



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

14 November 2012*

(Competition — Administrative procedure — Action for annulment — Acts adopted during an inspection — Intermediate measures — Inadmissibility — Decision ordering an inspection — Obligation to state the reasons on which the decision is based — Protection of privacy — Reasonable grounds — Review by the Courts)

In Case T-135/09,

Nexans France SAS, established in Paris (France),

Nexans SA, established in Paris,

represented by M. Powell, Solicitor, J.-P. Tran Thiet, avocat, and G. Forwood, Barrister,

applicants,

v

European Commission, represented initially by X. Lewis and N. von Lingen, and subsequently by N. von Lingen and V. Di Bucci, acting as Agents,

defendant,

APPLICATION for (i) annulment of Commission decision C (2009) 92/1 of 9 January 2009 ordering Nexans SA and its subsidiary Nexans France SAS to submit to an inspection in accordance with Article 20, paragraph 4, of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) (Case COMP/39.610); (ii) a declaration that the decision taken by the Commission during that inspection to copy in their entirety the content of certain computer files, in order to examine them in its offices, is unlawful; (iii) annulment of the decision taken by the Commission to interview an employee of Nexans France during the inspection; and (iv) an order directing the Commission to take certain action,

THE GENERAL COURT (Eighth Chamber),

composed of L. Truchot, President, M.E. Martins Ribeiro and H. Kanninen (Rapporteur), Judges,

Registrar: J. Weychert, Administrator,

having regard to the written procedure and further to the hearing on 19 October 2011,

gives the following

* Language of the case: English.

Judgment

Factual background to the dispute

- 1 The applicants – Nexans SA and its wholly-owned subsidiary Nexans France SAS – are two French companies which carry out their activities in the electric cable sector.
- 2 By Decision C(2009) 92/1, the Commission of the European Communities ordered Nexans and all companies directly or indirectly controlled by it, including Nexans France, to submit to an inspection in accordance with Article 20(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) ('the inspection decision').
- 3 Article 1 of the inspection decision is worded as follows:

'... Nexans ..., together with all the companies it directly or indirectly controls, including Nexans France ..., is obliged to submit to an inspection in relation to its (their) potential participation in anti-competitive agreements and/or concerted practices contrary to Article 81 EC ... in relation to the supply of electric cables and material associated with such supply, including, amongst others, high voltage underwater electric cables, and, in certain cases, high voltage underground electric cables. Those agreements and/or concerted practices consist of the offering of concerted bids in public tenders, client allocation, as well as the illegal exchange of commercially-sensitive information relating to the supply of those products.

The inspection can take place at all the premises controlled by the company ...

... Nexans ..., together with all the companies it directly or indirectly controls, including Nexans France ..., authorises the officials and other persons mandated by the Commission to proceed with an inspection, and it authorises the officials and other persons mandated by the competition authority of the Member State or nominated by the latter to this effect to help them access all the premises and means of transport during normal office hours. It submits to inspection of the books as well as any other professional document, whichever its medium, if the officials or persons mandated request this and will allow them to examine these documents at the premises and to take or obtain under any format a copy or an extract of those books or documents. It authorises the sealing of all commercial premises and books or documents for the duration of the inspection and to the extent necessary for the purposes of the inspection. It immediately gives, at the premises, oral explanations relating to the subject-matter and purpose of the inspection if those officials or persons ask for such explanations and authorises any representative or member of staff to give such explanations. It authorises the recording of those explanations under whichever format.'

- 4 In Article 2 of the inspection decision, the Commission states that the inspection can start on 28 January 2009. In Article 3 of that decision, it indicates that the inspection decision will be notified to the recipient undertaking immediately before the inspection.
- 5 The following reasons are given for the inspection decision:

'The Commission received information that electric cable suppliers, including the companies targeted in this decision, were participating or had participated in agreements and/or concerted practices in relation to the supply of electric cables and material associated with such supply, including, amongst others, high voltage underwater electric cables, and, in certain cases, high voltage underground electric cables. Those agreements and/or concerted practices consist of the offering of concerted bids in public tenders, client attribution, as well as the illegal exchange of commercially-sensitive information relating to the supply of those products.

...

According to the information received by the Commission, th[ose] agreements and/or concerted practices ..., which were put in place by 2001 at the latest, still exist today. ... [They] probably have a global reach.

Should those allegations prove to be well-founded, the agreements and/or concerted practices described above would account for very serious infringements under Article 81 EC.

In order to enable the Commission to check all the facts in relation to the presumed agreements and concerted practices and the context in which they took place, it is necessary to carry out inspections pursuant to Article 20 of Regulation ... No 1/2003.

...'

- 6 On Wednesday 28 January 2009, Commission inspectors ('the inspectors'), accompanied by representatives of the Autorité de la concurrence (French Competition Authority), visited the premises of Nexans France in order to carry out an inspection pursuant to Article 20(4) of Regulation No 1/2003 ('the inspection'). The inspection decision was notified to the undertaking, which made a meeting room available to the inspectors. A lawyer instructed by the applicants assisted them in all the actions related to the inspection.
- 7 The inspectors stated that they wished to examine the documents and the computers of certain Nexans France employees, namely Mr A ([*confidential*]¹ – High Voltage Business Group), Mr B ([*confidential*] – High Voltage Business Group) and Mr C ([*confidential*] of the High Voltage Land Business Unit). The inspectors were informed that Mr C was absent travelling and had his computer with him and that he would not be back until Friday 30 January 2009.
- 8 The inspectors first examined the paper documents in the offices of Mr A, Mr B and Mr C and in the office of their shared assistant. Next, they took copy-images of the hard drives of the computers of Mr A, Mr B and Mr D ([*confidential*] – High Voltage Business Group). In order to be able to carry out a search by keywords in the information contained in those computers, they used software which indexed that information overnight.
- 9 On the second day of the inspection – Thursday 29 January 2009 – the inspectors examined several documents found in the offices of Mr C and Mr E ([*confidential*] – High Voltage Business Group) and the emails of Mr A, Mr B, and Mr E and the copy-images of the hard drives of the computers of Mr A, Mr B and Mr D.
- 10 Mr B informed the inspectors that he had an appointment to meet Mr C on 29 June 2009 in the evening. He offered to collect Mr C's computer and to bring it to the premises of Nexans France the next morning, which he did.
- 11 On the third day of the inspection – Friday 30 January 2009 – the inspectors informed the applicants that they wished to ask Mr C for explanations relating to certain documents, in particular emails found mainly on Mr A's computer, of which Mr C was either the sender or which he had received as the addressee or in copy. In the afternoon, Mr C, accompanied by two of the applicants' lawyers, answered the inspectors' questions. Those questions and the answers to them were set out in an annex to the minutes of the inspection, which were signed by the applicants' representatives.

1 — Hidden confidential details

- 12 Similarly, during the course of the day on Friday 30 January 2009, the inspectors examined the content of the hard drive of Mr C's computer and recovered a number of files, documents and emails, in their opinion relevant to the investigation, which had been deleted between the start of the investigation and 30 January 2009. They copied two sets of emails on to two data-recording devices ('the DRDs'). They also copied a set of emails found in Mr A's computer on to two DRDs. Those four DRDs were placed in envelopes which were sealed and then signed by one of the applicants' representatives. The inspectors decided to take those envelopes back to the offices of the Commission in Brussels (Belgium). Mr C's computer and a DRD found in his office were placed in a cupboard, which was sealed by the inspectors. The hard drives of the Commission's computers used for the purposes of the searches were subsequently wiped. Lastly, the inspectors informed the applicants that they would notify them of the date on which the inspection would be continued. The applicants stated that they would prefer any inspection of the hard drive of Mr C's computer to take place at the premises of Nexans France, rather than in the Commission's offices.
- 13 The inspectors returned to the premises of Nexans France on Tuesday 3 February 2009. They opened the sealed cupboard containing the DRD found in Mr C's office and his computer. They inspected the DRD at the premises, printed and kept two documents extracted from the DRD and returned it to the applicants' representatives. They then made three copy-images of the hard drive of Mr C's computer on three DRDs. The inspectors gave one of the three DRDs to the applicants' representatives at their request and placed the other two in sealed envelopes which they took back to Brussels, after taking formal note of the fact that the applicants disputed the legitimacy of that procedure. The inspectors stated that the sealed envelopes would only be opened in the Commission premises in the presence of the applicants' representatives.
- 14 On 2 March 2009, the envelopes sealed at the premises of Nexans France and containing the DRDs were opened in the Commission's offices in the presence of the applicants' lawyers. The documents contained on those DRDs were examined and the inspectors printed out those which they considered relevant for the purposes of the investigation. A second paper copy of those documents and a list of them were given to the applicants' lawyers. That process was completed on 11 March 2009. The office in which the documents and the DRDs were examined was sealed at the end of each working day, in the presence of the applicants' lawyers, and opened again the following day, also in their presence.

Procedure and forms of order sought

- 15 By application lodged at the Court Registry on 7 April 2009, the applicants brought the present action.
- 16 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Eighth Chamber, to which the present case was accordingly allocated.
- 17 By letter of 14 January 2011, the applicants asked that two judgments of the European Court of Human Rights, delivered after the reply had been lodged and which they submit are relevant for the purposes of the examination of the admissibility of their action, be placed in the file (ECHR, judgments of 21 December 2010, *Primagaz v France*, Application No 29613/08, and *Société Canal Plus v France*, Application No 29408/08); that request was granted by decision of the Court of 26 January 2011. The Court asked the Commission to submit its observations on those judgments, which it did within the prescribed period.
- 18 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure. On 20 September 2011, by way of measures of organisation of procedure as provided for in Article 64 of its Rules of Procedure, the Court put written questions to the Commission and asked it to produce a copy of a Commission document referred to by the applicants in their pleadings and entitled

‘Explanatory note to an authorisation to conduct an inspection in execution of a decision under Article 20(4) of Regulation No 1/2003’. The Commission complied with that request within the prescribed period.

- 19 At the hearing on 19 October 2011, the parties presented oral argument and replied to questions put by the Court. At the end of the hearing, the Court decided not to close the oral procedure.
- 20 By letter of 25 October 2011, the applicants sent the Court factual details relating to the observations which they had submitted at the hearing. The Court placed that letter in the file by decision of 16 November 2011 and asked the Commission to submit its observations in that respect, which it did within the prescribed period.
- 21 By order of 21 December 2011, the Court ordered the Commission, by way of a measure of inquiry pursuant to Article 65 of the Rules of Procedure, to produce certain documents, and determined the arrangements in accordance with which the applicants could consult them. The Commission complied with that measure of inquiry within the prescribed period.
- 22 On 21 December 2011, by way of measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure, the Court put a written question to the Commission and asked it to produce a translation into the language of the case of certain extracts from two documents which it had produced earlier. The Commission complied with that request within the prescribed period.
- 23 On 24 January 2012, the applicants consulted the documents referred to in paragraph 21 above at the Court Registry. On 2 March 2012, they submitted their observations on those documents. On 26 March 2012 the Commission submitted its observations on the applicants’ observations.
- 24 The oral procedure was closed on 23 April 2012. By order of 1 October 2012, it was reopened. By way of measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure, the Court, on 2 October 2012, put a written question to the Commission, which replied, as requested, within the prescribed period. The oral procedure was subsequently closed on 22 October 2012.
- 25 The applicants claim that the Court should:
 - annul the inspection decision;
 - declare unlawful the Commission’s decision to remove copies of certain computer files and of the hard drive of Mr C’s computer for review at its offices in Brussels later;
 - annul the Commission’s decision to interview Mr C;
 - order the Commission to return to Nexans France any documents or evidence which it might have obtained pursuant to the abovementioned decisions, including, and without limitation, the documents outside the scope of the inspection, the documents relating to electric cable projects located outside the European Economic Area (EEA), the documents removed improperly and taken to Brussels and the statement created on the basis of the interview with Mr C;
 - order the Commission to refrain from using, for the purposes of proceedings in respect of an infringement of the competition rules, any documents or evidence which it might have obtained pursuant to the annulled decisions;
 - order the Commission to refrain from communicating such documents or evidence (or documents or information based thereon) to competition authorities in other jurisdictions;
 - order such other measures as justice may require;

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

- declare inadmissible the legal opinion produced by the applicants as an annex to the reply in support of their arguments relating to the admissibility of some of their heads of claim;
- dismiss the applicants' second to seventh heads of claim as inadmissible;
- dismiss the action as unfounded;
- order the applicants to pay the costs.

Law

- 27 The applicants' first three heads of claim constitute three applications for annulment, each of which concerns an act taken by the Commission with a view to undertaking the inspection or on the occasion of that inspection.
- 28 The first of the three acts challenged by the applicants is the inspection decision. The second and third acts ('the contested acts') were adopted by the inspectors during the inspection: the decision to make copy-images of a number of computer files and of the hard drive of Mr C's computer for the purposes of examining them later in the Commission's offices, and the decision to interview Mr C.
- 29 By their fourth to seventh heads of claim, the applicants claim that the Court should direct the Commission to take certain action.
- 30 In respect of admissibility, the Commission asserts, first, that the contested acts are not challengeable measures and that the applicants' heads of claim seeking annulment of those acts are therefore inadmissible. Next, it contends that the heads of claim by which the applicants request the Court to issue directions to the Commission are also inadmissible. Lastly, it submits that the Court should declare inadmissible the legal opinion which the applicants appended to the reply, in support of their arguments relating to the admissibility of the applications for annulment of the contested acts.
- 31 In respect of the substance, the Commission contends that the pleas relied on by the applicants in support of their applications for annulment must be rejected.
- 32 It is necessary to examine, first of all, the application for annulment of the inspection decision, the admissibility of which is not contested; next, the admissibility of the abovementioned opinion and that of the applications for annulment of the contested acts; and, lastly, the heads of claim seeking that the Court order measures against the Commission.

1. The application for annulment of the inspection decision

- 33 The applicants essentially raise a single plea in law in support of their application for annulment of the inspection decision, alleging infringement of Article 20(4) of Regulation No 1/2003 and of fundamental rights, namely the rights of the defence, the right to a fair trial, the privilege against self-incrimination, the presumption of innocence and the right to respect for privacy. That plea is divided into two branches alleging, first, the overly broad and vague product scope of the inspection decision and, secondly, the overly broad geographical scope of that decision.

The first branch: the product scope of the inspection decision is overly broad and vague

- 34 The arguments set out by the applicants in support of this branch of the plea can be construed as meaning that, in the inspection decision, the Commission did not sufficiently delimit the subject-matter and the purpose of the inspection. To that effect, the applicants rely on two grounds of challenge.
- 35 By their first ground of challenge, the applicants essentially claim that the Commission was imprecise in the inspection decision in its delimitation of the products concerned. That lack of precision made it impossible for the applicants to exercise their rights of defence or to distinguish the documents which the Commission was able to consult and copy from other documents in the possession of Nexans France in respect of which they did not have to tolerate such interference in their sphere of private activity. The Commission was therefore able to conduct a ‘fishing expedition’ and to search the premises of that company for documents and useful information for the purposes of detecting possible infringements of the competition rules in the context of all the applicants’ activities rather than solely in the context of the sector covered by the investigation.
- 36 By their second ground of challenge, the applicants submit that it was only in the high voltage underwater cable sector that the Commission had detailed information leading it to suspect that there had been an infringement of the competition rules, a point which is confirmed by the conduct of the inspectors during the inspection and by a Commission press release.
- 37 For the purposes of examining the two grounds of challenge relied upon by the applicants, it is necessary, before addressing their substance, to recall certain principles governing, first, the obligatory content of decisions adopted by the Commission ordering an inspection under Article 20(4) of Regulation No 1/2003 and, second, the review which the Courts of the European Union may be led to carry out as regards whether such an inspection was justified.

Preliminary observations

- 38 Article 20(4) of Regulation No 1/2003 defines the essential elements which must be present in a Commission decision ordering an inspection. Under that provision:
- ‘Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. ...’
- 39 The obligation on the Commission to specify the subject-matter and purpose of the inspection is a fundamental requirement in order both to show that the investigation to be carried out at the premises of the undertakings concerned is justified, enabling those undertakings to assess the scope of their duty to cooperate, and to safeguard the rights of the defence (Joined Cases 97/87 to 99/87 *Dow Chemical Ibérica and Others v Commission* [1989] ECR 3165, paragraph 26).
- 40 As regards whether the investigation to be carried out is justified or not and the scope of the duty to cooperate of the undertakings concerned, it must be observed that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, constitutes a general principle of EU law (see Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 27 and the case-law cited). That principle was laid down in Article 7 of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1), under which ‘[e]veryone has the right to respect for his or her private and family life, home and communications’.

- 41 As regards the safeguarding of the rights of the defence of the undertakings concerned, it must first be pointed out that those rights must be observed by the Commission both in administrative procedures which may lead to the imposition of penalties and in the course of preliminary investigation procedures, since it is important to prevent those rights from being irremediably impaired during preliminary investigation procedures including, in particular, inspections which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable (Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, paragraph 15).
- 42 Secondly, since the Commission's obligation to specify the subject-matter and purpose of the investigation constitutes a fundamental guarantee of the rights of the defence of the undertakings concerned, the scope of the obligation to state the reasons on which inspection decisions are based cannot be restricted on the basis of considerations concerning the effectiveness of the investigation. It must be specified in this connection that, although the Commission is not required to communicate to the recipient of an inspection decision all the information at its disposal concerning the presumed infringements, or to make a precise legal analysis of those infringements, it must none the less clearly indicate the presumed facts which it intends to investigate (*Dow Chemical Ibérica and Others v Commission*, paragraph 39 above, paragraph 45).
- 43 The Court of the European Union may be called upon to review a decision adopted under Article 20(4) of Regulation No 1/2003 for the purposes of ensuring that it is in no way arbitrary, that is to say, that it has not been adopted in the absence of facts capable of justifying an inspection. It must be borne in mind that the inspections carried out by the Commission are intended to enable it to gather the necessary documentary evidence to check the actual existence and scope of a given factual and legal situation concerning which it already possesses certain information. In the course of that review, the Court of the European Union must satisfy itself that there exist reasonable grounds for suspecting an infringement of the competition rules by the undertaking concerned (see *Roquette Frères*, paragraph 40 above, paragraphs 54 and 55 and the case-law cited).
- 44 It is in the light of all the foregoing considerations that it is appropriate to apply the case-law of the Courts of the European Union according to which, first, the reasons given for an inspection decision need not necessarily delimit precisely the relevant market, provided that the decision contains the essential information set out in paragraph 38 above (*Dow Chemical Ibérica and Others v Commission*, paragraph 39 above, paragraph 46) and, secondly, the Commission is none the less required to state in that decision the essential characteristics of the suspected infringement, indicating inter alia the market thought to be affected (Case T-340/04 *France Télécom v Commission* [2007] ECR II-573, paragraph 52).
- 45 Although, at the inspection stage, the Commission is not required to delimit precisely the market covered by its investigation, it must, on the other hand, identify the sectors covered by the alleged infringement with which the investigation is concerned with a degree of precision sufficient to enable the undertaking in question to limit its cooperation to its activities in the sectors in respect of which the Commission has reasonable grounds for suspecting an infringement of the competition rules, justifying interference in the undertaking's sphere of private activity, and to make it possible for the Court of the European Union to determine, if necessary, whether or not those grounds are sufficiently reasonable for those purposes.

The first ground of challenge: the inspection decision was imprecise in its delimitation of the products concerned

- 46 As described in paragraphs 3 and 5 above, the Commission stated in the inspection decision that the subject-matter of its investigation was 'the supply of electric cables and material associated with such supply, including, amongst others, high voltage underwater electric cables, and, in certain cases, high voltage underground electric cables'.

- 47 In the defence and the rejoinder, the Commission stated, at least impliedly, that the inspection decision did not concern all electric cables and the material associated with them. The Commission contends that the grounds for that decision, ‘and in particular the description of specific products included in the more general expression “*câbles électriques*”, allowed the [a]pplicants to understand without any difficulty that the focus of the inspection was not any electrical cables, but more specifically the cables mentioned by way of example in the [inspection] decision’.
- 48 Thus, according to the Commission, the subject-matter of its investigation included rather ‘cables used for the transmission of electricity, for example from power plants to substations or in interconnections between electric grids’, the types of electric cable expressly referred to in the inspection decision constituting specific examples of that category, which is sufficiently evident from the wording of that decision and its context.
- 49 However, the subject-matter of the investigation defined in the inspection decision cannot be construed as the Commission suggests in the defence and the rejoinder.
- 50 The grounds of the inspection decision refer clearly to all electric cables. The expressions ‘including, amongst others’ and ‘in certain cases’, used by the Commission in its delimitation of the subject-matter of the investigation, show that high voltage underwater electric cables and high voltage underground electric cables are referred to by the Commission only as examples of a wider range of products, potentially including any type of electric cable, and all material associated with the use or the installation of those cables.
- 51 Moreover, in its reply to the measures of organisation of procedure of 20 September 2011 and at the hearing, the Commission stated – contrary to the assertions made in the defence and the rejoinder – that the inspection decision concerned all electric cables and not only the electric cables referred to as examples in that decision.
- 52 As the applicants point out, the expression ‘electric cables’ could correspond to any sort of cable used in the transmission of electrical current. Furthermore, the inspection decision does not specify the products which might fall within the category of ‘material associated with such supply’. That decision therefore concerns a very large number of products. As the applicants submit, products as varied as telephone wires, high voltage electric cables, household electrical wiring or cables for household electrical products could fall within the general category of ‘electric cables’. Products such as transformers, switchgear or electricity meters could also fall within the general category of material associated with electric cables. As the applicants also point out, those grounds could cover all the activities of an undertaking manufacturing cables for conducting electricity, even though those activities might relate to very different sectors.
- 53 However, by referring in the inspection decision to all electric cables and all the material associated with those cables, the Commission has met its obligation to define the subject-matter of its investigation, contrary to the applicant’s submissions.
- 54 Even though the wording of Article 1 of the inspection decision and the grounds for that decision could have been less ambiguous, they enabled the applicants to assess the scope of their duty to cooperate. The applicants should have understood that the inspection decision did not exclude electric cables other than those specifically mentioned in that decision and that they were in principle required to provide the Commission with all information requested relating to all electric cables and to the material which is normally marketed with those cables or intended for complementary use. On reading the inspection decision, the applicants could understand that any opposition on their part to the Commission obtaining documents relating to those products, or to a request from the Commission asking them to produce such documents, could be penalised under Article 23(1) of Regulation No 1/2003.

- 55 The inspection decision also delimits the matters covered by the investigation, in relation to which the Court can, if necessary, check whether at the time of the decision's adoption the Commission had reasonable grounds for the purposes of justifying interference in the sphere of the private activity of the applicants relating to all of their activities.
- 56 The precision of the inspection decision as regards the delimitation of the products covered by the inspection cannot be called into question – contrary to the assertions made by the applicants – on the ground that, in decisions which it adopted before the inspection decision and, in particular, in its decision of 19 July 2000 declaring a concentration to be compatible with the common market and with the functioning of the EEA Agreement (Case No COMP/M.1882 – Pirelli/BICC) (OJ 2003 L 70, p. 35), the Commission distinguished more than one separate market in relation to the products covered by the investigation, namely the market for extra-high and high voltage cables, on the one hand, and, on the other, the market for low and medium voltage cables. The Commission was required to define precisely the markets concerned by the concentration at the origin of that decision, adopted under Article 8(2) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), as amended at the time of the adoption of that decision, in so far as it was required to examine in accordance with that provision whether the operation at issue was liable to create or to strengthen a dominant position, as a result of which effective competition would be significantly impeded in the common market or in a substantial part of that market. By contrast, as indicated in paragraph 44 above, the Commission is not required to delimit precisely the market covered by its investigation in the context of a decision taken under Article 20(4) of Regulation No 1/2003.
- 57 Moreover, there is no reason why a single infringement of competition law or linked infringements may not bring about effects on markets for different products and be the subject of the same Commission investigation – at least at the stage of the adoption of a decision under Article 20(4) of Regulation No 1/2003.
- 58 Lastly, the issue of whether, as the applicants submit, the inspectors undertook a 'fishing expedition' at the premises of Nexans France depends on whether, at the time of the inspection decision, the Commission had reasonable grounds for the purposes of justifying interference in the sphere of the applicant's private activity relating to all electric cables, and must therefore be examined in the context of the second ground of challenge.
- 59 The first ground of challenge must therefore be rejected.

The second ground of challenge: the high voltage underwater cable sector was the only sector in relation to which the Commission had reasonable grounds for suspecting an infringement of the competition rules on the part of the applicants

- 60 The applicants claim that the underwater cable sector was the only sector in relation to which the Commission had at its disposal information concerning possible anti-competitive conduct. That view is borne out, first, by the fact that when the Commission arrived for the inspection at the premises of Nexans France on 28 January 2009, it asked to meet certain Nexans France employees working in that sector and, secondly, by the content of a press release published by the Commission after the inspection. However, despite having that specific information, the Commission overly extended the subject-matter and purpose of the inspection and undertook a 'fishing expedition' at the premises of Nexans France.
- 61 The Commission essentially contends that, in the case of a decision taken under Article 20(4) of Regulation No 1/2003, the recipient undertaking is obliged to cooperate with the Commission not only as regards the subject-matter of the inspection – that is to say, the products or the services to

which that decision relates – but also as regards all the activities engaged in by the undertaking at issue. Moreover, the Commission contends that it had reasonable grounds for ordering an inspection covering all electric cables and the material associated with those cables.

- 62 In the first place, it should be observed in that regard that, as the Commission contends, its powers of investigation would serve no useful purpose if it could do no more than ask for documents which it was able to identify with precision in advance. On the contrary, its right to investigate implies the power to search for various items of information which are not already known or fully identified. Without such a power, it would be impossible for the Commission to obtain the information necessary to carry out the inspection if the undertakings concerned refused to cooperate or adopted an obstructive attitude (*Hoechst v Commission*, paragraph 41 above, paragraph 27; Case T-59/99 *Ventouris v Commission* [2003] ECR II-5257, paragraph 122).
- 63 In the second place, the exercise of that power to search for various items of information which are not already known or fully identified makes it possible for the Commission to examine certain business records of the undertaking which is the recipient of a decision under Article 20(4) of Regulation No 1/2003, even if it does not know whether they relate to activities covered by that decision, in order to ascertain whether that is so and to prevent the undertaking from hiding from it evidence which is relevant to the investigation, on the pretext that that evidence is not covered by the investigation.
- 64 Nevertheless, notwithstanding the above, when the Commission carries out an inspection at the premises of an undertaking under Article 20(4) of Regulation No 1/2003, it is required to restrict its searches to the activities of that undertaking relating to the sectors indicated in the decision ordering the inspection and accordingly, once it has found, after examination, that a document or other item of information does not relate to those activities, to refrain from using that document or item of information for the purposes of its investigation.
- 65 First of all, if the Commission were not subject to that restriction, it would in practice be able, every time it has indicia suggesting that an undertaking has infringed the competition rules in a specific field of its activities, to carry out an inspection covering all those activities, with the ultimate aim of detecting any infringement of those rules which might have been committed by that undertaking. That is incompatible with the protection of the sphere of private activity of legal persons, guaranteed as a fundamental right in a democratic society.
- 66 Next, the obligation on the Commission to indicate the purpose and the subject-matter of the inspection in decisions taken under Article 20(4) of Regulation No 1/2003 would be a mere technicality if it were defined in the manner suggested by the Commission. The case-law according to which the purpose of that obligation is, in particular, to enable the undertakings concerned to assess the scope of their duty to cooperate would not be complied with, inasmuch as that obligation would be systematically extended to all the activities of the undertakings at issue.
- 67 It must therefore be held that, in the present case, the Commission was under an obligation, in order to adopt the inspection decision, to have reasonable grounds to justify an inspection at the applicants' premises covering all the applicants' activities in relation to electric cables and the material associated with those cables.
- 68 In the application initiating proceedings, the applicants rely on two grounds to substantiate their assertion that the high voltage underwater cable sector was the only sector in relation to which the Commission had at its disposal information concerning potential anti-competitive conduct. First, they claim that, in a press release dated 3 February 2009, the Commission had declared that it had carried out inspections at the premises of undertakings engaged exclusively in the manufacture of those cables. Secondly, they claim that, during the inspection, the Commission showed interest in certain employees of Nexans France working in that sector.

- 69 It must be noted that, when the application was filed at the Court Registry, the applicants had not had access to the evidence in the possession of the Commission at the time of the inspection decision and on which its suspicions were based. Moreover, the Commission was not required to communicate that evidence to them (see, to that effect, *Dow Chemical Ibérica and Others v Commission*, paragraph 39 above, paragraphs 45 and 51).
- 70 Accordingly, the applicants cannot be required to provide, in addition to the grounds mentioned in paragraph 68 above, evidence in support of their assertion that the high voltage underwater cable sector is the only sector in relation to which the Commission had information concerning potential anti-competitive conduct.
- 71 Such a requirement would have the consequence in practice that an undertaking which was the recipient of a decision taken under Article 20(4) of Regulation No 1/2003 would not be able to call into question the reasonable nature of the grounds on which the Commission had adopted that decision. That would prevent the Court from checking that the decision was in no way arbitrary.
- 72 It must therefore be concluded that, at least when undertakings which are the recipients of a decision taken under Article 20(4) of Regulation No 1/2003 produce, as in the present case, some evidence casting doubt on whether the Commission had reasonable grounds for adopting such a decision, the Court of the European Union must examine those grounds and determine whether they are reasonable.
- 73 In its response to the measures of organisation of procedure of 20 September 2011, the Commission informed the Court of the indicia at its disposal before the adoption of the inspection decision which, in its view, justified ordering an inspection at the applicants' premises covering all electric cables.
- 74 The Commission first of all stated in that connection that one of the applicants' competitors ('the leniency applicant') had informed it orally, on 21 November 2008, under the leniency programme implemented by the Commission's notice of 8 December 2006 on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17), of a cartel covering high voltage underground and underwater cables, of which the applicants were members ('the suspected cartel'), and of a '[confidential]' arrangement for medium voltage [electric] cable contracts'. The latter arrangement, known as [confidential], was notified on [confidential] to the Bundeskartellamt (German Federal Cartel Office). Lastly, the [confidential] had replaced an earlier '[confidential]' arrangement', called [confidential], notified to the Bundeskartellamt in [confidential].
- 75 The Commission appended to its response to the measures of organisation of procedure of 20 September 2011 a copy of two versions of the [confidential] dating from the [confidential] and a copy of the [confidential].
- 76 The Commission subsequently observed that the inspection could not be restricted to high voltage underground and underwater cables in so far as:
- the [confidential] covered medium voltage electric cables [confidential] and the [confidential] covered cables intended for voltages which might be as low as [confidential];
 - the leniency applicant [confidential] was no longer able to check [confidential] whether [confidential] collusive conduct took place in relation to medium voltage cables;
 - investigations previously carried out by the Commission in the field of the control of concentrations had confirmed the lack of clear and definitive differentiation between high, medium and low voltage electric cables (Commission decision of 19 July 2000 in Case COMP/M.1882 – Pirelli/BICC, recitals 14 to 32 (see paragraph 56 above); Commission decision of

5 July 2005 in Case COMP/M.3836 – Goldman Sachs/Pirelli Cavi e Sistemi Energia/Pirelli Cavi e Sistemi Telecom, paragraphs 12 and 13; Commission decision of 6 January 2006 in Case COMP/M.4050 – Goldman Sachs/Cinven/Ahlsell).

- 77 At the hearing, the Commission added to its response to the measures of organisation of procedure of 20 September 2011 on that issue. It stated that, according to the information given to it on 21 November 2008 by the leniency applicant, the suspected cartel had existed since at least 2001 and had been organised as an extension of the [confidential]. Moreover, the leniency applicant had informed the Commission that it could not guarantee that that cartel did not concern cables other than high voltage underground and underwater cables, [confidential]. Accordingly, the Commission was entitled to suspect that there was an infringement of Article 81 EC covering all electric cables.
- 78 At the hearing, the applicants also indicated that, after the reply had been lodged, they had had access to the Commission's administrative file, of which the [confidential], the [confidential] and the oral statement of the leniency applicant of 21 November 2008 form part, and they maintained that the Commission could not have been able, on the basis of those documents, to form the doubt that the suspected cartel concerned all electric cables. First, those documents were very old and concerned [confidential] agreements notified to a competition authority and authorised by it. Secondly, the leniency applicant had stated that it did not know of any competition law infringement concerning cables other than high voltage underground and underwater cables.
- 79 The Court considered it necessary to place the leniency applicant's statement in the file in order to be able to examine whether the Commission had had reasonable grounds for suspecting infringement. As the Commission itself suggested in its reply to the measures of organisation of procedure of 20 September 2011, it had been asked for a copy of that statement by way of measure of inquiry, as referred to in paragraph 21 above. The observations which, after the applicants were able to consult that statement at the Court Registry, the parties submitted on the question whether the Commission had reasonable grounds for suspecting infringement are not materially different from those which they submitted at the hearing.
- 80 Lastly, in the context of the measures of organisation of procedure of 21 December 2011, the Court asked the Commission to identify the extracts from the versions of the [confidential] and the [confidential] which it had communicated to the Court and which, alone or in conjunction with the leniency applicant's oral statement of 21 November 2008, formed the basis for its suspicions concerning all electric cables prior to the adoption of the inspection decision.
- 81 First of all, it must be observed that the extracts identified by the Commission in response to that request, read in the light of the versions of the [confidential] and the [confidential] placed in the file and the observations which the Commission submitted on those agreements, show that [confidential] a number of Community producers reached agreements, notified to the Bundeskartellamt, concerning the marketing outside the common market of a wide variety of high, medium and low voltage electric cables.
- 82 Those agreements were [confidential].
- 83 As the Commission essentially submits, the [confidential] and the [confidential] – the only agreements among those at issue which were not limited to high voltage underground or underwater cables – were agreements under which [confidential].
- 84 However, the existence of the [confidential] and the [confidential], which are old, public agreements, notified to the competition authority of a Member State and, in principle, compatible with the EU competition rules, does not in itself constitute reasonable grounds for supposing that some of the signatories to those agreements later concluded secret agreements, contrary to those rules and concerning the same products, with other producers.

85 It must be noted in this connection that no information in the file enables the suspected cartel to be linked to the [confidential] or the [confidential], contrary to the assertions made by the Commission at the hearing. Nor do the documents which the Commission provided to the Court show that the suspected cartel was organised as an extension of those agreements.

86 On the other hand, first, it is apparent from the file [confidential].

87 Secondly, [confidential] the leniency applicant [confidential] had clearly indicated in its statement of 21 November 2008, as the applicants correctly submit, [confidential].

88 Thirdly, it is apparent from the file [confidential].

89 Next, the decisions on the control of concentrations which, according to the Commission, show that there is no clear differentiation between electric cables on the basis of their voltage, include the Pirelli/BICC decision (see paragraph 56 above). In recital 32 of that decision the Commission concluded – by contrast with its response to the measures of organisation of procedure of 20 September 2011 – as follows:

‘[T]he production and sale of [low and medium voltage electric] cables on the one hand and [high and extra-high voltage electric] cables on the other hand are distinct markets: First, there is no demand-side substitutability between these products. Secondly, switching costs and time from production of lower to higher voltages are significant. Thirdly, the limited supply-side substitutability does not have an impact equivalent to the (missing) demand substitution effect. ... Finally, a distinction between [low and medium voltage] on the one hand and the higher voltage ranges ([high and extra-high voltage]) on the other hand is required due to the different competitive conditions governing the supply and demand of these products. However, the Commission considers that there is not enough evidence to maintain that fluid-filled [electric] cables of extra-high voltages form a distinct product market from [extra-high voltage] cables manufactured with the use of other techniques (mainly [cross-linked polyethylene extrusion]), given that all producers and a large majority of customers in Europe consider these cable types as substitutes.’

90 It is therefore apparent from that decision that the Commission – by contrast with its reply to the measures of organisation of procedure of 20 September 2011 – had reached the conclusion, before adopting the inspection decision, that there were significant differences between high, medium and low voltage cables.

91 Accordingly, it must be found that the Commission has not demonstrated that it had reasonable grounds for ordering an inspection covering all electric cables and the material associated with those cables.

92 That finding, which is based exclusively on the analysis of the information which the Commission had at its disposal at the time of the adoption of the inspection decision, is moreover confirmed, first, by the statement of the Commission itself in point 36 of the rejoinder that the wording of the inspection decision allowed the applicants to understand that the inspection did not concern ‘any electric cables’ and, secondly, by the fact that the Commission admits that it restricted its investigation during the inspection to the types of electric cable mentioned as examples in the inspection decision.

93 On the other hand, it must be found that, before the adoption of the inspection decision, the Commission had reasonable grounds for ordering an inspection covering high voltage underwater and underground electric cables and the material associated with those cables.

94 This branch of the plea must therefore be upheld in so far as it concerns electric cables other than high voltage underwater and underground cables and the material associated with those other cables. It must be rejected as to the remainder.

The second branch: the geographical scope of the inspection decision was overly broad

- 95 The applicants claim that the only indication in the inspection decision of the geographical scope of the investigation is that the agreements and/or concerted practices covered by that decision ‘probably ha[d] a global reach’. The inspection decision did not indicate that certain projects situated outside the European Union could affect the common market, the only situation in which those projects could be caught by Article 81 EC. High voltage underwater electric cable projects are also highly localised. The Commission nevertheless copied documents concerning projects developed in the Middle East or in Asia. Such conduct on the part of the Commission is ‘especially pernicious’ given the level of cooperation between the various competition authorities. Nexans France expressly reserved its rights with respect to the issue of whether those documents were covered by the inspection decision but, not being aware of the precise scope of the investigation, it was unable to assess the scope of its duty to cooperate. According to the applicants, this constitutes an infringement of their fundamental rights, including their rights of defence, their right to a fair trial, the privilege against self-incrimination and the presumption of innocence.
- 96 The Commission disputes the applicants’ arguments.
- 97 Contrary to the assertions made by the applicants, by indicating that the suspected agreements and/or concerted practices ‘probably have a global reach’, the Commission described in sufficient detail the geographical scope of the suspected cartel. The inspection decision must therefore be regarded as sufficiently precise so far as concerns the geographical scope of the possible infringements of competition law suspected by the Commission.
- 98 However, it is possible to interpret the applicants’ arguments as criticising the Commission, not for having identified too vaguely the geographical scope of the suspected cartel, but because it might have treated as coming within the scope of the inspection decision documents relating to local geographical markets outside the common market, without specifying why conduct on the part of the undertaking at issue on those markets could distort competition in the common market.
- 99 It must be observed in this connection that the actual title of Regulation No 1/2003 shows that the purpose of the powers conferred on the Commission by that regulation is the implementation of the competition rules laid down in Articles 81 EC and 82 EC. Those two provisions prohibit certain conduct on the part of undertakings in so far as it may affect trade between Member States and in so far as it has as its object or effect the prevention, restriction or distortion of competition within the internal market. Accordingly, the Commission can use its powers of inspection only for the purposes of detecting such conduct. The Commission thus cannot carry out an inspection at the premises of an undertaking if it suspects that there is an agreement or a concerted practice which produces effects exclusively on one or more markets outside the common market. On the other hand, there is nothing to prevent it from examining documents relating to those markets in order to detect conduct which is liable to affect trade between Member States and which has as its object or effect the prevention, restriction or distortion of competition within the common market.
- 100 This branch must therefore be rejected.
- 101 Having regard to all the foregoing considerations, the application for annulment of the inspection decision must be upheld in so far as it concerns electric cables other than high voltage underwater and underground cables and the material associated with those other cables, and rejected as to the remainder.

2. The applications for annulment of the contested acts

Admissibility

Admissibility of the legal opinion appended to the reply

102 The Commission submits that the legal opinion appended to the reply, which supports the applicants' arguments relating to the admissibility of the applications for annulment of the contested acts ('the disputed opinion') (second and third heads of claim), is inadmissible. The Commission raises two objections of inadmissibility, alleging: (i) essentially, infringement of Article 5(3) and Article 5(7) of the Instructions to the Registrar of the Court of First Instance adopted on 5 July 2007 (OJ 2007 L 232, p. 1) and (ii) the disputed opinion does not substantiate the arguments expressly relied upon in the reply and contains explanations which are not repeated there.

– The first objection of inadmissibility: infringement of Article 5(3) and Article 5(7) of the Instructions to the Registrar of the Court

103 The Commission states that, under Article 5(3) and (7) of the Instructions to the Registrar of the Court, applicants are forbidden to communicate procedural documents to persons other than their lawyers. As it is, the authors of the disputed opinion, who are not the applicants' lawyers, have consulted the defence.

104 Article 5(3) of the Instructions to the Registrar of the Court provides:

'The lawyers or agents of the parties to a case before the Court or persons duly authorised by them may inspect the original case-file, including administrative files produced before the Court, at the Registry and may request copies or extracts of procedural documents and of the register.

...'

105 In addition, Article 5(7) of the Instructions to the Registrar of the Court is worded as follows:

'No third party, private or public, may have access to the case-file or to the procedural documents without the express authorisation of the President of the Court of First Instance or, where the case is still pending, of the President of the formation of the Court that is hearing the case, after the parties have been heard. That authorisation may be granted only upon written request accompanied by a detailed explanation of the third party's legitimate interest in inspecting the file.'

106 In the present case, the disputed opinion is signed by two persons who are identified only by their name. It is not apparent from the file that those two persons are lawyers. In any event, as the Commission points out, the signatories of the opinion are not included among the lawyers mandated by the applicants to represent them before the Court in the present case and, also, it is not apparent from the file that they have been duly authorised by those lawyers to consult the file. Yet the authors of that opinion have had access to the defence, in so far as they refer to it several times. That was confirmed by the applicants at the hearing.

107 However, the fact that the authors of the disputed opinion are not the lawyers of the parties or persons duly authorised by those lawyers to consult the file does not permit the inference that, for the purposes of Article 5(3) and (7) of the Instructions to the Registrar of the Court, they are third parties with no right to access the file.

- 108 Those provisions, the main object of which is to regulate access to the file in the offices of the Court Registry, must be interpreted in the light of their purpose. They reflect the general principle of the fair administration of justice, according to which parties have the right to defend their interests free from all external influences and which requires that a party who is granted access to the procedural documents of other parties is entitled to use those documents only for the purpose of pursuing his own case and for no other purpose (see, to that effect and by analogy, Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, paragraphs 135 to 137, and order of the President of the Court of First Instance of 16 March 2007 in Case T-345/05 R *V v Parliament*, not published in the ECR, paragraphs 70 and 71). That is why the Court held that the disclosure of procedural documents by a party to third persons in a situation where those documents were not communicated for the purposes of pursuing that party's case constitutes an abuse of procedure (see, to that effect, *Svenska Journalistförbundet v Council*, paragraph 139).
- 109 On the other hand, Article 5(3) and Article 5(7) of the Instructions to the Registrar of the Court do not preclude a party to a case from allowing an expert to consult a procedural document, where that is done with the aim of making it easier for that expert to draft a document for the purposes of defending that party's case, and the document is used only for the purposes of the proceedings.
- 110 Having regard to the foregoing, the Commission's first objection of inadmissibility must be rejected.
- The second objection of inadmissibility: the disputed opinion does not substantiate the arguments expressly put forward in the reply and contains explanations which are not repeated there
- 111 The Commission submits that the disputed opinion can be taken into account only in so far as it supports the arguments expressly set out in the reply. However, in its view, the opinion sets out a set of legal arguments on admissibility, rather than supporting or supplementing matters of fact or of law expressly set out in the reply. Moreover, it introduces arguments which are not included in the reply.
- 112 In that regard, it should be noted that, under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the General Court, each application is required to state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. According to consistent case-law, it is necessary, if an action is to be admissible, for the basic matters of law and fact relied on to be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents appended thereto, a general reference to other documents, even those appended to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the above provisions, must appear in the application. Furthermore, it is not for the Court to seek out and identify, in the annexes, the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (see Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraph 94 and the case-law cited).
- 113 That interpretation of Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the General Court also applies to the conditions for the admissibility of a reply, which, under Article 47(1) of the Rules of Procedure, is intended to supplement the application (see *Microsoft v Commission*, paragraph 112 above, paragraph 95 and the case-law cited).
- 114 In the present case, the disputed opinion is only referred to twice in the reply. First, the reply states, without providing other explanations, that the conclusion reached by the authors of the disputed opinion, following the examination of the issue of the admissibility of the second and third heads of claim, is also that which is set out in the reply, without mentioning to which specific points of that 13-page annex reference is being made. Next, it states that the disputed opinion substantiates the statement that the privilege against self-incrimination and the right of every person to protection

against arbitrary interference in the sphere of his private activity are fundamental rights which form part of the general principles of Community law. Accordingly, it is only in relation to that latter statement that account should be taken of the disputed opinion (see, to that effect, Case T-151/01 *Duales System Deutschland v Commission* [2007] ECR II-1607, paragraphs 78 and 81).

Admissibility of the applications for annulment of the contested acts

- 115 It has consistently been held that acts against which an action for annulment may be brought under Article 230 EC are those which produce binding legal effects capable of affecting the applicant's interests by bringing about a distinct change in his legal position (Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9, and Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others v Commission* [1992] ECR II-2667, paragraph 28).
- 116 In principle, an intermediate measure intended to pave the way for the final decision is not therefore a challengeable measure. However, according to case-law, acts adopted in the course of the preparatory procedure which were themselves the culmination of a special procedure distinct from that intended to permit the Commission to take a decision on the substance of the case and which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position, also constitute challengeable measures (*IBM v Commission*, paragraph 115 above, paragraphs 10 and 11, and Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* [2006] ECR II-1601, paragraph 65).
- 117 The Commission maintains that the applications for annulment of the contested acts are inadmissible. Those acts merely implement the inspection decision and do not bring about a distinct change in the applicants' legal position.
- 118 The applicants submit that the contested acts have brought about a significant change in their legal position and have seriously and irreversibly affected their fundamental rights – their right to privacy and the rights of the defence. They should therefore be considered to be challengeable measures. First, since no provision was made for them in the inspection decision, those acts cannot constitute implementing measures. Second, the form of a measure is irrelevant as regards the issue of whether it produces binding legal effects. As it is, the applicants were obliged to comply with the contested acts in order to avoid being required to pay an increase in the amount of any fine to which they might be liable or even to avoid other penalties. Those acts are therefore similar to requests for information made under Article 18(3) of Regulation No 1/2003, a provision which expressly provides that those measures are challengeable. Third, the contested acts have compromised the applicants' ability to defend themselves in competition investigations before other courts. Fourth and lastly, the decision to take copies of several computer files and of the hard drive of Mr C's computer produced legal effects, since those storage media contain data such as emails, addresses and so on, which are of a personal nature and protected by the right to privacy and the confidentiality of correspondence.
- 119 First of all, it must be observed that the contested acts are intermediate measures designed solely to pave the way for the adoption by the Commission of a final decision under Article 81(1) EC. Pursuant to those acts, the Commission copied certain computer files which had been found during the inspection and obtained explanations on specific documents also found during the inspection in order to check the actual existence and scope of a factual and legal situation regarding which it already had information – namely, the suspected cartel – with a view to preparing, if necessary, a final decision on that situation.
- 120 Next, it is apparent from Article 20(2)(c) and (e) of Regulation No 1/2003 that both the taking, in any form, of copies of or extracts from a business record, whatever its medium, of the undertaking concerned by an inspection ordered under Article 20(4) of that regulation and a request addressed to the employees or representatives of that undertaking for explanations of those documents in relation

to the subject-matter and purpose of that inspection constitute measures implementing the decision under which the inspection was ordered. The inspection decision itself provided that Nexans France was to authorise the inspectors to copy those business records and to give them, at the premises, ‘explanations relating to the subject-matter and purpose of the inspection’ (see paragraph 3 above).

- 121 As the Commission correctly submits, any inspection ordered under Article 20(4) of Regulation No 1/2003 implies that a selection of documents will be examined and, depending on the case, copied, and that a selection of questions will be put to the employees or representatives of the undertakings concerned relating to the subject-matter and purpose of the inspection. It is pursuant to the decision ordering the inspection, rather than pursuant to another distinct act adopted during the inspection, that those undertakings are required to allow the Commission to copy the documents at issue and to authorise their employees and representatives to provide the explanations requested.
- 122 A comparison of Article 18(3) and Article 20(2)(c) and (e) of Regulation No 1/2003 also suggests that the copying of documents and the requests for explanations made during inspections constitute measures implementing decisions ordering an inspection.
- 123 First, Article 18(3) of Regulation No 1/2003 provides that the requests for information addressed to undertakings under that provision may be the subject of an independent review. On the other hand, Regulation No 1/2003 is silent as regards the explanations requested during inspections and the copying of documents during inspections.
- 124 Second, it is apparent from Article 18(1) and Article 18(3) of Regulation No 1/2003 that the Commission may, under those provisions, require undertakings and associations of undertakings to provide all necessary information. On the other hand, pursuant to Article 20(2)(e) of that regulation, the Commission may request only explanations of facts or documents relating to the subject-matter and purpose of the inspection.
- 125 It must therefore be held that the copying of each document and the asking of each question during an inspection are not to be regarded as acts separable from the decision under which the inspection was ordered but as measures implementing that decision.
- 126 Lastly, it must be pointed out that, as the Commission submits, it could not have penalised the applicants on the ground that they had refused to allow it to copy the documents at issue or to provide a full answer to the inspectors’ questions to Mr C without adopting a decision under Article 23(1)(c) and (d) of Regulation No 1/2003. That decision, which would be distinct from the inspection decision and the final decision adopted under Article 81(1) EC, could be challenged by an action in which the Court would be moved to determine whether the copying of the documents concerned and the obtaining of the explanations requested by the Commission pursuant to the contested acts had adversely affected the applicants’ fundamental rights to privacy and of defence, as asserted by the latter.
- 127 In order to substantiate their argument that the contested acts produce binding legal effects such as to affect their interests by bringing about a distinct change in their legal position and, in the alternative, that the contested acts are themselves the culmination of a special procedure distinct from that intended to permit the Commission to take a decision on the substance of the case, for the purposes of the case-law referred to in paragraph 116 above, the applicants rely on Case 155/79 *AM & S Europe v Commission* [1982] ECR 1575, and Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals v Commission* [2007] ECR II-3523.
- 128 In this connection, it should be noted that the applicants in the cases which gave rise to the judgments referred to in paragraph 127 had argued before the Commission that certain documents which the Commission had requested them to produce in the course of an inspection ordered under Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC]

(OJ, English Special Edition 1959-1962, p. 87), or following that regulation, were covered by the confidentiality of communications between lawyers and their clients. It was in that context that the Court held that the decision by which the Commission rejected the request for the protection of the documents at issue produced legal effects for the undertakings concerned, in so far as that decision withheld the protection provided under Community law and was definitive in nature and independent of any final decision making a finding of an infringement of the competition rules (*Akzo Nobel Chemicals and Akros Chemicals v Commission*, paragraph 127 above, paragraph 46; see also, to that effect, *AM & S Europe v Commission*, paragraph 127 above, paragraphs 27 and 29 to 32).

- 129 However, the applicants did not claim at the time of the adoption of the contested acts that the documents copied by the Commission or the information obtained by it under those acts were eligible, under EU law, for protection similar to that conferred on the confidentiality of communications between lawyers and their clients. When the Commission decided to copy those documents and to request the applicants to provide that information it did not, therefore, adopt a decision withholding that protection from the applicants.
- 130 As regards the documents copied during the inspection, it must be pointed out that the applicants kept the originals, in either paper or electronic form, and are able to ascertain the nature and the content of those documents. Notwithstanding that fact, the applicants did not identify specific documents or parts of documents which are protected under EU law. The applicants merely maintain that the Commission did not have the right to copy those documents in order to examine them later in its offices. According to the applicants, the documents ought to have been examined at the premises of Nexans France, and the Commission was entitled to take a copy only of those documents relevant for the purposes of the investigation. It must therefore be held that the applicants are not taking issue with the Commission for having consulted or copied certain specific protected documents, but for having examined them in its own offices in Brussels rather than at the premises of Nexans France and for having kept them up until the time of the examination.
- 131 As regards the questions put to Mr C during the inspection, it is apparent from the file that the applicants, which were accompanied by their lawyers, did not in any way object to the Commission obtaining the information sought. In asking those questions, the Commission could not, therefore, have adopted a decision withholding from the applicants the protection provided for under EU law.
- 132 It follows from the foregoing that the contested acts cannot be regarded as actionable measures. The legality of those acts could only be examined – apart from in the context of an action for annulment of the decision imposing a penalty, referred to in paragraph 126 above – in the context of an action challenging the final decision adopted by the Commission under Article 81(1) EC. Review by the Courts of the way in which an inspection was conducted falls within the scope of an action for the annulment of the final decision adopted by the Commission under that provision (see, to that effect, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931, paragraphs 413 and 414).
- 133 Moreover, if the applicants believe that the acts by which the Commission took a copy of several computer files and of the hard drive of Mr C's computer in order to examine them later in its offices and requested from him explanations of documents found during the inspection are illegal and have caused them to suffer harm such as to cause the European Union to incur liability, they may bring an action against the Commission for non-contractual liability. A remedy of that kind is not part of the system for the review of the legality of acts of the European Union which have legal effects binding on, and capable of affecting the interests of, the applicant, but it is available where a party has suffered harm on account of unlawful conduct on the part of an institution (see, to that effect, Case C-131/03 P *Reynolds Tobacco and Others v Commission* [2006] ECR I-7795, paragraphs 82 and 83).
- 134 The applications for annulment of the contested acts must therefore be declared inadmissible.

3. *The fourth to seventh heads of claim*

- 135 As the applicants themselves observe, by their fourth to seventh heads of claim they are seeking a ruling from the Court on the consequences of the annulment of the inspection decision and of the contested acts.
- 136 Accordingly, as the Commission contends, the applicants are seeking to obtain from the Court a declaration relating to the effects of a ruling ordering annulment, which would also constitute a direction to the Commission as regards how that judgment is to be complied with. However, since the Court has no jurisdiction, in the context of a review of legality on the basis of Article 230 EC, to issue declaratory judgments (see, to that effect, order of the Court in Case C-224/03 *Italy v Commission* [2003] ECR I-14751, paragraphs 20 to 22) or directions, even where they concern the manner in which its judgments are to be complied with (order in Joined Cases C-199/94 P and C-200/94 P *Pevasa and Inpesca v Commission* [1995] ECR I-3709, paragraph 24), the applicants' request must be declared manifestly inadmissible (see, to that effect, Case T-145/06 *Omya v Commission* [2009] ECR II-145, paragraph 23).
- 137 It follows from all the foregoing that the inspection decision must be annulled in so far as it concerns electric cables other than high voltage underwater and underground electric cables and the material associated with those other cables. The action must be dismissed as to the remainder.

Costs

- 138 Under the first subparagraph of Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.
- 139 Since the applicants have been unsuccessful in their main heads of claim they must be ordered, in addition to bearing their own costs, to pay half of the costs incurred by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Annuls Commission decision C (2009) 92/1 of 9 January 2009 ordering Nexans SA and all companies directly or indirectly controlled by it, including Nexans France SAS, to submit to an inspection in accordance with Article 20, paragraph 4, of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC], in so far as it concerns electric cables other than high voltage underwater and underground electric cables and the material associated with those other cables;**
2. **Dismisses the action as to the remainder;**
3. **Orders Nexans and Nexans France to bear their own costs and to pay half of the costs incurred by the European Commission;**
4. **Orders the European Commission to bear half of its own costs.**

Truchot

Martins Ribeiro

Kanninen

Delivered in open court in Luxembourg on 14 November 2012.

[Signatures]

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