Brussels, 26 February 2008

TO THE MEMBERS OF
THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

**RESPONSE**

Pursuant to Article 115 of the Rules of Procedure of the Court of Justice

by

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**Intervenor at First Instance**

in

**Case C-550/07 P**

**Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd**

**Appellants**

**v.**

**Commission of the European Communities**

**Defendant at First Instance**

Appeal brought on 8 December 2007 under Article 56 of the Statute of the Court of Justice against the judgment of the Court of First Instance delivered on 17 September 2007 in Case T-253/03: Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission of the European Communities.

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## I. Introduction

1. The Association of Corporate Counsel Europe ("ACCE"), the European chapter of the Association of Corporate Counsel ("ACC"), submits this Response in support of the Appellants' appeal against the portion of the judgment of the Court of First Instance ("CFI") of 17 September 2007 in Case T-253/03 (the "Contested Judgment") that rejected the claim of legal professional privilege ("LPP") for communications with Akzo Nobel's in-house lawyer. This Response is lodged within the applicable time limit because ACCE was an intervenor in the proceedings before the CFI and received notice of the Appellants' appeal on 17 December 2007. ACCE concurs with many of the arguments put forward by the Appellants. There are, however, additional arguments that it wishes to highlight in this Response.

2. ACC is the world's largest bar association exclusively serving in-house counsel, who are employed in public and private non-profit companies. It was incorporated as a non-profit organization in Washington, DC in 1982. ACCE is a non-profit organization established under French law as a chapter of ACC serving in-house lawyers in Europe. ACC has 23,000 members in 75 countries employed by more than 10,000 organisations. ACCE has more than 1,000 members in Europe representing over 600 organisations, and is one of the fastest growing chapters of ACC worldwide.

3. ACC and its chapters are the voice of the in-house bar, engaging members in vital local professional activities, and supporting in-house counsel who seek to meet their clients' needs for legal representation, both in their home jurisdictions and in cross-border practice. ACC and ACCE serve members through networking, knowledge sharing, continuing legal education, and advocacy on behalf of the in-house profession. As a recognized leader in the development and dissemination of practical compliance tools and the promulgation of the highest ethical and professional standards for in-house counsel, ACC helps its members to improve their corporate clients' ability to not only comply with the law, but prevent wrongdoing through early and meaningful involvement in the corporate decision-making process.

4. This appeal offers this Court an opportunity to clarify the scope of LPP as applied in the context of EC competition law proceedings and, in particular, to ensure that the application of LPP reflects the professional status of the in-house lawyer and addresses

the critical need of corporate clients to consult confidentially with their lawyers on all legal issues confronting the organization. While the question raised by the specific facts of this case only concerns whether LPP applies to documents coming from an in-house lawyer who is also a member of a bar in a Member State, ACCE respectfully submits that, in order to be a meaningful right of clients and lawyers, LPP must attach to communications from any lawyer who is a member of a bar or a member of a professional organisation comparable to a bar that is recognized by law. It should be irrelevant to the recognition of LPP whether the lawyer is employed as an in-house counsel or retained as outside counsel. Likewise, it should be irrelevant whether the bar or comparable organization regulating the lawyer's practice is within the Community or outside of the Community. Either it should be assumed that any licensed lawyer is competent and ethical until proven otherwise, or it should be assumed that all licensed lawyers – including outside counsel – lack those qualities and should not be trusted. Surely, the latter is not what the profession deserves or what is in the public's best interest.

5. As discussed in this submission, the CFI's failure to extend LPP to in-house lawyers undermines the broader public policies underlying LPP. First, it frustrates the goal of fostering compliance with the law because companies are less likely to consult their in-house lawyers when it is most important to do so, and thus may forego seeking legal advice on the most complex and significant matters. Second, it is inconsistent with companies' fundamental rights of defence to deprive them of the right to obtain effective legal advice on a confidential basis from the lawyer of their choice.

6. The CFI erred in refusing to grant LPP to communications with in-house lawyers on the grounds that they are not sufficiently "independent." An ever-increasing number of in-house lawyers are either members of a bar, and thus bound by the same rules as outside counsel, or they are members of professional organizations recognized by law that impose equivalent rules. The assumption that in-house lawyers are not "independent" ignores these developments in the regulation of in-house lawyers. In addition, distinguishing between in-house counsel and their peers in private practice for the purposes of recognizing LPP is to make a distinction without a difference: whether a lawyer is "employed" by a company as in-house counsel or "retained" by a company as outside counsel has no bearing whatsoever on that lawyer's integrity or competence. Indeed, as discussed below, it is arguable that an in-house lawyer is actually in a far

better position than outside counsel to ensure that the company complies with the law and engages in responsible and ethical decision-making.

## II. The CFI's Failure to Apply LPP to Communications from In-House Lawyers Undermines the Public Policies Underlying LPP

### 1. Compliance with the Law

7. A core policy underlying LPP is that it promotes full and frank communication between lawyers and their clients, thus promoting the broader public interest in compliance with the law. As this Court recognized in *AM&S Europe Limited v. European Commission* ("*AM&S*"), "the protection against disclosure afforded to written communications between a lawyer and client … contributes towards the maintenance of the rule of law."[1] If clients are unsure whether their communications with a lawyer will be kept confidential, they may decide not to seek legal advice at all, or may not reveal sensitive aspects of the matter. They will be less likely to get in-house counsel involved at an early stage with the working groups of business teams that are developing corporate policy, products, and strategic direction. This result is surely not in the public's best interest. The protection afforded by LPP encourages clients to seek legal advice and to be candid with their lawyers at every stage and level of the company's work, ensuring that the lawyer is able to provide advice in a preventive fashion, and based on the full disclosure and a thorough understanding of all pertinent facts. If the corporate client believes that communications with its lawyer may later be disclosed and subjected to "out-of-context" review, the client may decide that its best interest is in avoiding communications with the lawyer entirely.

8. The CFI's ruling that written communications from in-house counsel are not eligible for LPP undermines the broader public interest in promoting compliance with the law that LPP is designed to promote. In-house legal departments are crucial to corporate compliance. In-house lawyers offer a variety of benefits to those corporate clients whose operations are complex and significant enough to require full-time counsel to

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[1] Case 155/79, *AM&S Europe Limited v. European Commission*, [1982] ECR 1575 at ¶20.

advise the company on an ongoing basis. The benefits afforded by employing in-house lawyers rather than relying exclusively on the ad hoc retention of outside lawyers include the following:

- an in-house lawyer has greater familiarity with the company's culture, history, structure, industry, and past dealings, allowing the in-house lawyer to more quickly grasp the impact of corporate actions as well as issues that will need to be addressed when a problem arises;
- an in-house lawyer is in a better position to develop trusted relationships with key corporate executives, which will make them more inclined to seek legal advice;
- an in-house lawyer has a natural entrée into corporate business teams to counsel pro-actively to help prevent problems from arising;
- an in-house legal department gives a company the internal capacity to mandate compliance regimes within the company that not only deter and detect fraud and other problems, but also to measure and improve the company's progress toward a more ethical and compliant culture;
- an in-house lawyer can expend resources, create initiatives, and hire outside lawyers to aggressively address and remedy problems that may arise;
- in-house lawyers play a highly-valued role in the context of corporate decision-making as they are able to synthesize large quantities of information and form legal judgments in a responsible and timely manner; and
- in-house counsel are uniquely positioned to help companies make complex and fast-paced business decisions across multiple jurisdictions where inconsistent (and even conflicting) legal requirements are the norm.

9. The advantages that in-house lawyers bring to a company in terms of achieving compliance with the law are lost, however, if company managers cannot consult in-house lawyers without fear of such communications becoming public. Managers may be reluctant to seek advice at all. And even if they do consult an in-house lawyer, the quality of the legal advice may suffer because the manager may be reluctant to disclose

all of the relevant facts. Also, the in-house lawyer may decide that it is preferable to only give oral advice to avoid possible disclosure, which can be less effective in furthering compliance because, unlike written advice, it cannot be widely disseminated within the company. In short, the failure to extend LPP to communications with in-house lawyers will impede the in-house counsel's ability to provide full and candid legal assessments on complex matters by whatever mode of communication is best suited to the needs of the moment. LPP is intended to encourage candid communications and, thus, should be interpreted in a manner that helps to promote – not limit – such candour.

10. The need to protect communications with in-house lawyers from disclosure in order to encourage corporate managers to seek advice is even greater today than it was at the time of *AM&S*. In the 25 years since that judgment was issued, the legal environment in which companies operate has changed radically. The proliferation of corporate regulation combined with draconian penalties for violations has made legal compliance a top priority of companies. Failure to comply can not only damage a company's reputation and result in massive fines, but can also cause the company to go out of business, damaging many innocent stakeholders including employees, retirees, suppliers, customers, and investors.

11. Developments in the field of EC competition law in recent years mirror this general trend of greater complexity in the law and increasingly severe penalties for failure to comply. Since 1982, the sheer volume and complexity of the competition rules has increased significantly due to both the adoption of numerous new regulations and other rules in the field and a steady stream of jurisprudence. Moreover, the recent shift caused by the adoption of Regulation 1/2003 from a regime where companies could notify their agreements to the Commission to one where they must make a self-assessment of whether their activities run afoul of the competition rules increases both the compliance burden and the need for internal and "real-time" preventive counselling. At the same time, penalties for competition law violations have increased exponentially so that responsible companies have made compliance a priority and often hire in-house counsel to help assure their corporate leadership as well as the financial markets that the company is properly positioned to meet these challenges.

12. These developments are part of the reason for the enormous increase in the number of in-house lawyers as well as the greater importance placed on their role. In-house lawyers are critical to the implementation of corporate compliance initiatives to help ensure that companies can focus on doing business, rather than defending errant legal actions. In multinational companies, the in-house legal department is often as large as a major law firm, with teams of lawyers focused on providing advice to major operational units and advising senior executives and the board of directors on corporate governance issues. In addition, larger law departments often have teams of legal specialists dedicated to helping the company cope with challenges on a global basis in areas such as employment, intellectual property protection, environmental and resource compliance, commercial standards, and, of course, compliance with competition law. But the larger number of companies with in-house lawyers have smaller departments, whose job is to ensure that issues are identified, business leaders are equipped to develop appropriate compliance standards and practices for their units, outside counsel teams are called in when needed (and coordinated and effective in doing their work), and that the board of directors and top executives comply with corporate governance standards.

13. In the wake of so many significant corporate failures in recent years, the role and responsibilities of in-house lawyers are subject to increasing scrutiny, which underscores their importance. As a company's reputation increasingly depends on the integrity and competence of its in-house legal team in navigating the intricate web of rules and regulations to which it is subject, it follows that regulators, courts and corporate boards will all focus greater attention on the in-house lawyer's ability to live up to the highest standards of professionalism and secure corporate compliance. The increasingly likelihood that in-house counsel will be viewed as fiduciary "gatekeepers" is evidenced in the United States, for instance, by the recent trend for courts and government regulators to hold in-house lawyers accountable for failures experienced by their companies even when the in-house lawyer did not engage in criminal behaviour or commit malpractice.[2] Clearly, if this Court is worried about whether in-house counsel will be accountable for their actions, the experience of in-house lawyers in the United

[2] See ACC Report, "In-House Counsel in the Liability Cross-Hairs." **http://www.acc.com/resource/v8918.**

States suggests that they will be more likely be held accountable than their peers in private practice.

14. Extending LPP to communications between in-house lawyers and their corporate clients will enhance, not hinder, compliance. With the confidence and assurance that LPP exists, managers will be encouraged and more likely to seek legal advice, and in-house lawyers will be better equipped to pro-actively advise employees on all facets of the company's work. In contrast, if communications with in-house lawyers are not covered by LPP, the likely result will be more violations of the law and corporate failures, which will increase the burden and costs borne by competition authorities and courts, and damage many innocent stakeholders.

15. The CFI erred in brushing these concerns aside. According to the CFI, companies are not hindered in their ability to ensure compliance with the competition rules because their in-house lawyers can simply involve outside counsel, which then ensures that any advice benefits from LPP.[3] This view ignores the reality of corporate life. Companies often need immediate legal advice in order to prevent problems from arising or to minimize the damage of bad decisions. In-house lawyers are better situated to provide this advice because they are in the meeting room with their clients, helping to surface problems and address them in real-time, and do not need to climb a "learning curve" with each representation or develop a relationship of trust with managers who must be forthcoming with them. Moreover, managers may choose not to consult a lawyer at all if they either do not know they have a problem to contend with in the first place, or have to go through the time-consuming process of selecting and engaging outside counsel and bearing the associated costs if they do. While there are undoubtedly situations where it may be appropriate to involve outside counsel, it is clear that having to involve outside counsel when they are not the best or most convenient counsel to the company hampers corporate compliance.

[3] Contested Judgment at ¶173.

### 2. Rights of Defence

16. A second key justification for extending LPP to in-house lawyers is the need to protect the company's fundamental rights of defence. The CFI's denial of LPP to written communications from in-house counsel undermines the fundamental right of companies to obtain effective legal advice on a confidential basis with lawyers of their preference and choosing.

17. Article 6(3)(c) of the European Convention on Human Rights provides that everyone has the right "to defend himself in person or through legal assistance of his own choosing." Unless communications with in-house lawyers are protected by LPP, companies are denied their fundamental right to consult the lawyer of their choice.

18. Failure to accord LPP to communications with in-house lawyers also contravenes the fundamental right to obtain effective legal advice on a private and confidential basis. In *AM&S*, this Court recognized that LPP is justified by the requirement "that the rights of defence must be respected."[4] The European Court of Human Rights has acknowledged that LPP is a fundamental human right, reasoning that the confidentiality of a client's communications with his lawyer is part of the right to privacy guaranteed by Article 8 of the European Convention on Human Rights.[5] The United Kingdom's House of Lords has acknowledged that LPP is an essential condition of an individual's ability to exercise the right to obtain legal advice, noting that "such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards by disclosed and used to his prejudice."[6] In a similar vein, the English Court of Appeals relied on decisions of the European Court of Human Rights to reaffirm that "access to legal advice on a private and confidential basis is also a fundamental right not lightly to be interfered with" regardless of whether the context was civil or criminal.[7]

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[4] *AM&S* at ¶20.

[5] *Foxley v. United Kingdom*, (2000) 31 EHHR 637 at ¶43.

[6] *R (Morgan Grenfell & Co Ltd) v Special Commissioner for Income Tax* [2002] UKHL 21 at ¶7.

[7] *Bowman v. Fels* [2005] EWCA Civ 226 at ¶74.

## III. The CFI Erred in Refusing to Grant LPP to Communications with In-House Lawyers on the Grounds that They Are Not "Independent"

### 1. The Requirement of Independence

19. A central issue raised in this case is whether in-house counsel are sufficiently "independent" so that their communications are eligible for the protection afforded by LPP. This requirement of independence was set forth in *AM&S*, where this Court ruled that written communications between lawyer and client are protected by LPP where two conditions are met: (1) the communications are made for the purposes and in the interests of the client's rights of defense," and (2) "they emanate from independent lawyers."[8] As explained in *AM&S*, a lawyer is "independent" for the purposes of LPP if the lawyer is bound by certain rules of professional ethics and discipline:

> "the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced by the institutions endowed with the required powers for that purpose."[9]

20. This requirement of independence is only relevant to the possible *abuse* of LPP, not to its *existence*. LPP arises out of the benefits to society of unfettered communication between lawyer and client. These benefits inure regardless of whether the lawyer is "independent," i.e. subject to ethical and disciplinary rules. In the context of LPP, the requirement of independence simply protects against a lawyer's abuse of LPP by ensuring that the lawyer operates under a regime of ethical and disciplinary rules.

### 2. Employment Status Is Irrelevant

21. Whether a lawyer works for a company or is engaged in private practice is irrelevant to the determination of whether the lawyer is "independent" for the purposes of recognizing LPP. The critical question is whether the lawyer – whether employed by

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[8] *AM&S* at ¶25.

[9] *AM&S* at ¶24.

his client or not – is subject to a professional code of conduct that would protect against abuse of LPP.

22. Thus, the CFI erred in holding that the requirement of "independence" set forth in *AM&S* means that the lawyer may not be bound to his client by a relationship of employment.[10] In reaching this conclusion, the CFI relied on the portion of *AM&S* in which this Court stated that written communications are entitled to LPP if they are made for the purpose of the client's rights of defence and if "they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment."[11]

23. ACCE agrees with the Appellants that the CFI's narrow, literal interpretation of the criterion of "independence" was incorrect.[12] The CFI ignored this Court's explanation that "independence" refers to the fact that the lawyer is bound by rules of professional ethics and discipline. The statement in *AM&S* that in-house lawyers are not independent simply reflects the mistaken view that employment somehow taints an in-house counsel's ability to be objective and the fact that, at the time of the *AM&S* judgment, in-house counsel in Europe were generally not subject to such rules. This statement was not intended to categorically exclude written communications from in-house counsel from the protection of LPP. To the extent that circumstances changed and in-house lawyers are increasingly subject to ethical and disciplinary rules, *AM&S* contemplated that they would meet the requirement of independence. In particular, this Court recognized the need to take into account the principles and concepts common to the law of the Member States on the issue of LPP, thus making it clear that the question of the scope of LPP is not immutable, but rather must reflect changing circumstances.[13]

24. If a lawyer is subject to professional rules that protect against the abuse of LPP, the lawyer should be "independent" within the meaning of *AM&S.* The lawyer's employment status should not matter because employment is irrelevant to whether a

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[10] Contested Judgment at ¶166.

[11] *AM&S* at ¶21.

[12] Application at ¶¶10-21.

[13] See ¶¶18-21 (referring to recognition of LPP in Member State legal systems).

lawyer abides by rules of the profession. There is no empirical evidence or any other reason to suppose that in-house lawyers are more likely to abandon their professional obligations or engage in actions that are harmful to the public than their self-employed peers. They do not present any greater risks and indeed, because of the prospect of being held individually liable, have a greater stake in ensuring the proper corporate actions and outcomes than their outside peers who simply walk away at the end of their engagement.

25. Moreover, employment increases the likelihood that a lawyer for the company can, for instance, refuse to assist the company in pursuing an illegal course of action and even report violations and be protected for doing so by the increasing number of statutes offering whistleblower protections to employees who report wrongdoing.[14] In contrast, outside lawyers that deliver advice that a particular course of action is illegal can be dismissed without any further repercussions for the company.

26. Indeed, in terms of independence, the relationship between outside counsel and their clients can create objectivity problems that are far greater than those often attributed to in-house lawyers. Many outside counsel are so financially attached to the continued retainer of their law firm by the company that they fear delivering advice that may be unpopular with the client. A firm that loses an "anchor" client experiences not only severe financial repercussions and bad press, but also may even find its very survival threatened.

### 3. In-House Lawyers Who Are Members of a Bar or Who Are Members of a Comparable Organization Recognized by Law Are "Independent"

27. In light of the purpose of the requirement of independence, it is clear that the only relevant question in determining whether a lawyer is sufficiently "independent" so as to be eligible for the protections of LPP is whether the lawyer is subject to professional rules of ethics and discipline that will protect against abuse of LPP. If an in-house lawyer is subject to professional ethical and disciplinary rules imposed by a bar, or is subject to equivalent rules as a result of membership in a comparable professional

[14] For instance, in the United Kingdom, the Public Interest Disclosure Act 1998 protects employees who inform on the illegal activity of their employers.

organization recognized by law, the lawyer should be treated as being "independent" for the purpose of recognizing LPP.

28. For in-house lawyers who are members of a bar, there is clearly no reason not to extend LPP to their communications. These lawyers have the same qualifications and are subject to the same laws and codes of professional conduct as their counterparts in private practice. As explained at length in the Appellants' application, there is no justification for treating two groups of lawyers who have the same qualifications and are subject to the same obligations differently.

29. Likewise, there is no justification for discriminating between in-house lawyers within the Community and those outside the Community. If LPP is recognized for in-house lawyers who are members of a national bar within the Community, there is no reason not to recognize LPP for in-house lawyers who are members of a bar outside of the Community. In both cases, the lawyers are subject to professional rules of ethics and discipline that guarantee the requisite degree of independence. In the Contested Judgment, the CFI declined to address the issue of whether lawyers who are members of non-EU bars are eligible for LPP.[15] ACCE would urge the Court to take this opportunity to revisit this issue.

30. In addition to covering communications from in-house lawyers who are members of a bar, LPP should cover communications from in-house lawyers who belong to a comparable professional organisation recognized under the law. These lawyers are deterred by the rules of their professional body from misusing LPP and, therefore, communications with them should be protected by LPP. For example, in Belgium, in-house lawyers who are registered with the *Institut des Juristes d'entreprise*, an organisation created by statute, are entitled to LPP.[16] These lawyers are subject to the rules of ethics and discipline issued by the *Institut*.

31. In the Contested Decision (¶¶170-171), the CFI acknowledged that "specific recognition of the role of in-house lawyers and the protection of communications with

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[15] Contested Judgment, at ¶174.

[16] See Annex I-5 to ACCE's Intervention Statement submitted on 17 May 2004 to the CFI.

such lawyers under LPP is relatively more common today than when the judgment in *AM&S* was handed down," but found that "it is not possible, nevertheless, to identify tendencies which are uniform or have clear majority support in that regard in the laws of the Member States." ACCE submits that the recognition of LPP in the case of in-house counsel should not depend on whether a clear majority of Member States extend LPP to in-house lawyers. Rather, this Court should adopt a more principled approach grounded in the rationale articulated in *AM&S*: communications with an in-house lawyer should be protected by LPP if the lawyer is "independent," i.e. is subject to rules of professional ethics and discipline. Such an approach is flexible enough to accommodate the increasing tendency of Member States and other countries to recognize and regulate the practice of in-house lawyers without the need to revisit this decision with every future development.

## IV. Orders Sought

32. For all of the above reasons, ACCE respectfully requests the Court

- to set aside the Contested Judgment insofar as it rejects the claim of LPP for email correspondence with Akzo Nobel's in-house lawyer (part of the Set B documents);
- set aside the Commission's decision of 8 May 2003 regarding the Commission's refusal to return to the Appellants copies of this email correspondence or, alternatively, remit the matter back to the CFI; and
- order the Commission to bear the costs incurred by ACCE in connection with this proceeding and in the proceedings before the CFI insofar as they relate to the issue under appeal.

| Dr. Georg M. Berrisch<br>Rechtsanwalt | David W. Hull<br>Solicitor |
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