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

CASE C-550/07 P

REJOINDER TO THE REPLY FILED BY AKZO NOBEL CHEMICALS LTD AND AKCROS CHEMICALS LTD IN CONNECTION WITH ITS APPEAL AGAINST THE JUDGMENT OF THE COURT OF FIRST INSTANCE OF SEPTEMBER 17, 2007 IN CASE T-253/03, *AKZO NOBEL CHEMICALS LTD. AND AKCROS CHEMICALS LTD V. COMMISSION*

ON BEHALF OF:

The European Company Lawyers' Association, Intervener
of 5, Rue des Sols, B-1000, Brussels, Belgium

REPRESENTED BY:

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I. SUMMARY AND INTRODUCTION

1. This Rejoinder is submitted by The European Company Lawyers' Association ("ECLA"). It supports Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd's (together, the "Appellants") Reply of June 16, 2008 (the "Reply") in Case C-550/07P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission* (the "present proceedings"),[1] and respectfully requests the Court to confirm the Appellants' submissions as to admissibility.

2. The present Rejoinder is limited to the arguments raised in the Reply on the question of the Appellants' interest in bringing proceedings, according to the instructions of the President of the Court.

3. ECLA's interest in the present proceedings is unchanged. The individual members of its member organizations continue to exercise their profession as in-house lawyers without legal certainty as to the protection afforded to their clients, even where their advice benefits from legal professional privilege ("LPP") under national law. This uncertainty will continue until this Court addresses the legal question as to whether the test of the independence of legal advice will be determined only by reference to the formalistic test applied by the CFI,[2] or whether the independence of the lawyer in question will be assessed by the reference to the circumstances of the provision of his/her advice, in particular whether he/she is a full member of a national Bar or a regulated legal profession under the national law of a Member State that allows or imposes an obligation on the lawyer to provide legal advice in full independence.

4. As noted in the Reply, the Commission queries whether the Appellants have an interest in the proceedings at point 30 of their Response, considering that the two e-mails for which the Appellants claim protection under the principle of LPP do not fulfill the first of the two conditions set in the *AM&S* judgment, *i.e.*, that legal advice is sought and given in exercise of the rights of defence.[3] The Commission suggests that the Appellants would not obtain an advantage by the present proceedings, since

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1 [2008] OJ C37/19.

2 Joined cases T-125/03 and T-253/03 *Akzo and Akcros v. Commission* [2007] ECR not yet reported, the subject of the present proceedings.

3 Case 155/79 *AM&S Europe Ltd v. Commission* [1982] ECR 1575, para. 21.

the two e-mails and the attached draft letter would in any event not be covered by LPP.

5. ECLA supports the Appellants' rejection of the Commission's argument. It agrees with the Appellants' submission that the Court of First Instance's ("CFI", and together with the Court, the "Community Courts") finding that the documents did not benefit from LPP was based on the fact that they were no communications with or from an external lawyer (*i.e.*, the second *AM&S* condition), and was unrelated to the actual content of the two e-mails, which the Court did not analyze. As a result, ECLA considers that the Commission cannot claim a lack of interest on the Appellants' part due to the failure to fulfill the first *AM&S* condition, since such non-fulfillment was not established by the CFI. There is therefore no basis for the Commission's claim that the e-mails in question would, regardless of the outcome of the proceedings, not be covered by LPP, and no grounds for believing that the Appellants would not obtain an advantage from the present proceedings.

6. The Appellants have already developed this line of reasoning in the Reply, and ECLA will therefore not repeat the arguments made. This Rejoinder will instead put forward additional arguments as to the admissibility of the present proceedings.

7. The following sections discuss three areas in which the Community Courts have declared proceedings admissible despite the fact that the outcome of the proceedings would not result in any specific advantage for the applicant.

II. INFRINGEMENT PROCEEDINGS MAY BE CONTINUED AGAINST A MEMBER STATE EVEN WHERE THE STATE HAS CEASED THE IMPUGNED BEHAVIOUR

8. In *Commission v. Germany*, the Court held that the admissibility of the proceedings was not affected by the fact that Germany had subsequently implemented the directive at issue and that the Commission lacked a specific interest or motive to bring the enforcement proceedings. The Court reached the following conclusion:

> *"Since Germany has implemented the Directive in the meantime, it considers that the Commission no longer has any legal interest in bringing proceedings...That plea of inadmissibility must also be rejected...Given its role as guardian of the Treaty the Commission alone is [...] competent to*

> *decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil[l] its obligations...*"[4]

9. This decision was recently upheld in *Commission v. Italy*,[5] having previously been confirmed in *Commission v. Greece*,[6] *Commission v. Germany* (C-28/01),[7] and *Commission v. Germany* (C-476/98).[8]

10. Further, any failure by a Member State to fulfill its obligations may be subject to enforcement proceedings, regardless of the nature of such failure. In *Commission v. Italy*, for example, the fact that the failure to provide fisheries data to the Commission caused no substantive damage was irrelevant. As the Court said,

> *"Even if it should be established that there was no damage, it is important to remember that the failure to comply with an obligation imposed by a rule of Community law is sufficient to constitute the breach, and the fact that such a failure had no adverse effects is irrelevant."*[9]

11. Similarly, in *Commission v. Italy*, the Court stated that the Commission is entitled to bring enforcement proceedings regardless of the nature or gravity of the breach of Community law, even if the breach has no adverse effects.[10] This principle was also confirmed in *Commission v. Netherlands*,[11] *Commission v. Denmark*,[12] and *Commission v. France*.[13]

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4 Case C-431/92 *Commission v. Germany* [1995] ECR I-2189, paras. 19-22.

5 Case C-442/06 *Commission v. Italy* [2008] ECR not yet reported, paras. 29-31.

6 Case C-394/02 *Commission v. Greece* [2005] ECR I-4713, para. 16.

7 Case C-28/01 *Commission v. Germany* [2003] ECR I-3609, para. 30.

8 Case C-476/98 *Commission v. Germany* [2002] ECR I-9855, para. 38.

9 Case 209/88 *Commission v. Italy* [1990] ECR 4313, para.14.

10 Case C-209/89 *Commission v. Italy* [1991] ECR I-1575, para. 6.

11 Case 95/77 *Commission v. Netherlands* [1978] ECR 00863, paras. 13-14.

12 Case C-19/05 *Commission v. Denmark* [2007] ECR I-8597, para. 35.

13 Case C-333/99 *Commission v. France* [2001] ECR I-1025, para. 37.

III. COMPANIES HAVE A RIGHT IN COMPETITION LAW TO HAVE A DECISION ANNULLED EVEN IF THEY ARE NO LONGER CARRYING OUT THE CONDUCT IN QUESTION, AND HAVE NOT BEEN FINED

A. General

12. In *British Petroleum*, the Court held that the absence of monetary sanctions did not modify the right of the addressee of a decision to bring a claim for annulment of the decision.[14] This principle was recently confirmed by the CFI in the *Austrian Banks* case, where the CFI upheld the right of the applicant to challenge the decision to publish a fining decision after the fining decision had been published:

> *"the legal interest of the addressee of a decision in challenging that decision cannot be denied on the ground that it has already been implemented, since annulment per se of such a decision may have legal consequences, in particular by obliging the Commission to take the measures needed to comply with the Court's judgment and by preventing the Commission from repeating such a practice".*[15]

B. Merger control

13. In the area of merger control, the fact that the addressees of a Commission decision have complied with that decision, does not affect their interest in bringing proceedings. In *Kesko v. Commission*, for example, it was held that where the Commission declares a concentration incompatible with the common market and orders it to be reversed, the undertakings involved do not lose their interest in the annulment of the decision by complying with the order and thereby bringing the concentration irreversibly to an end.[16]

14. In addition, where the Commission issues a prohibition decision in respect of a concentration which has not been implemented, but which can no longer take place (even in the event that the judgment of the CFI is in the applicant's favour) as a result

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14 Case 77/77 *British Petroleum v. Commission* [1978] ECR 1513, para. 13.

15 Case T-198/03 *Bank Austria Creditanstalt AG v. Commission* [2006] ECR II-01429, para. 44.

16 Case T-22/97 *Kesko v. Commission* [1999] ECR II-3775, paras. 55-65.

of the disappearance of its contractual basis, the parties to the notified concentration retain an interest in the annulment of the Commission decision.[17]

15. The applicant may also have an interest in bringing an action against a measure which has been implemented in full, which can be explained by the fact that the defendant institution may be able to do justice to the applicant, such as by paying damages,[18] or making necessary amendments to the legal system for the future.[19]

16. Finally, it was established by the Court in *Langnese-Iglo* that the Commission and a party which had intervened in the proceedings before the CFI had an interest in bringing a cross-appeal against the judgment of the CFI declaring part of a Commission decision void, even though that part of the decision would no longer have been applicable, regardless of the CFI's decision. The relevant part of the decision in this case prohibited its addressee from concluding exclusive purchasing agreements up until December 31, 1997. Since the ECJ had not adjudicated on the cross-appeal by that date, the addressee of the decision, who had appealed, claimed that there was no need to adjudicate on the cross-appeal on the ground that it had no purpose. The ECJ held, however, that the fact that the end-date for the prohibition had expired did "*not make it any less desirable to settle definitively the dispute as to the legality and scope of [the relevant provision] of the contested decision with a view to determining its legal effects in the period up to the abovementioned date.*"[20]

IV. AN AGREEMENT MAY BE PROHIBITED EVEN THOUGH THE AGREEMENT HAS BEEN TERMINATED

17. In the area of cartel law, most infringements are likely to have been terminated by the time the Commission adopts its final decision. Nevertheless, Regulation 1/2003 provides that a legitimate interest in finding that the existence of past infringement applies in all cases in which a fine is imposed, and the fact that an agreement has

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17 Case T-102/96 *Gencor v. Commission* [1999] ECR II-753, paras. 41-45.

18 Case C-496/99 P *Commission v. CAS Succhi di Frutta* [2004] ECR I-3801.

19 Case 92/78 *Simmenthal* [1979] ECR 777, para. 32; Case T-256/97 *BEUC v. Commission* [1999] ECR II-169, para. 18.

20 Case C-279/95 P *Langnese Iglo v. Commission* [1998] ECR I-5609, para. 71.

come to an end does not preclude the Commission from taking proceedings in respect of its period of operation.[21]

18. In *GVL/Commission*, the Court held that in the circumstances the Commission was justified in considering that the illegal practice could resume if the obligation to terminate the practice was not expressly confirmed, and consequently had a legitimate interest in clarifying the legal position.[22]

19. The CFI restated the *GVL* principle in the *Vitamins* case, where it stated:

> *"Moreover, [...] the fact that the Commission no longer has the power to impose fines on persons committing an infringement on account of the expiry of the limitation period referred to in Article 1(1) of Regulation No 2988/74 does not in itself preclude the adoption of a decision finding that that past infringement has been committed."*[23]

20. The GVL principle was also applied in *Peroxidos Organicos v. Commission*[24] and *Austrian Banks*.[25]

V. CONCLUSION

21. ECLA supports the position expressed in the Reply. The Commission is wrong to claim that the e-mails would fail to benefit from LPP regardless of the outcome of the present proceedings due to failure to fulfill the first *AM&S* condition, since such non-fulfillment was not established by the CFI.

22. The case law of the Community Courts establishes a flexible approach to the question of interest in bringing proceedings generally, on the basis of precedents in three different areas of EC law which confirm the right to bring proceedings on matters of principle regardless of the possibility to obtain a specific advantage. For this reason, and whether or not the e-mails are covered by LPP, the Appellants' interest in bringing the present proceedings should be upheld.

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21 Article 7(1) Reg 1/2003, [2003] OJ L1/1: Vol II, App B.3.

22 Case 7/82 *GVL v. Commission* [1983] ECR 00483, paras. 24-28.

23 Joined Cases T-22 & 23/02 *Sumitomo v. Commission* [2005] ECR II-4065, para. 131.

24 Case T-120/04 *Peroxidos Organicos SA v. Commission* [2006] ECR II-04441.

25 *Austrian Banks*, *supra*, para. 56.

Brussels, 30 July 2008

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