Editorial

Employed Lawyers — Without Privilege?

The *A M and S Europe Ltd* case was analysed in our last issue (at p 197). While the European Court of Justice upheld the doctrine of legal professional privilege as applying in anti-trust investigations by the EEC Commission, the Court has cast considerable doubt on the extent to which this privilege attaches to employed or "in-house" lawyers.

This point is not expressly covered in the EEC treaties or regulations and the Court thus had recourse to the "general principles of law". The Court took the view that privilege only attaches to "independent lawyers . . . not bound to the client by a relation of employment". We would first comment that for a person accused in criminal proceedings to have to rely only on such protection as may be accorded unanimously by the laws of all member States is most oppressive. The Court should not have approached the matter on a literal point by point basis — using this approach, if each of the member States protected the interests of accused persons in varying ways, there might be little common ground between them and an accused might thus be left with no meaningful rights of defence under Community law. With respect, the Court should have rather concentrated on the broad principles of defendants' rights shared by member States and should have then asked whether according legal professional privilege to employed lawyers was essentially contrary to such broad principles. It must, however, be conceded that attributing full professional rights and duties to employed lawyers is in practice restricted to common law countries which are in a small minority in the Community.

Restricting the privilege to "independent" lawyers may be reasonable but declaring in effect that employed lawyers are *ipso facto* not independent is insupportable. Companies which both employ in-house lawyers and instruct outside legal advisors will no doubt be able to cope with the new ruling although this may involve inconvenience and additional expense. However, for those major companies which as a matter of policy do not use outside solicitors an unacceptable dilemma arises: whether to use lawyers not of its own free choice or whether instead to rely on in-house advice on a non-privileged basis.

The UK legal profession should take urgent steps to demonstrate to the Community authorities that, in the UK at any event, employed solicitors, barristers and advocates are truly independent and assimilated with their private practice colleagues in this respect. It may be that in a future case the point could be re-argued as being *per incuriam* since it seems that the exclusion of employed lawyers from legal professional privilege was not pressed or argued in detail by any of the parties to the case; it would certainly be desirable for the Court to consider this matter again with the benefit of full argument and of evidence of the position in the UK in particular. The UK Government should also press for adoption of an EEC regulation embodying this privilege. Unfortunately, either of these courses is likely to take a considerable time during which companies will be left in much uncertainty and the personal employment interests of employed lawyers in the UK may suffer.

Co-incidentally, the impact of EEC competition law on proceedings in the UK courts was underlined by a case reported in the same edition of *The Times* (May 20) as the *A M and S* judgment: *Garden Cottage Foods Ltd v Milk Marketing Board*. This is the first case to come before the Court of Appeal in which an injunction was granted to restrain an alleged "abuse of dominant position" under Art 86 of the EEC Treaty. It may not be long before a UK court finds itself in the distressing position during the hearing of a "domestic" case of having to withold an established professional privilege from members of its own legal profession.