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SPEED READ: KEY POINTS

1. The Court of Justice of the European Union's Akzo judgment on in-house legal professional privilege was a missed opportunity but it did not change the law
2. The number of mergers and acquisitions notified to the Irish Competition Authority has risen dramatically – up 50% on 2009 and higher than 2008
3. Businesses need to be vigilant about State aid being given to competitors by other Member States
4. The IMF gives an opportunity for businesses to seek change in the competitive landscape
5. Ireland's Corporation Tax rate is safe from legal challenge
6. The Competition Authority has given useful guidance on participation in trade associations
7. The High Court has become the "Second Competition Authority"
8. A great deal of change is expected in the competition arena with the merger of the Competition Authority and the National Consumer Agency but also the "IMF stimulus"
9. Compliance is critical – particularly with emails

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1. The Court of Justice's Akzo judgment on legal professional privilege was a missed opportunity but it did not change the law – it was *Paradise Lost* but *Much Ado about Nothing*

On 14 September 2010, the Court of Justice of the European Union held in *Akzo v Commission* that legal advice given by in-house counsel is not privileged for the purposes of EU competition investigations conducted by the European Commission. It was a missed opportunity because the court could have recognised the important role of in-house lawyers. However, the court did not oblige. Instead, many commentators and lawyers hailed the judgment as being a dramatic development which undermined the position of advice given by in-house lawyers. In fact, the court was essentially reaffirming its earlier 1982 judgment in *AM&S v Commission*. So, the effect of *Akzo* has been exaggerated as it reaffirmed the earlier position – and the work of in-house counsel has not diminished in the 28 years since *AM&S* so the same precautions which in-house counsel have taken to date should continue to be taken.

2. The number of mergers and acquisitions notified to the Irish Competition Authority has risen dramatically – up 50% on 2009 and even higher than 2008

By 29 November, there were 41 mergers and acquisitions notified to the Competition Authority. There had been only 27 in 2009 so the number is up 50%. The 2010 tally is already more than 2008 when there were 38 notifications. The deals so far this year have come from both trade deals (26) and private equity (15). The most significant sectors in those 41 deals have been financial services (8), manufacturing (8), media (8), food and drink (5) and IT (4).

3. Businesses need to be vigilant about State aid being given to competitors by other Member States

Many States, but not Ireland, are providing so-called “stimulus packages” for various economic sectors and are also giving targeted aid for particular businesses. Businesses, and their legal advisors, need to keep an eagle-eye out for such developments because they may have to complain to the European Commission to prevent competitors obtaining an unfair competitive advantage.

4. The IMF gives an opportunity for businesses to seek change in the competitive landscape

The IMF is keen on opening up markets in countries which it supports financially. In the case of Greece, the IMF and the EU sought to have various markets opened and Greece has to show progress. The same phenomenon has now been included in the Irish/IMF/EU package. If businesses want markets opened then this may be a good time to urge reform.

5. Ireland's Corporation Tax rate is safe from legal challenge

Direct taxation is within the sovereign domain of Member States rather than being under the control of the EU. This was confirmed in the solemn declarations which Ireland obtained before the second Lisbon referendum in Ireland. For it to be established that Ireland could no longer determine its direct tax rates, it would mean that all Member States would have their direct tax regimes subject to such interference.

6. The Competition Authority has given useful guidance on participation in trade associations

The Competition Authority has published a "notice" on trade association activities. It would be very useful for in-house counsel to read it because it would assist them on advising their colleagues on how to comply with competition law while participating in the work of trade associations. Copies are available at www.tca.ie or from A&L's competition unit.

7. The High Court has become the "Second Competition Authority"

The High Court has shown itself willing to hear claims by plaintiffs that there is a lack of competition in particular markets and has proven to be a second competition authority. For example, in regard to waste collection, it has held that local authorities are subject to competition law in certain circumstances. Businesses faced with obstacles to competition may be able to invoke the High Court, as well as the Competition Authority, in removing those obstacles.

8. A great deal of change is expected in the competition arena with the merger of the Competition Authority and the National Consumer Agency but also the "IMF stimulus"

The Government has announced the merger of the Competition Authority and the National Consumer Agency. This is the situation in many countries. However, the merged entity must focus on competition in *all* sectors - business needs that - and not be overly concerned with consumer matters (as important as those matters are) because there is the risk that other breaches would go unremedied. Equally, the IMF should bring a new sense of urgency to the competition agenda in Ireland which would be very welcome.

9. Compliance is critical – particularly with emails

In *Hasbro Toy Price-Fixing* case, the following email was discovered. It was sent by the company's Sales Director:

"Ian ... This is a great initiative that you and Neil have instigated!!!!!!! However, a word to the wise, never ever put anything in writing, its highly illegal and it could bite you right in the arse!!!! suggest you phone Lesley and tell her to trash? Talk to Dave. Mike"

An idea in terms of helping compliance is to send that email to your colleagues and just suggest that “we all need to think before emailing” to avoid breaching competition law! Not that your colleagues would be doing anything wrong but everyone needs to think carefully about their communications and actions!