bar Association shall pay the costs incurred by the Commission in connection with the intervention proceedings and bear its own costs.**
- 4. The applicants and the interveners shall bear their own costs relating to the intervention proceedings.**

Luxembourg, 28 May 2004.

H. Jung

Registrar

P. Lindh

President