

A national and international perspective on representing businesses and trade associations in competition law cases

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1. Introduction

Representing clients in competition law matters is, with apologies for mixing metaphors, somewhat like trying to simultaneously paint a moving train while playing five-dimensional chess.

In terms of the fast moving element, there are several aspects: for example, instructions to competition lawyers are often given on an urgent basis (e.g., to advise a client who has just been subject to a dawn raid/unannounced inspection and none of the parties (including the lawyer being instructed) have the full facts¹) while the rules are changing rapidly both substantively and procedurally with new issues and interpretations evolving all the time.²

¹ E.g., if a lawyer is telephoned to attend to Company A which is being inspected by a competition agency, the lawyer is not likely to know whether Company B (which the lawyer or someone in his or her firm has represented in the past) is involved in the alleged anti-competitive activity. Moreover, the lawyer may not know if Company C (which the lawyer or someone in his or her firm has represented in the past) could be affected because Company C is a customer of Company A and may have been, for example, overcharged by a cartel which that lawyer is potentially going to learn about during the course of the dawn raid or later. It could even be the case that Company D has used another law firm to make the immunity/leniency application which caused the investigation to be commenced in respect of Company A but the lawyer (or someone in his or her firm) has also represented Company D in other matters or even competition law matters in the past and could now unwittingly be heading to assist Company A from an investigation sparked by Company D with both companies being clients of the lawyer and his or her firm.

² It is not surprising that new issues and interpretations are evolving so rapidly in the area of competition law given the relative "youth" of competition law as compared to most areas of law. EU competition law is only 60 or so years old and has grown rapidly over the last 30 years or so. It is not surprising therefore that "novelty" is

In terms of the multi-dimensional nature of competition law practice, there are at least five key dimensions which competition lawyers have to bear in mind in competition law cases: the substantive; the procedural; the economic; the tactical; and the personal/ethical. This short paper considers the last mentioned of those five dimensions, namely, the personal/ethical dimension.

In particular, the paper highlights the various challenges involved in this area (including the somewhat imprecise³ area of "conflict of interests"). The paper also examines whether it would be possible and/or desirable to have joint and/or separate representation by outside counsel during investigations and proceedings initiated by competition agencies and, in particular, whether a competition agency could veto the right of a witness or defendant to choose a lawyer.

The paper considers the issue by examining three issues in particular: (a) the issue of whether competition agencies should control

a feature of this area of law more than in most other areas of law (e.g., property or contract law where the changes are on-going but are now more incremental in nature).

³ Commentators often assume that there is a *conflict* of interest when a lawyer acts for more than one party in a case or in a sector. This can often be more of a case of a *commonality* of interests or even a *coincidence* of interests or even a *convergence* (of non-conflicting) interests or simply that there are different clients in the same sector which do not have common interests at all. The real issue arises, if it arises at all, is when there is a *conflict* of interests and not just a commonality, coincidence or convergence of interests.

representation will be examined on the basis of an Irish case study; (b) a comparative perspective is provided by examining an approach taken by the New York Bar to this type of issue; and (c) the issues involved in representing one particular type of client in competition law matters, namely, trade associations. Before considering those three issues, it is useful to make some general, but hopefully useful, observations on the topic.

Echoing the theme of this symposium, it is worth observing that representation is not only “personal” for clients but it can also be personal for lawyers because no responsible lawyer would be unmoved if he or she was accused of acting improperly (e.g., an accusation of acting improperly for different parties). The issue is therefore not only personal for the client but also personal for the lawyer.

It is also worth acknowledging at the outset the difficulties facing competition agencies in investigating competition issues. The agencies can be faced with the difficulty of having multiple lawyers representing different parties which is comparable to a student doing an oral examination in front of, say, a dozen professors all parsing the student's thesis and one of the dozen or so professors is more likely to find fault than if it was just one professor acting alone. Equally, agencies can face the difficulty of having one lawyer representing several parties and who can thereby understand the picture better than lawyers representing several parties individually and acting without a joint defence agreement.⁴

It is trite but true that there can be a conflict of interests in competition law cases. However, it is not always easy to see whether there is a *conflict* of interest or, alternatively, just a *divergence* of interests. It is not always easy to identify that there is an issue in the “heat of battle”. Indeed, judgment on these issues is often only possible with the benefit of “hindsight” and “full insight” with the result that actions should be judged on the basis of what people knew or ought reasonably to have known in the circumstances.

4 It is also true, and no bad thing, that the agency faced with one lawyer representing several parties is also less able to “divide and rule between the parties”, “play good cop/bad cop between the parties” or benefit from “Prisoner's Dilemma” because the one lawyer has the “lie of the land” between all the parties which he or she represents.

Again, by way of a background comment, it is worth highlighting the importance of privilege and confidentiality. It is worth noting that privilege and confidentiality (which are not the same) should not be compromised by the actions of a lawyer. It is therefore a good signal to lawyers in these cases as to the existence of a potential conflict problem if the lawyer is faced with having to compromise privilege and/or confidentiality.⁵

There are clear efficiencies to be gained by one lawyer or law firm representing a number of parties in a competition law investigation. For example, the same document does not have to be read or written multiple times and issues can be dealt with more quickly leading to a more efficient use of resources and speedier outcomes. It may even happen that some parties (e.g., employees) may get legal representation (paid for by employers) when they may not otherwise do so.⁶ There can be reduced compliance costs for all concerned. Indeed, competition agencies can also benefit; for example, some agencies have found that in jurisdictions where there are relatively few competition lawyers, it can be problematical when a lawyer who is not expert or experienced in competition law is instructed because more experienced competition lawyers are not available.

2. Should agencies control legal representation? An Irish case study

2.1 Introduction

It is interesting to pose the question of whether a competition agency should be allowed to veto or control a witness or suspect's choice of lawyer.⁷ It is proposed to consider the question by examining an Irish case which is directly in point: this is the

5 E.g., if the lawyer has to tell Company E something which he or she learned from Company F then that may be a potential signal of there being an issue.

6 Lawyers representing employees in such circumstances need to be very careful to advise the employees about the priority of representation (if that arises in the case); for example, the employees might have to be told about what happens if there is a divergence of interests between the employer and the employee (e.g., that the lawyer will continue to act for the employer but the employees would be represented by a new lawyer who would have access to all the relevant notes made and information learned by the lawyer who would resign from acting for the employees but continue acting from the employer).

7 It would be wrong to draw a distinction between a “witness” and a “suspect” in this context because a person could easily move from being a witness to a suspect (and *vice versa*) during an investigation and it would be impractical to have a regime which differed between a witness and a suspect (e.g., the choice of lawyer would be vetoed in the latter situation but not the former).

case of *The Law Society of Ireland v The Competition Authority*.⁸ It is proposed to consider first the facts of the case and then examine the legal analysis in the judgment.

2.2 Irish Competition Authority published a Notice on Legal Representation

In 2004, the then⁹ Irish Competition Authority adopted a “Notice in respect of Legal Representation of Persons Attending before the Competition Authority”.¹⁰ The Authority sought, by virtue of the Notice, to veto the choice of lawyer where the choice would have affected what the Authority described as the “integrity” of the Authority’s investigation. While the facts which led to the adoption of the Notice are not known publicly, it may be that the Authority had become frustrated because a number of witnesses were using the same lawyer to represent them and there could have been, at least in the eyes of the Authority, some exchange of information between the witnesses through the lawyer.¹¹

Article 3 of the Notice was the key provision. It was entitled “General Policy” and it is worth citing in full:

“(1) The Authority’s ability to carry out effectively its investigative functions under the Act relies heavily on its right to obtain fully the information and forthright testimony and statements of persons attending before it without such efforts being compromised by conflicts which potentially arise where the same lawyer represents more than one person attending before the Authority.

(2) The Authority recognises the right to legal representation of persons attending before it who are under investigation by the Authority. As a matter of law, the same right does not extend to persons who are merely witnesses attending before the Authority and who are not, or are not likely to be, the subject of an investigation. However, as a matter of general policy, the Authority will permit such witnesses to be legally represented so long as the choice of representation does not threaten to compromise the integrity or proper functioning of its investigative processes.

(3) In general the Authority takes the view that the integrity of its processes is, or is likely to be compromised by the fact that the same lawyer represents more than one person in any particular matter, be it two parties to an investigation or a party to an investigation and a witness relevant to that investigation. In general, therefore, the Authority will not permit the same lawyer to represent both persons.

(4) In circumstances where the Authority is of the opinion that the integrity of its processes may be compromised by the fact that the same lawyer represents more than one person in any particular matter it will permit that lawyer to appear before it on behalf of only one of those persons.”

Curiously, the Notice provided in Article 4 that a lawyer could apply to the Authority to be allowed to represent more than one client (i.e. a suspect’s lawyer could apply to the investigating or, in some circumstances, prosecuting authority):

“Notwithstanding its general policy, the Authority may allow, upon application, a legal representative to act for more than one person or witness in relation to the same matter if the Authority is satisfied that the integrity of its processes will not thereby be compromised.”

It was not clear how the Authority could possibly have adjudicated on such applications because it would have been investigating a case before it and would then have to appraise itself of what a lawyer appearing before the Authority in that same investigation knew or did not know.

The Notice was silent as to how matters would be dealt with if the investigation reached an Irish

8 [2005] IEHC455, O’Neill J, 21 Dec.2005, available at: <http://www.courts.ie/Judgments.nsf/0/8296C9A8773A6CDA8025714F-00597D5C>. The case is considered by the present author in “Right to a Lawyer in Competition Investigations: *Law Society of Ireland v. Competition Authority*” (2006) *European Competition Journal* 89 and Mackey, “One Lawyer, Many Clients: Legal Representation of Parties with Conflicting Interests” (2012) 6 *International In-House Counsel Journal* No. 21, 1. The present author acted for the Law Society in the case but the facts and commentary in this paper are drawn solely from the public record.

9 The Competition Authority is now the Competition and Consumer Protection Commission (“CCPC”) (see www.ccpc.ie).

10 This was published on the Competition Authority’s website (www.tca.ie) but has since been removed and is not found on the www.ccpc.ie website. The relevant provisions of the Notice are published in this paper for the convenience of the reader. It is worth noting that the Notice was not enacted by the Irish Parliament but was an administrative document signed by the then Authority Chairman.

11 The present author does not know the background facts as they have not been published or made available and this is simply speculation to describe the background to the Notice. See fn.15 below for further information based on an affidavit of an Authority official.

court. One would imagine that all of the suspects could at that point (i.e., when the case reached court) choose the same lawyer or legal team as that is their right and a court would not interfere with that choice.

Equally, the Notice had a major gap in that it was silent on situations where the various interviewees before the Authority chose to have (whether in the interview situation or outside) the same economist or other non-lawyer as advisor. The Notice was therefore targeted to lawyers and no other advisor or type of person.

Article 5 of the Notice provided:

“Notwithstanding the provisions of Article 3, as a matter of general policy, the Authority will permit the same lawyer to act for more than one person in the course of the review of a merger or acquisition pursuant to Part 3 of the Act, unless the Authority is of the opinion that in any particular case that such representation has the potential to compromise the integrity of the review process.”

This exception ignored that there could also be civil and criminal breaches of law in the context of mergers and acquisitions. The Notice was also silent on other Authority activities such as studies and unworkable in other contexts.

2.3 Law Society reacts to the Notice on Legal Representation

The Law Society of Ireland is a body which represents solicitors. It was¹² also part of the co-regulatory regime for solicitors whereby the Law Society and the President of the High Court co-regulated solicitors. The Law Society was quite concerned about the Notice because it could lead to a situation where various State or public bodies (e.g., the police, tax, environmental and other authorities) could veto the lawyers which appeared in cases. Interestingly, and contrary to what some economists and administrators might expect, the Law Society did not act in the interests of its members (as a representative body) but rather acted in the public interest (as a co-regulatory body); the effect of the Notice meant that instead of there being work for just one lawyer, there would now be work for many lawyers so the Law Society

acted contrary to its members' interests in so far as it would have suited the members to retain the Notice and thereby have work for many members. The Law Society sought by way of negotiation with the Authority to have the Notice withdrawn by the Authority. As that was not possible, the Law Society instituted proceedings in the High Court.

“Representing clients in competition law matters is...somewhat like trying to simultaneously paint a moving train while playing five-dimensional chess”

In essence, the Law Society sought various reliefs from the High Court including: a declaration that the Notice was *ultra vires* the Authority's powers and functions pursuant to section 30(1) of the then Competition Act 2002 (the “2002 Act”);¹³ a declaration that the Notice was not adopted pursuant to any statutory or other lawful power; a declaration that in purporting to veto a choice of lawyer made by a party to an investigation or a witness that the Authority had unreasonably and disproportionately infringed the rights of such persons to a lawyer of their choice and to basic fairness of procedures guaranteed by Article 40.3 of the Irish Constitution of 1937;¹⁴ and, finally, a declaration that the Notice infringed the rights of such persons to a fair hearing pursuant to Article 6(1) of the European Convention on Human Rights (“ECHR”), and consequently the Notice was *ultra*

¹³ S.30(1)(d) of the Act provided that one of the Authority's functions is “...to publish notices containing practical guidance as to how the provisions of this Act may be complied with...”

¹⁴ Art.40.3 of the Constitution provides in its first and second paragraphs: “1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen” and “2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.” However, the Irish courts also recognise so-called “unenumerated rights”/“unspecified rights” under Art.40.3 which are not specified but are believed by the Irish courts to apply including certain rights relating to legal procedures and representation.

¹² The regulatory regime for solicitors has changed in some respects since the time of the case.

vires the Authority's powers, was null and void and of no legal force and effect.

The Authority's defence was robust and relied in part on the difficulties which the Authority had faced in dealing with investigations where a lawyer would represent different witnesses.¹⁵

The judgment of the High Court is interesting and instructive.

2.4 The Court Judgment: the *Ultra Vires* Doctrine

The court had to consider the legality of the Notice under section 30(1)(d) of the 2002 Act.

¹⁵ One officer of the Authority stated on affidavit to the High Court (but it is not clear whether the lawyer being referred to was the same lawyer or from the same firm): "8. ...in certain instances in the past the fact that different persons use the same lawyer has caused difficulties in respect of investigations. The following are examples from my personal experience.

(a) In one instance where the Authority was investigating an alleged cartel, an employee of one of the members of the alleged cartel gave certain information to case officers of the Authority at an informal meeting. The information was subsequently used to seek and obtain warrants to conduct searches of premises. Another member of the alleged cartel then asked his solicitor (who also represented other members of the cartel) to write to the member whose employee had furnished the information asking him to sanction his employee. Subsequently the Authority summonsed the employees of four members of the cartel to attend separately before it and the same solicitor responded, saying he also represented the employees and would accompany them to the hearings. The Authority wrote in advance of the hearings to the solicitor, telling him that it would not admit him to the hearing. It was unsatisfactory from the Authority's perspective that the same solicitor was representing all the parties and was in a position where he was being asked by one of his clients to intervene in the manner that could serve to frustrate the investigation;

b) In another instance, one solicitor represented 10 of approximately 16 persons under investigation. Inevitably, issues arose as to the event in which the solicitor was in a position to avail himself of this knowledge arising out of matters and documents disclosed in the interviews of the prime movers of the cartel to prevent minor players from making admissions that might incriminate the major players. On a number of occasions during the course of interviews with minor players, the solicitor refused to allow his client to answer questions put to these minor players. The Authority was concerned that certain facts that might otherwise have been disclosed were not disclosed since one solicitor acted for so many of the persons under investigation. In addition, the Authority was concerned that the common representation acted to the detriment of the interests of the minor players, and as a result to the detriment of the investigative process. Consequently these minor players may not have proffered information that they would otherwise have proffered which could have underlined their minimum involvement in the cartel under investigation. In addition, the fact that only one solicitor acts for a number of persons under investigation militates against any one person under investigation getting completely impartial advice as to the suitability of the Immunity Programme made available by the Director of Public Prosecutions through the agency of the Authority. ...

In the circumstances the Authority has no doubt but that the common representation of a number of persons under investigation certainly impacts negatively on the investigation process."

Section 30(1)(d) of the Act provided that one of the Authority's functions was:

"...to publish notices containing practical guidance as to how the provisions of this Act may be complied with...."

The Notice stated that its purpose was:

"to give guidance to businesses and legal practitioners on the Authority's policy in relation to the legal representation of persons attending before the Authority, consistent with the rights of the public in the integrity and effective functioning of the Authority's investigative processes."

The court found that section 30(1)(d) was not intended to be used for the publication by the Authority of rules governing the conduct by it of its investigative processes and, in particular, the conduct of oral hearings. The proper subject matter of a notice under section 30(1)(d), the court found, was material addressed to persons or undertakings who were the suppliers of goods and services and whose commercial activities fell to be regulated by the respondent under the provisions of the Act. Such material would, the court said, assist them by means of guidelines, in achieving compliance with their obligations under the substantive provisions of the Act. An essential feature of material published under section 30 (1) (d) was that it was not a binding rule, or a rule of general application, but was merely a guideline (one suspects that this would include brochures, guidelines, notices (in the European Commission sense of notices) and leaflets) which may be adopted, or rejected if another alternative means of compliance was available. Thus, section 30(1) (d) did not empower the respondents to publish the Notice in question because it went beyond the scope of the provision.

The Authority argued that if it were not empowered by section 30(1)(d) to publish the Notice, that there was an ample power to do so in another provision of the 2002 Act, namely, section 37(5). The court then considered section 37(5) which provided that:

"[s]ubject to this Act, the Authority may regulate its own procedures."

The court refused to accept that submission by the Authority as well. The court said that the entirety of section 37 was confined to the regulation of meetings of the Authority itself, and section 37(5) did no more than to enable the respondents to regulate its own procedures for the conducting of meetings of the Authority itself:

"[i]t does not enable or empower the respondents to enact or promulgate rules for the conducting of its investigative role and in particular oral hearings held as part of the investigative process."

It is clear that the court found that the Notice (which was a substantial and substantive measure) went well beyond the scope of the section which is entitled "Meetings and business" and was procedural in nature dealing with the quorum for an Authority meeting, which person acted as chair and that the Authority had to act by way of a majority vote with the chairperson of the meeting having a casting vote.

"Representation is not only "personal" for clients but it can also be personal for lawyers."

The court then considered whether or not the power to adopt the Notice and the power to publish the Notice was a power which was necessarily and properly required for the carrying into effect of the Authority's purpose or it was to be regarded as incidental to or consequential upon the things which the legislature had authorised the Authority to do. The court said that it was clear to the court that the respondents were empowered under section 30(1)(b)¹⁶ to conduct investigations into alleged breaches of the 2002 Act and in order to do that they may use the powers that are given to them under section 31. In the context of the use by the Authority of the powers conferred

¹⁶ S.30(1)(b) provided that one of the Authority's functions was to "... carry out an investigation, either on its own initiative or in response to a complaint made to it by any person, into any breach of this Act that may be occurring or has occurred...."

under section 31, the court said that the Authority rightly conceded in court that persons under investigation are entitled as of right to avail of legal representation in any Authority hearing.

Although the Authority asserted that persons who appear before them as witnesses, were not entitled as of right to legal representation, as a matter of policy the Authority conceded to those persons a right to avail themselves of legal representation. The court believed that methodologies used or practices followed by the Authority in the conduct of investigations and in particular oral hearings, pursuant to the express powers given to them in sections 30 and 31, were a matter which must fairly be regarded as incidental to or consequential upon the functions given to the respondent under section 30 and the powers given under section 31. The court therefore believed that notification to the public of the creation or variation of any such methodologies or practices must not only be regarded as incidental or consequential to those functions, but indeed could be said to be necessary to the fair and reasonable exercise by the Authority of its functions and powers, because if practices were to be adopted concerning legal representation then it would be essential that persons to be investigated by the respondents would know in advance what these practices were so that they could arrange their legal representation accordingly. The court thus found that the Authority did have a power which was incidental to, or consequential upon, the functions and powers conferred upon the Authority under sections 30 and 31 of the Act, to publish notices of the kind impugned in these proceedings and the court concluded:

"[i]f the respondents did have that power then the mere fact that the source of the power for the making of a notice was misdescribed as being under s. 30(1)(d), cannot deprive the notice of validity, solely on the ground of a lack of power to make it or issue it, when in fact the Authority lawfully enjoyed that power as discussed above."

The court therefore reached the conclusion that the notice was not *ultra vires* the powers of the respondent merely because the express provisions of section 30(1)(d) or section 37(5) of the Act do not expressly provide for that power, the power in question being necessarily incidental and

consequential upon the functions and powers conferred in sections 30 and 31 of the Act.

2.5 The Court Judgment: Constitutional right to a lawyer

The court then considered whether or not the contents of the Notice, i.e., the restriction on the choice of legal representation contained in the Notice, unreasonably and disproportionately infringed the right of persons appearing before the Authority to the lawyer of their choice and thus infringed the right to fair procedures guaranteed by Article 40.3 of the Constitution.

The court was mindful of the precise nature of the restriction contained in the Notice. There was no restriction on either the number of legal representatives that may attend at hearings or indeed any other kind of restriction except that there was a general prohibition on one lawyer representing more than one person in any matter under investigation. This obviously gave one party (i.e., the Authority) the power to restrict or veto the choice of lawyer made by one or more of these persons.

“Worth acknowledging
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competition issues.”

The first aspect of this problem considered by the court was whether there was a right to freedom of choice of one's own lawyer, as an aspect of the right to fair procedures guaranteed by Article 40.3 of the Constitution. The court found that the nature of the proceedings before the Authority can be said to be or be deemed to be of sufficient significance or consequence,¹⁷ for either persons under investigation, or witnesses, to merit the

¹⁷ E.g., while the Authority could not (and the CCPC may still not) impose penalties (e.g., fines), an investigation could lead to a civil or criminal case before a court (and the court could impose a penalty) and, in any event, the Authority (and now the CCPC) may institute (or recommend the institution of) certain criminal proceedings in the courts.

fullest legal representation. The court made this finding despite the fact that the Authority argued that it did not make “findings which they report in any kind of public way” – a submission which was not entirely accurate. After all the Authority was obliged¹⁸ to publish an annual report outlining its activities which contains details of its investigation; the Authority also published decisions in merger cases; and the Authority interpreted its advocacy role as including publicizing some of its activities. Needless to say there also was (and remains) media coverage of its activities.

The court recalled that whether or not there is a right to freedom of choice of one's own lawyer, as a matter of Irish law, is an issue which had been expressly considered in at least two earlier cases.¹⁹ The court also considered the US case of *Wheat v. United States*.²⁰ The Irish court in *Law Society v Competition Authority* believed that it was clear from the opinions in the *Wheat* case that there was no dissent in relation to the general principle, to the effect, that there was a strong presumption in favour of freedom of choice of lawyer, but that in the interests of ensuring a fair trial, that choice could be interfered with or denied by the trial court where multiple representation by a lawyer gave

¹⁸ S.42 of the 2002 Act.

¹⁹ *The State (Royle) v. Kelly* [1974] I.R. 259 and *The State (Freeman) v. Connellan* [1986] I.R. 433. Both of those cases concerned freedom of choice of solicitor under Ireland's Free Legal Aid Scheme which is a State-funded scheme to provide legal advice to those of limited financial means. In one of these cases, *The State (Freeman) v. Connellan*, Barr J. said: “I am ... of [the] opinion that [a] court should be very slow indeed to refuse to nominate the applicant's choice of solicitor [under the Free Legal Aid Scheme] if the person nominated is duly qualified for assignment and should do so only if in the view of the judge there is good and sufficient reason why the applicant should be deprived of the services of the solicitor nominated by him. Where in any particular case the court, having considered and given due weight to the representations of the applicant, is satisfied, nonetheless, that there is a strong, compelling reason for refusing to assign the solicitor of the applicant's choice, the judge should state that reason and enquire whether the defendant wishes to nominate any other particular solicitor. If he does nominate a second solicitor then that application should be considered in the same way. The court should choose a solicitor for the applicant only where he has not nominated one himself or where any nominated by him are unable to accept assignment or are not acceptable to the court for good and sufficient reason. This interpretation is in accord with the nature of the scheme of legal aid in criminal cases as devised by the legislature, which includes two important dimensions, namely, the opportunity given to each qualified applicant to nominate his own solicitor (though the court is not bound to allocate the solicitor chosen), and the creation of panels of all practising solicitors and barristers who are willing to participate in the scheme...” Barr J concluded that freedom of choice of solicitor under this Legal Aid Scheme should only be denied for good and sufficient reasons.

²⁰ 486 U.S. 153.

rise to either actual conflict of interest or a serious potential for that conflict to arise during the trial.

The court then said that the two Irish cases dealing with choice of solicitor under the Criminal Legal Aid Scheme and the *Wheat* case dealt only with a choice of representation in a criminal trial. However, this was a somewhat different scenario. The court said that first:

*“the legal representation [in the present scenario] is not State funded, it is the result of contracts freely entered into between the legal representatives in question and persons under investigation by the respondents or witnesses. Needless to remark the fees of these legal representatives must be paid by the persons under investigation or by witnesses if they avail of legal representation.²¹ Thus there can be no question of the respondents having a discretion similar to that afforded to a court under [the Legal Aid regime]. Notwithstanding the specific discretion given to a court under the above regulations, Barr J. nonetheless held that in *The State (Freeman) v. Connellan* that freedom of choice of solicitor, from the Legal Aid panel, should not be denied save for good and sufficient reasons. The conclusion of Barr J. in that regard would appear to me to be similar to that reached by the US Supreme Court in the *Wheat* case namely that a presumption in favour of choice of lawyer must be recognised.”*

The Irish court in the case recalled that:

“where a defending lawyer had a conflict of interest as between multiple defendants, certain deleterious effects can result, such as the failure to properly cross-examine, the failure to call evidence which benefits one defendant perhaps at the expense of another, or the failure to point out or emphasise disparities of involvement between two defendants. These deficiencies could result in there not being a fair trial and damage public confidence in the rendition of a just verdict. Hence, while there is a presumption in favour of freedom of choice of lawyer, the court retains a discretion to deny that freedom of choice where the consequences of it are likely to damage the prospect of a satisfactory and fair trial and ultimately public confidence in the process.”

²¹ Ed., it is unlikely that much would have turned on whether the fees were paid by another (e.g., an employer) because the point being made was more to do with the fact that the lawyer was appointed in this case was not State-funded.

The court said that the same could occur in civil proceedings, where a lawyer has a conflict of interest between two clients, similar deficiencies can occur. In conclusion, however, the court said that while:

“these are very important factors to be considered I do not think that they could have the same weight as they would have in criminal proceedings”

and thus:

“... in civil proceedings such as the type conducted by the [Authority] there must be a strong presumption in favour of freedom of choice of representation. Although it is the case that in these proceedings the clients will invariably be paying for their own lawyers, this factor does not...add significantly to the weight or strength of this presumption. Regardless of who is paying for the representation the principle must... remain essentially the same.”

The court was satisfied that:

“were a tribunal, empowered to veto a choice of lawyer made by a party appearing before it, invariably this would give rise to a perception of unfairness, on the part of the person denied freedom of choice. Where the tribunal was in effect the adversary as in the position of the [Authority], that perception will be very strong indeed. The interference by a tribunal with a choice of lawyer will in many instances cause actual unfairness because of the disruption of confidence, which is an essential aspect of every successful lawyer/client relationship.

I am satisfied that a person facing a tribunal in respect of which it is appropriate to have legal representation does, as an incident or aspect of the right to fair procedures, have a constitutional right pursuant to Article 40.3 of the Constitution to freely select the lawyers that will represent him or her, from the relevant pool of lawyers willing to accept instructions.

Every tribunal has the right and indeed the duty to control its own proceedings so that it can discharge its lawful function in accordance with law and respecting the constitutional rights of all those who appear before it.

There will be rare cases where for one reason or another and specifically where conflicts of interest

arise, and the choice by a person of a particular lawyer may have the effect of hampering or impeding the tribunal from discharging its lawful function.”

The court then went on to find the contents of the Notice did not satisfy the proportionality test in Irish law, that is to say, the court did not believe that the Notice was proportionate.²²

The court rejected the applicant's submission, to the effect that the Authority, if concerned about a conflict of interest on the part of lawyers, should deal with the matter by making a complaint to the Law Society, which has the statutory function of dealing with such complaints made against solicitors. The court rejected that argument because that avenue of complaint:

“even if it were available to the respondents, [it] would be unlikely to preserve the effectiveness of its investigative processes, or at the very least could result in lengthy delays, in completing investigations.”

Ultimately, this finding was little comfort to the Authority having seen the Notice being struck down on several other grounds. The court's conclusion on Irish law was emphatic. The judge stated:

“I am of the opinion that the [Authority] have impermissibly reversed the presumption, as an essential aspect of the right to fair procedures, in favour of a freedom of choice of legal representatives, and in so doing impermissibly infringed the right of a person appearing before them, either under investigation or as a witness, to choose their own legal representatives.”

2.6 The Court Judgment: European Convention on Human Rights

The Irish High Court then turned to the ECHR. The court believed that as it had granted an order of *certiorari* (i.e., an order to annul or quash the Notice as a matter of law) that would be sufficient to dispose of the proceedings. However, in deference to the submissions made by the parties, the court thought it appropriate to opine on the final claim, made in the alternative, in these proceedings, which was for a declaration pursuant to section

5 of the European Convention on Human Rights Act 2003, (the “ECHR Act”)²³, that the Notice was incompatible with Ireland's obligation under Article 6(1) of the ECHR.²⁴

While obviously the Law Society sought to challenge the Notice under the ECHR and the Authority sought to uphold it, there was an interesting twist in regard to the ECHR arguments. The Irish Attorney General was represented in court because the ECHR was at issue. The Attorney General submitted that the policy in the Notice was not compatible with Article 6 ECHR and that there must be a compelling justification for interfering with the choice of lawyer where the client is paying. It was submitted that the flaw in the Notice was that the correct approach should have been a case by case analysis rather than a general rule. Thus the Notice could be made the subject matter of a declaration pursuant to section 5(1) of the ECHR Act. The Attorney General argued that the reasons put forward by the Authority to justify the Notice were not sufficiently compelling to justify a general prohibition. It was also submitted by the Attorney General that the Authority by their Notice:

“fundamentally misunderstood...[the]...importance of what at a minimum is the prima facie entitlement of a person under investigation to a lawyer of their own choice as part of the requirements of a fair hearing within the meaning of Article 6.1 and wrongly reverses a general rule with the exception.”

²³ S. 5 of the ECHR Act provides (in part):“(1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as “a declaration of incompatibility”) that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions. (2) A declaration of incompatibility— (a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made, and (b) shall not prevent a party to the proceedings concerned from making submissions or representations in relation to matters to which the declaration relates in any proceedings before the European Court of Human Rights.”

²⁴ The relevant provisions of ECHR, Art.6 (entitled “Right to a fair trial”):“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...3. Everyone charged with a criminal offence has the following minimum rights:...(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require...”

²² The proportionality test in Irish law was largely laid down by Costello J. in *Heaney v. Ireland* [1994] 3 IR at p. 607.

The court then considered whether Article 6(1) ECHR could have been invoked in respect of the investigative proceedings of the Authority to which Articles 3 and 4 of the Notice applied. The court said that it had to be borne in mind that the:

“primary purpose of an investigation will be to ascertain whether or not breaches of the [Competition] Act have been committed by certain persons. In essence therefore these investigations are investigations to determine whether or not a crime such as a breach of sections 4 or 5²⁵ of the Act has been committed by a particular person or persons. It is therefore in essence a criminal investigation. Whether or not a “charge” is laid against any particular person will depend upon the progress of each investigation.”

“it is not always easy to see whether there is a conflict of interest or, alternatively, just a divergence of interests. It is not always easy to identify that there is an issue in the “heat of battle.”

The term “charge” had been defined by the European Court of Human Rights in the case of *Serves v. France*²⁶ where the following is said in respect of what is a “charge” for the purposes of Article 6(1):

“That concept is ‘autonomous’; it has to be understood within the meaning of the convention and not solely within its meaning in domestic law. It may thus be defined as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’, a definition that also corresponds to the test whether

‘the situation of the (suspect) has been substantially affected.’”

The court in *Law Society v Competition Authority* believed that a “charge” for the purposes of Article 6(1) of the ECHR arises in the context of investigative proceedings of the Authority at the point where there is an intimation to a person that it is alleged that he has committed any or all of the criminal offences set out in the Act of 2002. The court said that:

“[m]anifestly this could happen at various stages but it would appear to me, that for many persons who may be described as either the target of an investigation or the subject of an investigation, that it would be likely to arise very early on in the investigation, if not in fact at the point where certain persons are summonsed to appear before the respondents, not as witnesses but as persons being investigated. This would tend to suggest that Article 6(1) is engaged from that point onwards.”

The court said that the crucial question is not:

“just, whether or not the [Authority] make any determination either of criminal or of civil liability but in addition, whether or not in the investigative process an event can occur which in later proceedings, be they criminal or civil can have a decisive effect on a determination of either criminal or civil liability on the part of a person investigated.”

The court believed that:

“faced with an appropriate caution from the respondents and in order to understand the potential consequences of that for the purpose of giving evidence both, persons, who are the target of an investigation and witnesses, would need legal advice and assistance, in order to know which questions they were obliged to answer by virtue of sec. 31(1)(4) and which questions they would be entitled to refuse to answer, exercising the privilege against self incrimination. The potential creation of decisive evidence admissible in later criminal proceedings out of all this, suggests to me that Article 6 ought to apply. In my view any court charged with the jurisdiction of having regard to the State’s obligations under Article 6 of the Convention would feel compelled to the view, that in the circumstances revealed in this case, that Article 6(1) was engaged.”

²⁵ Ed., ss 4 and 5 are the provisions in the Act which replicated the principles in Arts.81 and 82 EC or, now, Arts.101 and 102 TFEU.

²⁶ [1997] 28 E.H.R.R. 265, para.42.

The court then had to consider whether or not the content of Articles 3 and 4 of the impugned notice constitute a breach of Article 6(1) ECHR.

The court found that the cases decided by the European Court of Human Rights that concerned choice of lawyer were mainly concerned with the choice of lawyer in the circumstances where legal representation is being provided by the State. It is clear in that circumstance, there is not a right to an unfettered choice of lawyer under the convention and the cases illustrate a variety of circumstances in which that freedom of choice has been curtailed. However in *Croissant v. Germany*,²⁷ the European Court of Human Rights said:

"...the appointment of more than one defence counsel is not of itself inconsistent with the Convention it may indeed be called for in specific cases in the interests of justice. However, before nominating more than one counsel a court should pay heed to the accused's views as to the number needed, especially where, as in Germany, he will in principle have to bear the consequent costs if he is convicted. An appointment that runs counter to those wishes will be incompatible with a notion of a fair trial under Article 6(1) if, even taking into account a proper margin of appreciation, it lacks relevant and sufficient justification."

Further on, the European Court of Human Rights said:

"It is true that Article 6(3)(c) entitles 'everyone charged with a criminal offence' to be defended by counsel of his own choosing. Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also whereas in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes; indeed German law contemplates such a course. However, they can override those wishes when they are relevant and sufficient grounds for holding that is necessary in the interests of justice."²⁸

27 [1990] 16 E.H.R.R. 135, para 27.

28 Ibid para. 29

The court in *Law Society v Competition Authority* said that if freedom of choice of lawyer cannot be denied in a criminal trial where legal assistance is being provided by the State then it should not be denied where the client is paying for the services of the lawyer. Such interference could only happen with good and sufficient reason. The court believed that it would be unarguable that the Convention would require as an incident of a fair trial, that the freedom of choice of lawyer by a client who is paying for the services of a lawyer would be respected and not interfered with save for the gravest and most compelling of reasons which must necessarily establish that the choice of lawyer made, would for whatever reason, grossly impede the conduct of the proceedings in question.²⁹ The court thus found that the reasons argued by the Authority could not amount to a sufficient justification for denying a freedom of choice of lawyer which is required as an integral aspect of a fair trial, as guaranteed by Article 6(1) ECHR. The court stated however that, as it had already held that the Notice breached Article 40.3 of the Constitution, and that therefore on that ground alone there should be an order of *certiorari*, by virtue of section 5 of the ECHR Act, it was unnecessary to make the declaration of incompatibility envisaged in section 5, there being another adequate legal remedy available as a matter of Irish law.

2.7 Observations

The Notice was an extraordinary measure. It attacked the basic right of the citizen to instruct a lawyer of their choice; something which even courts do not do. The radical nature of the Notice was apparent to many lawyers and had the

29 The Irish court then said: "...where the Tribunal conducting the proceedings interferes with the choice of lawyer made by a party to the proceeding, at the very least there will invariably be a perception by the party affected that the proceedings have not been conducted in a fair manner. This will almost certainly be so when the Tribunal, is itself the adversary of the person appearing before it, as in the position of the respondents. The interference by a Tribunal with a choice of lawyer made by a party appearing before it may frequently have the consequence, because of the disruption of the relationship of lawyer and client and of the confidence which a client should have in his or her lawyer, of actually inhibiting a fair hearing. I would be of opinion, that as a general proposition Article 6(1) requires that persons before tribunals which have a jurisdiction to determine rights and impose liabilities either in the primary hearing before them or to cause decisive events to occur which materially affect the determination in secondary proceedings, consequent upon the primary proceedings, have the right to choose their legal representatives, subject only to the tribunal having a discretion to interfere with that choice, as discussed above."

Authority consulted on the matter (i.e., published a draft notice and invited comments), the difficulties might have been identified before its adoption. Indeed, given that the Law Society's costs of challenging the Notice were awarded against the Authority, it was an expensive exercise for the Authority and hence the Irish tax payer. The Notice lacked balance or fairness in that economists or other advisors could represent no end of parties but lawyers specifically were seen as particularly problematical. There was something vaguely Orwellian about a "notice" "to give guidance to businesses and legal practitioners" which sought to deny the right, long recognized in civilized societies, to a lawyer of one's choosing. Perhaps the starkness of the Notice was such as to move the court to such an absolute finding. It may well be that such a notice may work in some other jurisdictions but it does not work as a matter of Irish law and the Irish High Court has said so emphatically. It is no defence before a court in one jurisdiction to say that it would have to work "here" because it works "there". In some ways, this case proves that despite the globalization of competition principles, each jurisdiction still has its own core or fundamental principles. The case also demonstrates that the competition authorities who investigate matters must be careful to comply at all times with the principles of fairness and respect for fundamental human rights. Competition agencies would generally be better advised to raise such an issue if it arises with the appropriate authorities rather than seeking to be a judge in their own cause and decide who may, or may not, appear before them. For present purposes, it is clear though that it ought to be generally possible for lawyers to act for more than one party albeit in very limited circumstances, although such circumstances are not capable of precise and finite definition in the abstract and that it would generally be inappropriate for competition agencies to interfere with the rights of parties to choose their own lawyers.

3. A comparative perspective

Having considered the national perspective, it is appropriate to take a comparative perspective even if only briefly. In that regard, it is useful to consider "The Association of the Bar of the City of

New York – Committee on professional and judicial ethics – Formal Opinion 2004-02"³⁰ (the "Opinion"). The purpose of reviewing this Opinion is not to consider the exact state of the law now in New York but to identify some of the issues generally because the Opinion is a useful touchstone to identify those issues.

"It is for courts and the supervisory bodies to supervise conflict of interest issues rather than protagonists in the case (e.g., a competition agency)."

The Opinion recognises correctly that multiple representations of a corporation and one or more of its constituents (e.g., employees) are ethically complex, and are particularly so in the context of governmental investigations. The Opinion observes that if the interests of the corporation and its constituents actually or potentially differ, counsel for a corporation will be ethically permitted to undertake such a multiple representation, provided the representation satisfies the requirements of a particular code of conduct (i.e., DR 5-105(C) of the New York Code of Professional Responsibility³¹):

30 <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2004-02-representing-corporations-and-their-constituents-in-the-context-of-governmental-investigations> and https://www2.nycbar.org/Publications/record/Vol_59_%20no_2.pdf.

31 In essence, DR 5-105 provided the ethical standard governing the permissibility of representing multiple clients in a matter. Subject only to the exception contained in DR 5-105(C), the provisions of DR 5-105(A) and (B) prohibit undertaking or continuing in multiple representation "if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected" or "if it would be likely to involve the lawyer in representing differing interests." In the context of the Code, differing interests "include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest."

(i) corporate counsel concludes that in the view of a disinterested lawyer, the representation would serve the interests of both the corporation and the constituent;

and

(ii) both clients give knowledgeable and informed consent, after full disclosure of the potential conflicts that might arise.

In determining whether these requirements are satisfied, counsel for the corporation must ensure that he or she has sufficient information to apply DR 5-105(C)'s disinterested lawyer test in light of the particular facts and circumstances at hand, and that in obtaining the information necessary to do so, he or she does not prejudice the interests of the current client, the corporation.

The Opinion recognises the reality that circumstances can change during the course of the case and therefore it states that even if the lawyer concludes that the requirements of DR 5-105(C) are met at the outset of a multiple representation, the lawyer must be mindful of any changes in circumstances over the course of the representation to ensure that the disinterested lawyer test continues to be met at all times.

The Opinion also recognises that the lawyer should consider structuring his or her relationships with both clients by adopting measures to minimize the adverse effects of an actual conflict, should one develop. These may include prospective waivers that would permit the attorney to continue representing the corporation in the event that the attorney must withdraw from the multiple representation, contractual limitations on the scope of the representation, explicit agreements as to the scope of the attorney-client privilege and the permissible use of any privileged information obtained in the course of the representations, and/or the use of co-counsel or shadow counsel to assist in the representation of the constituent client.

There are several practical points to be gleaned from the Opinion which are worth highlighting in the broader context of other jurisdictions. First, the Opinion recognises that the same lawyer may represent different parties in the same matter, this is “ethically complex” (but not impossible)

and is therefore permissible but subject to certain safeguards. Secondly, the test which the Opinion uses is the “disinterested lawyer”³² and not the test of, say, a “disinterested client” or “disinterested lay by-stander” which is an interesting and pragmatic approach because it uses the approach of someone knowledgeable in the field but it could be that the lawyer would be influenced by his or her involvement in such matters and clients could see matters differently. Thirdly, the Opinion recognises that it could be in the interests of all parties for the same lawyer to represent the parties so there is no *a priori* prohibition. The Opinion recalls that, a finding of “adverse” or “differing” interests “does not require “actual detriment” or any actual conflict; rather, a broad prophylactic rule is appropriate because it “not only preserves the client’s expectation of loyalty but also promotes public confidence in the integrity of the bar.”³³

“It is a case by case assessment.”

4. Trade associations

Having considered the national and international perspective, it is useful to consider issues which can arise in representing one particular type of client in competition law cases.

Representing trade associations is often rewarding and very interesting for competition lawyers. Trade associations are often at the very epicentre of competition law cases³⁴ and therefore an entrepreneurial competition lawyer might well

³² The Opinion recalls that “[a] “disinterested lawyer” is an objective, hypothetical lawyer “whose only aim would be to give the client the best advice possible about whether the client should consent to a conflict” or potential conflict. Simon’s New York Code of Prof’l Responsibility Ann. 554-55 (2003). If the lawyer believes that such a disinterested lawyer “would conclude that any of the affected clients should not agree to the representation under the circumstances, the lawyer involved should not ask for” consent to multiple representation.”

³³ Citing *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 131, 674 N.E.2d 663, 667 (1996) (discussing, on motion to disqualify, similar standard under DR 5-108 regarding conflicts with former clients).

³⁴ One need only think of the plethora of competition law cases in which trade and other associations are at the epicentre. Indeed, the list of such cases is so long that it is otiose to seek to enumerate them all.

believe that identifying and then representing trade associations could be a useful path to success. Moreover, the issues can be interesting as one sees a different perspective on how markets operate by examining the issues not just from the perspective of a single undertaking but one can, to some extent, span the market by seeing how members (whether, for example, large or small, national or multinational, public or private, docile or agile, succeeding or failing) approach the issues.

Representing trade associations in competition law matters can however have its difficulties and it is useful to examine a few.

Competition lawyers are often introduced to a trade association by one of the members of the association who already instructs that lawyer. It may well be possible for the lawyer to do some work for the client and some work for the association but it is rarely possible to act fully for the entire association *and* for *one* of its members. This is where a conflict of interest is most likely to arise in the case of trade associations. Indeed, as a general rule, in contentious matters, it may be easier not to act for a trade association *and* one or more members. In purely advisory matters, the issue is less problematical and it may be possible to act for the association and a combination of its members but issues could arise if the matter became contentious.

Acting for a trade association and a member may be particularly problematical where the one member chooses to seek leniency or immunity and the lawyer has therefore gained knowledge or information relating to other members by acting for their association.

All of this is apart from the usual difficulties of acting for trade associations typified by the example of where an incumbent outgoing head of the association is keen to have the case resolved during his or her term of office (to claim the glory) or to delay the conclusion of a difficult case until his or her successor takes over (to avoid the difficulty).

When a lawyer is involved in representing a trade association and evidence emerges of a cartel then the lawyer may be in some difficulties if he or she acts for one member in seeking immunity or

leniency vis-à-vis the other members even if the lawyer stops acting for the association because to stop acting for one but not all parties may involve tipping off the other cartellists that an immunity or leniency application has been made.

In conclusion, acting for trade associations is possibly more fraught with difficulties than acting for individual members so it is fair to say that acting for multiple parties is more difficult if one is acting for a trade association and some of its members than where one is acting for (a) the association, (b) one member or (c) the association and all of its members.

5. Conclusions

It is perhaps more difficult to navigate conflicts of interest in competition law than in most other areas of legal practice given, for example, the fact that the subject often relates to intensive interaction between competitors at the most senior levels and in the most sensitive of situations as well as the fact that some of the information and evidence will not come to light until late in the process (or at all).

Lawyers therefore have to be mindful of a number of considerations in taking (and keeping) instructions in competition law matters. It would be useful to recall a number of these considerations.

It is often important for a lawyer taking instructions in competition law matters (in particular, when taking urgent instructions to attend on a dawn raid) that the lawyer would explain to the client that he or she will attend but if anything emerges at any time in the future which would cause a conflict then the lawyer would have to stand down. It is not always necessary to stand down but it could happen and therefore before taking instructions, it is useful to set the ground rules.

Legal professional privilege is of enormous importance in competition law. One need only think of the hard fought *AM&S*³⁵ and *Akzo Nobel*³⁶ cases and the controversy surrounding

35 Case 155/79 *AM & S Europe Limited v Commission of the European Communities* [1982] ECR 1575, ECLI:EU:C:1982:157.

36 Case C-550/07 *P Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* [2010] ECR I-8301, ECLI:EU:C:2010:512 (see,

both cases. One guiding principle which should inform lawyers' conduct in competition law cases is whether anything they are doing would compromise the privilege which the *client* (not the lawyer) has in the legal advice - this is a useful "canary in the coalmine" to detect whether there is an issue.

It is often said, but somewhat simplistically, that one should "follow the money" in deciding whether there is a conflict of interest. For example, if a lawyer is acting for an undertaking (e.g., a company) and the directors or employees of the undertaking then it is worth considering who is paying the legal fees of the directors or employees represented by that lawyer. If it is the undertaking then that is not proof that there is a conflict of interest but it is worth checking whether the necessary protocols and procedures have been put in place.

It is often difficult, if not impossible, to see whether there is a conflict of interest in competition law cases at the outset. For example, instructions might have to be acted on as a matter of urgency (e.g., when an undertaking or association of undertakings calls a lawyer to assist them urgently in a "dawn raid" or unannounced inspection) and none of the parties (including the lawyer) have the full facts.

Even after a case commences, it can still be difficult to see if there is a conflict of interests. It is useful to consider a number of reasons why this is so. First, much of the evidence in these cases is deliberately hidden and difficult to find – such as in the case of cartels where the parties have taken steps to keep their activities secret and difficult to discover. Secondly, the process in competition law cases is often adversarial with some of the file being

unavailable to the other parties in the case (unlike in most other areas of the law where there can be full discovery (at least in those jurisdictions which permit full discovery)). To take a third example, the role and evidence of some of the protagonists is not immediately evident or transparent (e.g., where a party has sought immunity or leniency and is under a duty to maintain confidentiality about their role). Finally, the activities of one client can have unforeseeable implications for clients not only at the same level of the economic chain but others in entirely different sectors. A lawyer receiving instructions to act in, for example, an alleged cartel among, say, computer manufacturers will no doubt do a conflict check with regard to computer manufacturers and others in the computer sector but would rarely think of a conflict arising from, say, a bakery client but there could be a claim for overcharging by a bakery client who bought computers from the computer client. It is clear that it is impossible to be precise about conflicts not only when cases are accepted but even during the process. This is why on-going diligence and vigilance seem desirable where feasible.

Ultimately, as the Irish case and experience in the United States demonstrates, it is for courts and the supervisory bodies to supervise conflict of interest issues rather than protagonists in the case (e.g., a competition agency). This is because a competition agency has a direct interest in the outcome. There are situations where it is clearly wrong for a competition lawyer to act for multiple parties but the skill is not in articulating such a trite truism but rather in prescribing with precision those situations which are problematical and those which are not. In many ways, it is a case by case assessment but it often involves a choice which has consequences for the client and the lawyer personally.

in this context, Power, "In-House Lawyers and the European Court: The *Akzo v Commission* Judgment" (2010) *XLV Irish Jurist (New Series)* 198).