Summary of the Order

[...]

101 Third, professional privilege is intimately linked to the conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs (Case 155/79 AM & S v Commission, [1982] ECR 1575, paragraph 24).

102 In order that a lawyer may effectively and usefully exercise his role of collaborating in the administration of justice by the courts with a view to the full exercise of the rights of the defence, it may prove necessary, in certain circumstances, for the client to prepare working or summary documents, notably for the purpose of gathering the information which the lawyer may find useful, or indeed indispensable, in understanding the context, the nature and the scope of the facts in respect of which his assistance is sought. Furthermore, the preparation of such documents may prove particularly necessary in matters involving considerable and complex information, which is the case, in particular, of proceedings initiated with a view to imposing sanctions for infringements of Articles 81 EC and 82 EC.

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

[...]

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

122 On the other hand, however, the solution in Case 155/79 AM & S v Commission [1982] ECR 1575, is based, inter alia, on an interpretation of the principles common to the Member States dating from 1982. It is therefore necessary to determine whether, in the present case, the applicants and the interveners have adduced serious evidence of such a kind as to demonstrate that, taking into account developments in Community law and in the legal orders of the Member States since the judgment in Case 155/79 AM & S v Commission [1982] ECR 1575, it cannot be precluded that the protection of...
professional privilege should now also extend to written communications with a lawyer employed by an undertaking on a permanent basis.

[...]

125 Without its being possible at this stage to ascertain and to embark upon a thorough and detailed analysis of the evidence adduced by the applicants and the interveners, that evidence none the less appears prima facie to be capable of showing that the role assigned to independent lawyers of collaborating in the administration of justice by the courts, which proved decisive for the recognition of the protection of written communications to which they are parties (Case 155/79 AM & S v Commission [1982] ECR 1575, paragraph 24), is now capable of being shared, to a certain degree, by certain categories of lawyers employed within undertakings on a permanent basis where they are subject to strict rules of professional conduct.

126 The evidence therefore tends to show that increasingly in the legal orders of the Member States and possibly, as a consequence, in the Community legal order, there is no presumption that the link of employment between a lawyer and an undertaking will always, and as a matter of principle, affect the independence necessary for the effective exercise of the role of collaborating in the administration of justice by the courts if, in addition, the lawyer is bound by strict rules of professional conduct, which where necessary require that he observe the particular duties commensurate with his status.

[...]

Referring Principles:

XII.6 - Attorney-client privilege