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Dear Sirs,

Please find attached the application by the Chamber of Commerce of the United States of America for leave to intervene in Case C-550/07P, *Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission*, pursuant to Article 123 of the Rules of Procedure of the Court.

The original of the application to intervene and the required number of copies and the formal documents will be lodged to your Registry within 10 days from today, as provided by Article 37(6) of the Rules of Procedure of the Court.

Yours faithfully,



Margarita Peristeraki

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**IN THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES****APPLICATION****(Pursuant to Article 40 of the Statute of the Court)****FOR LEAVE TO INTERVENE****In Case C-550/07 P**

The **Chamber of Commerce of the United States of America**, with registered address in Washington DC, United States, represented by Mr. Kiran Desai, Solicitor at the Supreme Court of England and Wales and registered at the Brussels Bar, and Margarita Peristeraki, Attorney at law (Δικηγόρος), Member of the Athens Bar, both with an address for service at 52, Avenue des Arts, Brussels 1000, Belgium, in the premises of Mayer Brown International LLP, agreeing that service of documents is to be effected on them, according to Article 38(2) second paragraph of the Rules of Procedure of the Court of Justice, by telefax on +32 2 502 5421 or by electronic mail (kdesai@mayerbrown.com, and/or mperisteraki@mayerbrown.com),

hereby requests to be admitted as intervener pursuant to Article 40 of the Statute of the Court of Justice,

in **Case C-550/07 P, Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v the Commission**, concerning an appeal against the judgment of the Court of First Instance of the European Communities in Case T-253/03, in support of the conclusions presented by the appellants, Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd.

## I. Legal Framework

1. According to the second paragraph of Article 40 of the Statute of the European Court of Justice (the “**Court**”), any “*person establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institutions of the Communities or between Member States and institutions of the Communities*” may intervene in that case before the Court. Moreover, according to the fourth paragraph of Article 40, “*an application to intervene shall be limited to supporting the form of order sought by one of the parties*”. The notion of interest is determined by settled case law of the Court, which is referred to below, under section IV of this application.
2. Article 123 of the Rules of Procedure of the Court provides that an application to intervene before the Court in appeal proceedings shall be lodged before the expiry of a period of one month, running from the date of the notice given in the Official Journal of the European Union of the registration of the appeal. According to Article 81(2) of the Rules of Procedure this period should be extended for a single period of ten days on account of distance.

## II. Description of the case

3. With the present application the Chamber of Commerce of the United States of America (the “**Chamber**”) requests the Court to grant it leave to intervene in an appeal procedure in Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v the Commission* (the “**Appeal**”) brought by Akzo Chemicals Ltd (“**Akzo**”) and Akcros Chemicals Ltd (“**Akcros**”) against the judgment of the Court of First Instance of the European Communities of 17 September 2007, in case T-253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v the Commission* (the “**Contested Judgment**”).

4. With the Contested Judgment, the Court of First Instance dismissed an action introduced by Akzo and Akcros for the annulment of the Commission decision (C(2003) 1533 FINAL) of 8 May 2003, in which the Commission denied a claim of legal professional privilege (“**LPP**”) put forward by Akzo and Akcros in relation to documents seized by the Commission during a dawn raid. In particular, the dispute about the LPP concerns communications exchanged between the General Manager of Akcros and the in-house lawyer of Akzo, a member of the Netherlands Bar Association. Akzo and Akcros alerted the Commission that it had seized documents that Akzo and Akcros considered privileged attorney-client communications, but the Commission declined to treat the communications as privileged.
5. In their Appeal, Akzo and Akcros (the “**Appellants**”) submit that the Court of First Instance violated Community law and that “*by strictly following partial and literal interpretation*” of a few paragraphs of the earlier judgment of the Court in the *AM&S Europe v Commission* (Case 155/79, (1982) p. 1575), it “(1) gave incorrect interpretation of the principle of LPP as it is explained in *AM&S*, thereby violating the principle of equality; (2) in the alternative, by refusing to reinterpret the principle of LPP in view of the significant developments in the legal landscape, violated the general principles of protection of the rights of defence and of legal certainty; and (3) in the further alternative, violated Article 5 EC (principle of attribution of competence) and the principle of national procedural autonomy”<sup>1</sup>.
6. On these grounds, the Appellants request the Court to set aside the Contested Judgment insofar as it rejected the claims on LPP for the communications with Akzo Nobel's in-house lawyer; to annul the Commission decision of 8 May 2003

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<sup>1</sup> Notice given in the Official Journal of the European Union, in relation to Case C-550/07 P, OJ C 37/19, of 9.2.2008.

insofar as it refused to grant LPP in relation to the documents seized during the investigations in the premises of the Appellants and more precisely, to the e-mail correspondence with Akzo Nobel's in-house lawyer; and to order the Commission to pay the costs of this Appeal and of the proceedings before the Court of First Instance in as far as they concern the plea raised in the present Appeal.<sup>2</sup>

7. The Notice of the Appeal was published in the Official Journal of the European Union on 9 February 2008. Therefore, the present request to intervene is submitted in conformity with the deadline provided by Article 123 (read in conjunction with Article 81(2) of the Rules of Procedure of the Court).
8. The Chamber, if it is admitted as intervener in the Appeal, will support the form of order sought by the Appellants and will respectfully request the Court to set aside the Contested Judgment insofar as it does not grant LPP to the communications between Akcros' General Manager and Akzo's in-house lawyer who was also a member of the Netherlands Bar Association.

### **III. The Chamber**

9. The Chamber is the world's largest business federation representing an underlying membership of more than 3 million businesses of all sizes, sectors, and regions. It includes hundreds of associations, thousands of local chambers, and more than 100 American Chambers of Commerce in 91 countries.<sup>3</sup>

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<sup>2</sup> *Ibid.*

<sup>3</sup> See, <http://www.uschamber.com/about/default.htm>.

10. The Chamber's core mission is to defend business and free enterprise before the United States Congress, the White House, regulatory agencies, the courts, the court of public opinion, and governments around the world.<sup>4</sup>
11. The Chamber's legal programs include the National Chamber Litigation Center (“NCLC”), the public-policy law firm of the Chamber, which represents businesses before the courts on issues of national concern to the business community and plays a major role in shaping public policy on important legal questions of national concern to American business while achieving long-range improvements in the legal system.<sup>5</sup>
12. Since its founding in 1977, NCLC has filed more than one thousand *amicus curiae* briefs (intervention statements) in state and federal courts.<sup>6</sup> The Chamber states that its briefs “*have shaped the law by advocating the business community's need for clarity and predictability in areas as diverse as antitrust, class actions, punitive damages, and securities litigation.*”<sup>7</sup>
13. The Chamber has been an active participant in the development and protection of attorney-client privilege in the US because ensuring the predictability and effectiveness of that privilege is a matter of critical importance for the Chamber’s members. It has filed a number of *amicus curiae* briefs in US courts on the topic of attorney-client privilege.<sup>8</sup> Most recently, the Chamber represented the interests

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<sup>4</sup> See, US Chamber of Commerce website, at “About Us Representing your ideas—and interests—in Washington for nearly a century”, at <http://www.uschamber.com/about/default.htm>.

<sup>5</sup> See, US Chamber of Commerce website, Programs, at <http://www.uschamber.com/programs/default.htm#legal>.

<sup>6</sup> See, US Chamber of Commerce website, at NCLC Case List, <http://www.uschamber.com/nclc/caselist/default>.

<sup>7</sup> National Chamber Litigation Center, 30<sup>th</sup> Anniversary Report 1977-2007, provided as **Annex 1** page 8.

<sup>8</sup> E.g. Brief of *Amicus Curiae* in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), which examined whether attorney-client privilege extends to conversations between corporate counsel

of its members in lobbying the US House of Representatives to pass the Attorney-Client Privilege Protection Act of 2007, which would prevent US prosecutors from seeking waiver of the privilege as a condition for leniency and which the Chamber has praised as ensuring protection of basic due process.<sup>9</sup>

14. According to the Chamber, the attorney-client privilege lies at the heart of a defendant's right to effective counsel and is a cornerstone of basic due process. If businesses cannot trust the confidentiality of communications with their legal advisors, they will be much less likely to seek advice regarding compliance with legal obligations and to bring to their legal advisors' attention concerns about possible wrongdoing within the business.<sup>10</sup> That, in turn, will significantly reduce both compliance with the law and the uncovering of wrongdoing—thereby harming the public interest and, in the case of listed companies, the investors who are the companies' owners. In addition, if the EU does not protect attorney-client communications involving in-house lawyers, then such communications may lose their confidential status in the US and Chamber members headquartered in the EU may face a serious competitive disadvantage as compared to corporations doing business only in the US or headquartered there.

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and company management; Brief for *Amici Curiae* in *In re Qwest Communications Int'l, Inc.*, 450 F.3d 1179 (10th Cir. 2006), which examined attempts by government investigators to require waiver of the attorney-client privilege in exchange for leniency; Brief for *Amici Curiae* in *United States v. Stein*, No. 07-3042-cr (2d Cir. filed Jan. 22, 2008), which concerns a similar matter; *Amici Curiae* Brief, No. 32 WAP 2007 (Supreme Court of Pennsylvania filed Dec. 12, 2007), which concerns the attorney-client privilege as to legal communications exchanged between a company's in-house lawyer and its senior executives.

<sup>9</sup> Attorney-Client Privilege Protection Act of 2007, H.R. 3013, see press release of 13 November 2007, attached as **Annex 2** also available at <http://www.uschamber.com/press/releases/2007/november/07-193.htm>.

<sup>10</sup> See statement by Thomas Donohue, President and CEO of the US Chamber of Commerce, in press release of 13 November 2007, cited above and attached as Annex 2.

#### IV. Circumstances establishing the right to intervene

##### a. General principles of “interest to intervene”

15. As mentioned above, Article 40 of the Statute of the Court provides for the right of an individual to intervene in proceedings before the Court, subject to the condition that he/she is able to establish an interest in the result of the case. On the basis of the Court's jurisprudence “interest” within the meaning of Article 40 should be established when the following criteria are met:
16. First of all, it has been consistently held by the Court that the concept of interest in the result of the case, within the meaning of Article 40, must be defined in the light of the precise subject-matter of the dispute and be understood as meaning a direct, existing interest in the ruling on the forms of order sought and not as an interest in relation to the pleas in law and arguments put forward. The expression ‘result’ is to be understood as meaning the operative part of the final judgment which the parties ask the Court to deliver (orders of the President of the Court: of 21 February 2008, in Case C-385/07 P, *Der Grüne Punkt, Duales System Deutschland GmbH v Commission*, paragraph 5; of 6 April 2006 in Case C-130/06 P(I), *An Post and Deutsche Post AG v Commission*, paragraph 8; of 6 March 2003, in Case C186/02 P, *Ramondín and Ramondín Cápsulas v Commission*, paragraph 14; of 17 June 1997, in joined cases C-151/97 P(I) and C-157 P(I), *National Power and PowerGen v British Coal Corporation and Commission*, paragraphs 51, 53 and 57).
17. It is also settled case-law that it is necessary to distinguish between prospective interveners establishing a direct interest in the ruling on the specific act whose annulment is sought and those who can establish only an indirect interest in the result of the case by reason of similarities between their situation and that of one of the parties (orders of the President of the Court: in Case C-130/06 P(I) *An Post*



*and Deutsche Post v Commission*, cited above, paragraph 9, and of 15 November 1993 in Case C-76/93 P, *Scaramuzza v Commission*, paragraph 11).

18. Second, according to settled case-law, representative associations whose object is to protect their members in cases raising questions of principle liable to affect those members are also allowed to intervene (orders of the President of the Court of Justice of 17 June 1997 in Joined Cases C-151/97 P(I) and C-157/97 P(I) *National Power and PowerGen*, paragraph 66, and of 28, of September 1998 in Case C-151/98 P *Pharos v Commission*, paragraph 6; see also recent order of the President of the Court of First Instance of 26 February 2007, in Case T-253/03, *Akzo and Akros v Commission*, para 15). More specifically, an association may be granted leave to intervene in a case if (i) it represents an appreciable number of operators active in the sector concerned, (ii) its objects include that of protecting its members' interests, (iii) the case may raise questions of principle affecting the functioning of the sector concerned and (iv) the interests of the members may therefore be affected to an appreciable extent by the judgment to be given (See order of the President of the Court of First Instance, in Case T-253/03, *Akzo and Akros v Commission*, para 15, cited above).

*b. The Chamber's interest to intervene in the Appeal*

19. First, it is clear that the interest of the Chamber in the present case is direct and existing and stems from the annulment of the very form of order sought by the Appellants. If the Court decides to uphold the Contested Judgment, insofar as the erroneous interpretation of the principle of LPP for communications with Akzo's in-house lawyer is concerned, this will have an adverse effect on the way the Chamber's members run their businesses as well as on their financial and other interests.

20. Because corporations are expected to comply with an increasingly intricate array of legal obligations, corporations' officers and employees increasingly rely on their in-house lawyers for advice in order to ensure that the corporations' conduct complies with all applicable legal requirements. Corporations are complex entities that are subject to rapidly changing laws and regulations in every jurisdiction in which they conduct business. In-house lawyers have superior knowledge of their clients' operations and obligations, which allows them to identify and deal effectively and quickly with any issues that arise. For many matters related to the companies' activities, outside lawyers are simply not sufficiently knowledgeable to respond with equal effectiveness to the needs of a modern business. In order for in-house lawyers to advise their clients effectively and to ensure their compliance with legal requirements, in-house lawyers need full access to the facts surrounding their clients' operations. This access can be guaranteed only by safeguarding communications between in-house lawyers and their clients; otherwise, business people will be reluctant to seek their lawyers' advice for fear that their communications will be turned against the company. The in-house lawyers' integrity and ability to advise their clients would be very significantly restricted. The adverse consequences would not be limited to the companies. Rather, the lack of candid communication between business people and in-house lawyers could significantly reduce both compliance with the law and the uncovering of wrongdoing—thereby harming the public interest and, in the case of listed companies, the investors who are the companies' owners. Indeed, this argument, put forward by the Chamber to the US Congress,<sup>11</sup> is the key reason for the passage of the legislation in the US, referred to in paragraph 13.

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<sup>11</sup> See statement by Coalition to Preserve the Attorney-Client Privilege, to the US House of Representatives, 13 November 2007, provided as **Annex 3**; press release of 13 November 2007, cited above and provided as Annex 2.

21. Additionally, for as long as there is no adequate protection for attorney-client communications at EU level,<sup>12</sup> corporations that conduct business in both the US and the EU will be disadvantaged in the US. Under US law, communications that are otherwise privileged lose their protection if the parties lack the expectation of confidentiality.<sup>13</sup> Thus, if the EU does not protect attorney-client communications between in-house counsel and their clients, then the equivalent privilege of multinational corporations in the US will also be undermined. This is particularly true in the case of lawsuits in US courts filed by private parties. Private parties can gain access to communications with the corporations' EU-based in-house lawyers and obtain information relevant to the subject of the US litigation, whilst they are not able to obtain such communications when they take place in the US. This inevitably makes EU-based corporations much more vulnerable to large damages claims in US courts, including class actions seeking millions or even billions of US dollars.
22. Furthermore, the Chamber's direct and existing interest in the result of the Appeal is also founded on the fact that LPP exists primarily for the benefit of businesses and of their rights of defence and not for protecting lawyers *per se*.
23. Second, in relation to the criteria set by the jurisprudence of the Court to determine interest of associations to intervene, the following can be noted:
  - (i) *An association needs to represent an appreciable number of operators*

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<sup>12</sup> It should be noted that the position vis-à-vis LPP is not coherent in the EU; There are several Member States that would grant LPP to in-house lawyers admitted in an EU Bar. More precisely these Member States are England, Denmark, Germany, Ireland, the Netherlands, Portugal, Scotland, Spain and Belgium.

<sup>13</sup> See, e.g., *United States v. Tellier*, 255 F.2d 441 (2d Cir. 1958) (“It is of the essence of the attorney-client privilege that it is limited to those communications which are intended to be confidential”).

24. As mentioned above, the Chamber is the largest business federation in the world representing an underlying membership of more than 3 million businesses of all sizes, sectors, and regions, including significant business activities within the EU. In its members it includes also associations, local chambers, and more than 100 American Chambers of Commerce in 91 countries.

(ii) *The association's objects include protection of members' interests*

25. The case-law attaches great importance to the fact that the object of an association is clearly stated in its statutes (See, order of the Court of First Instance in Case T-253/03 *Akzo Nobel Chemicals and Akros Chemicals v Commission*, cited above, paragraph 20). The Court also appears to distinguish between ‘*promotion*’ and ‘*representation and protection*’ by an association of its members' interests. Accordingly an association seeking to promote the general and collective interests of a profession would not have sufficient interest to be granted leave to intervene (order of the President of the Third Chamber of 25 June 1999 in Case T-13/99 *Pfizer Animal Health v Council*, paragraph 28).

26. It emerges clearly from the Bylaws of the Chamber<sup>14</sup> that its mission is to defend its members' interests. More precisely, Article 1 of the Bylaws provides that amongst the Chambers' principal purposes are:

*“[...] to provide for the consideration of national and international subjects having significant implications for United States enterprise and, through concentration of informed judgment and opinion, to develop and seek implementation of policy recommendations to guide the process of decision-making on such subjects; and, through all proper means to foster*

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<sup>14</sup> Bylaws of the Chamber of Commerce of the United States of America, reprinted with amendments as of 1 June 2001, provided as **Annex 4**.

*enlightened understanding and effective application of the economic and political principles, essential to the continued growth of freedom and opportunity within the American enterprise system”.*

27. This is also proven by the past and the current activities of the Chamber in the US and around the world, representing and defending the interests of its member-companies in various fields of law. Many smaller and medium-sized businesses rely upon the Chamber to express their collective view on matters of importance.

*(iii) Are there questions of principle emerging from the case that can affect the business sector?*

28. The fact that there are questions of principle emerging from the form of order sought by the Appellants is incontestable.<sup>15</sup> The Chamber considers that the Appeal provides the opportunity to the ECJ to revisit its position adopted in the early 1980s in relation to the AM&S<sup>16</sup> judgment and put the principle of LPP in context of the developments since then and current challenges that businesses are facing.
29. Insofar as the question of impact on the business sectors where the members of the Chamber are active is concerned, the Chamber affirms that the Contested Judgment would certainly affect a fundamental underlying principle of professional conduct and would prejudice the interests of all businesses having at least one in-house lawyer.
30. The interpretation of LPP provided by the Commission and upheld in the Contested Judgment raises serious issues of principle for all businesses, especially

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<sup>15</sup> See also position of the President of the Court of First Instance who heard the application for interim measures, in his Order of 30 October 2003, in joined Cases T125/03 R and T-253/03 R, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v the Commission*, paras 121-130.

<sup>16</sup> Judgment of the Court of 18 May 1982, in Case 155/79, in *AM&S Europe Limited v Commission*.

for those operating on both sides of the Atlantic and that, as a consequence, are subject to different standards of LPP for the same activities. At the same time, as mentioned above, this interpretation might jeopardize protection in the US unless the restrictive standard of the EU is modified to ensure confidentiality.

*(iv) The interests of the associations' members affected to an appreciable extent by the contested judgment*

31. The Chamber submits that if the Contested Judgment is upheld insofar as the principle of the LPP is concerned, and communications between a company and its in-house lawyer(s) are not protected by LPP at EU-level, this will result in depriving businesses of the ability to communicate freely and timely with their principal legal advisors, the in-house lawyers. Businesses' ability to consult and obtain confidential and privileged advice from their in-house lawyers on issues that may or may not be contentious will be hindered out of fear of not being covered by LPP. Considering, as mentioned above, that due to their intimate understanding of the company culture and structures, in-house lawyers are far better placed than outside lawyers to provide advice, this would have a significant adverse impact on the effectiveness and on the quality of advice that can be obtained by businesses. Under the current situation, because in-house lawyers are less able to protect the confidences of their clients, businesses will be driven to abandon consultations with their in-house legal departments or to significantly reduce their activities, as they will be compelled to outsource their legal work in order to obtain advice benefiting from LPP. Such a result would have a substantial effect on the structure of these businesses and would appreciably increase their legal costs. And even with the increased cost, corporations will be less able to comply with legal standards for the reasons discussed above, threatening increased costs due to enforcement proceedings and financial penalties.

32. Finally, the Chamber also submits that large corporations with activities in both the US and the EU jurisdictions will be appreciably affected due to potentially significant additional costs that would need to be incurred to ensure that technical and other IT infrastructure is separated to provide protection from discovery of US records capable of being obtained from EU-based subsidiaries or affiliates.
33. In any event, the Chamber asserts that its members are entitled to obtain confidential legal advice by their own company lawyers regardless of whether they are located in the US or the EU in order to facilitate compliance and avoid irregularities in their business conduct.
34. The Chamber considers that the form of order sought by the Appellants in the present case, if granted, would benefit greatly its members as well as the business community on an international level.
35. The Chamber requests to intervene and to explain in greater detail its concerns as to the direct consequences that would arise were the Court to dismiss the Appeal and deny the form of order sought by the Appellants.
36. At the same time, the Chamber will endeavor not to repeat or duplicate any of the arguments or evidence produced by the other parties to these proceedings.

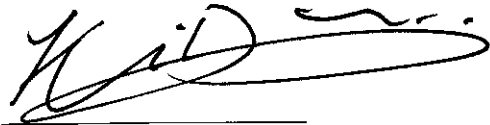
#### **V. Form of order sought by the Chamber**

37. For the reasons set out above, the Chamber respectfully requests the Court to grant it leave to intervene in Case 550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v the Commission* in support of the form of order sought by the Appellants; and
38. Accordingly, if admitted in the proceedings, the Chamber in its intervention would request the Court to set aside the Contested Judgment insofar as it denied

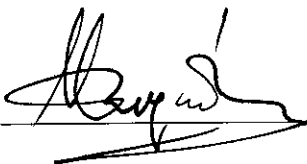
LPP for communications between Akcros and the in-house attorney of Akzo, member of the Netherlands Bar and to order the Commission to pay the costs associated with this intervention.

Brussels, 19 March 2008

Kiran Desai

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Margarita Peristeraki

A handwritten signature in black ink, appearing to read 'Margarita Peristeraki', written over a horizontal line.



**Table of Annexes**

- Annex 1:** National Chamber Litigation Center, 30<sup>th</sup> Anniversary Report 1977-2007 (cited on page 5 of the intervention request).
- Annex 2:** Press Release of the Chamber of Commerce of the United States of America, of 13 November 2007 (cited on page 6 of the intervention request).
- Annex 3:** Statement of the Coalition to Preserve Attorney-Client Privilege of 13 November 2007 (cited on page 9 of the intervention request).
- Annex 4:** Bylaws of the Chamber of Commerce of the United States of America of 1 June 2001 (cited on page 11 of the intervention request).

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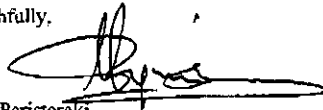
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