CLA/BIICL Akzo Nobel Seminar

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Some thoughts on implications of the CJEU judgment in Case 550/07 P and possible future developments

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(Views expressed are personal)

1. Last week's judgment perpetuates a thoroughly unsatisfactory situation under EU law, which does not respect rights of defence or the proper role of the legal adviser. It serves neither the interests of compliance with competition law (a matter of no small importance to consumers and the economy generally) nor those of businesses seeking to establish a compliance culture across their international organisations.

2. It was not unexpected, however and reflects a deep-seated view in many EU countries of the elevated status of the independent lawyer in private practice, somewhat detached from his clients' commercial concerns. That view does not embrace the view of the lawyer as trusted legal adviser in business matters, fully understanding her client's commercial activities and priorities, which is accepted in those countries whose lawyers have made the greatest impact in international business advice, notably the common law jurisdictions and the Netherlands. It is precisely these jurisdictions (with a few others) which have gradually come to the point of according an employed lawyer substantially the same professional status as a private practitioner and specifically accord LPP to communications between the client and a lawyer in their employment.

3. The Court's view does not reflect the vision which I and, I believe, most other solicitors, have of a single profession, embracing private practitioners and those working in-house in the public and private sectors, all governed by a single code of practice, set of ethical rules and disciplinary structure. It certainly does not reflect the view of the Law Society, which twice, unsuccessfully, sought leave to intervene in the case (sadly too late in the day) and fully supported the position taken by Akzo, CCBE and the ECLA. The Law Society's press release following the judgment is in your papers.

4. The difficulties presented by the Court's adherence to the AM&S principles have grown over the intervening 28 years, not just by the globalisation of business, but also by the steps that have been taken by antitrust authorities around the world, to work together in a co-ordinated fashion to secure more effective international antitrust enforcement. These measures of co-ordination are perfectly proper in themselves, indeed in a general sense to be welcomed, but when that co-operation extends to sharing documents and information which is unprivileged in the originating jurisdiction, but privileged in the receiving jurisdiction, the possibility of injustice and impaired rights of defence start to arise.

5. How can a company's in-house legal department seek to foster a global compliance culture across their organisations, when any communication with them by their business client on a matter to which competition law may be relevant, or any expression of their own view of the relevant law, may be unprivileged if it comes into the hands of the EC, or any national authority whose law follows that of the EU? As the applicants and interveners argued before the Court (rightly in my view) these

problems are exacerbated by the requirement for self-assessment by companies of their agreements and conduct, following modernisation under Reg 1/2003.

6. These developments come on top of the complication, arising from AM&S and surviving the Akzo Nobel judgment, that LPP only arises in respect of communications with a lawyer qualified to practise in an EU Member State. With antitrust expertise having become more international with greater legal and policy convergence between NCAs around the world, this presents a real pitfall for an international company seeking competition law advice. These inconsistencies between EU and US law on LPP raise significant difficulties in international cartel investigations, notably where leniency applications are concerned.

7. The OFT remains obliged to respect LPP under the relevant jurisdiction within the UK, when exercising its powers under the Competition Act, even where it is undertaking a dawn raid under Article 22(2) of Reg 1/2003 at the request of the European Commission EC officials, however, when making inspections within the UK, are entitled to seize documents which are privileged under UK law, but not EU law as are OFT officials who assist them. Furthermore, the OFT has indicated that if it receives such a document from the Commission, or an NCA, pursuant to Article 12 of Reg 1/2003, it would be entitled to use it in proceedings under A 101/102 or CA, even though the defendant has not expressly or impliedly waived privilege in respect of it.

8. The consequences of the Akzo Nobel judgment are not confined to EU law. My colleagues at A&O have reviewed its effects in a number of EU jurisdictions and observed, for example, that immediately following the judgment the College of Competition Prosecutors in Belgium announced that it would no longer treat communications with in-house lawyers as privileged in proceedings under the Belgian Competition Act (notwithstanding a Belgian statute expressly protecting the confidentiality of such communications). In the Netherlands the inconsistency between proceedings under national and EU competition law is as stark as it is in the UK.

9. The Court's judgment is in terms confined to competition law, specifically inspections under Reg 1/2003 and is of course final as a matter of EU law. That is the immediate context in which to analyse it, but the ratio of the judgment is not based on any particularity of the drafting of Reg 1/2003 or the Commission's powers thereunder. On the contrary it is based on the principles enunciated in AM&S that privilege arises as a matter of EU law for communications which are made for the purposes of the exercise of the client's rights of defence and are made with independent lawyers, supported by the principle of the uniform application of EU law. The Court simply concluded that there was a fundamental difference between the position of a lawyer in private practice (however economically dependant he might in practice be on the client) and an employed lawyer (however strong his professional code and ethics might be). Despite his professional ethical obligations the in-house lawyer does not enjoy the same degree of independence from his employer as a lawyer working in an external firm and is consequently less able to deal effectively with any conflicts between his professional obligations and the aims of his client. His position as an employee does not allow him to ignore the commercial strategies pursued by his employer and thereby affects his ability to exercise professional independence (see paras 45 – 49 of the judgment). The suggestion that companies are likely to obtain useful advice from lawyers who ignore their commercial strategies is bizarre.

10. Should the same issue arise in any other EU law context, the Court would surely make the same distinction, as a matter of principle. This question could well, for example, be relevant in connection with new areas in which EU executive bodies are given direct powers of investigation The most immediate cases in point concern EU proposals on financial supervision and credit rating agency regulation, where the Law Society and CCBE are making common cause to secure recognition of national rules on LPP.

11. Indeed, the test of independence potentially has even wider implications in the soon-to-be-liberalised legal market in England and Wales. Will, for example, advice given by a legal practice regulated as

an alternative business structure under the LSA 2007, to a company owning or investing in the practice, be protected by LPP? Would the Court's test of independence be satisfied in such a case. What ammunition will the decision give to those who might oppose the extension of rights of establishment under the EU Directive, shortly to be reviewed, to barristers and solicitors who have opted for the ABS model? Without such rights, the choice of ABS may not be open to international law firms.

12. Having said that the Court's judgment is final, as a matter of EU law, which has supremacy over national law, what other political or legal route might be available to nullify its effects? Under EU law, a change in Regulation 1/2003 would be necessary to grant LPP to in-house communications and I do not think the judgment makes this constitutionally impossible. However, it is hard to see more than half-a-dozen Member States, at the most, supporting such a change, let alone the Commission or Parliament, so absent the most serendipitous of circumstances, where the change could be traded for something desired by the other Member States, that seems to be a dead duck.

13. On the legal side the only remaining avenue seems to be to explore the possibility of the issue being considered by the ECtHR in Strasbourg as a possible breach of Article ECHR. The ECHR recognises rights of defence and Article 6(3)(c) confers a right to communicate with a lawyer out of the hearing of a third party. I claim no great expertise on human rights law, but the substantive issue of rights of defence was raised by the Law Society and others intervening in the case, but found to be inadmissible on procedural grounds. Thus the Court made no finding on it. Following the Lisbon treaty, the EU is able to accede to the Council of Europe and ratify, in its own right, the ECHR, but it has not yet done so. If and when it has done so, which is thought likely to take at least two years, it will be far too late for an application to the ECtHR be made in the Akzo Nobel case. Another party would have to be found who would be prepared to take a case on similar facts all the way through the Courts of a Member State respecting in-house LPP to Strasbourg (making few friends with the European Commission in the process).

14. However. It is not beyond the bounds of possibility that a basis exists for bringing the present case to Strasbourg, with the defendant as the Member State in whose territory the putative infringement of Article 8 occurred. This would be the UK, where the dawn raid on Akros (a UK company, though this may not be material) and, I think, Akzo, occurred. Such a course would need to be embarked upon by the appellants (and I have no information on what their position might be). The application would face the procedural hurdle of the need to exhaust UK remedies, in circumstances where no proceedings are yet on foot in the UK.

15. It would also need to overcome the substantive hurdle of the deference shown by the ECHR to EU law, as in the Bosphorus Hava Yollari v Ireland case (App No. 45036/98) where the ECtHR accepted that the mere fact that Ireland was obliged to give effect to an EU Regulation did not prevent the ECtHR from examining the substance of the case, since membership of the EU did not absolve Ireland of its responsibilities under the ECHR. In this case, however, the Court avoided ruling on whether human rights law overrode EU law. Since the EU itself gave substantive guarantees for the protection of human rights, the ECtHR would presume compliance, except where the circumstances of the case showed that the protection offered by the EU was "manifestly deficient" (see paragraph 156 of the judgment).

16. The majority of the Court are, of course, from civil law jurisdictions in which in-house LPP is not recognised (though possibly because in-house lawyers cannot be full members of the national bar or law society) and this is another factor to be taken into account in assessing the attractions of this route. Whatever one thinks of the prospects of success, however, it is not clear to me that there is any better legal hole for those who support in-house LPP to run to. The Law Society will no doubt wish to continue to work with all interested parties to explore what constructive steps can now be taken to protect in house LPP.