

PART IX: ALTERNATIVE DISPUTE RESOLUTION AND COLLECTIVE REDRESS

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Link at: [JustCompetition – Training Module – Part IX](#)

I want to start by saying something about the alternative dispute resolution, which is provided for in Articles 18 and 19.

It probably won't come as a great surprise to know that a national court can suspend the proceedings before it for a period not exceeding two years if the parties in fact are in agreement that there might be some prospect of resolving the underlying issues by reference to some form of consensual dispute resolution.

That suspension, of course, feeds back into something we touched upon this morning, namely, the limitation periods and how long, in fact, an action can continue before a national court before there is a final decision.

You will see that, under Article 18 if there is some form of agreement between the parties then the amount paid under that agreement can in fact be taken into account by a national competition authority in the imposition of any fine which that authority has in mind in relation to the infringer.

A slight divergence for a moment – most systems in Member States across Europe confer on the national competition authority power to impose fines.

In many respects, therefore, at a national level it replicates what the Commission does at Community level.

The situation in Ireland is different simply because under the Constitution the only body that can impose a fine, or the only body that can make a finding upon which a fine can be imposed, is a court.

There is a specific constitutional provision to that end and accordingly the Irish national competition authority does not have the same power as many national competition authorities throughout Member States across Europe, but it's specifically on account of an express constitutional provision which has the effect of what I have mentioned.

So, under this provision, as I say, if an infringer pays compensation to an injured party, the amount of that compensation can be taken into account.

I don't see any similar provision if in fact the infringer pays compensation resulting from a court action, or resulting from a court decision.

And I wonder why is that the case?

Why is there such an obvious distinction expressly made in the Directive between monies/compensation paid as a result of a reference to the consensual dispute resolution, as distinct from the payment of the same money by reason of a court decision?



Secondly, it seems to me that if a national competition authority has a particular amount in mind as being an appropriate fine, then that is the fine that should be levied and the amount thereof ought to be paid by the infringer.

You could end up with a situation of having two infringers pretty much with the same liability, pretty much with the same fine being imposed, but one paying less and one paying more.

I am not sure, as I say, whether that's just or whether that's fair and certainly the infringer who pays the same amount pursuant to a court order would take a poor view, I think, on the basis of proportionality as between him and the other individual.

What is intriguing then is the effect of this settlement on subsequent actions. This is provided for in Article 19 of the Directive.

This provision bears similarity to the provisions we were discussing this morning on joint and several liability.

A general point can be made about the Directive.

In essence, the Directive creates a framework, within which Member States must put in place, by way of national legislation, measures to reflect the core value of the Directive. So, when you see right across the Directive "Member States shall", "Member States shall" that's imposing the obligation on Member States, as I say, to put in place sufficient safeguards that national judges can in fact implement the Directive in accordance with result to be achieved.

The first part of article 19 is what you would expect, that if the plaintiff should settle his action against an infringer, then the amount of his claim against the remaining infringers is reduced.

That makes perfect sense. If he claims for 100 EURO and if infringer 1 pays 20, then you would expect that his claim against infringers 2 and 3 is limited to 80.

The Article, however, doesn't talk in monetary terms.

It talks about his claim being reduced relative to the settling infringer's share of the harm that the infringement has caused.

So, the yardstick or criteria by which the plaintiff's claim is being reduced is by reference to the settling infringer's share of the harm that the infringement has caused.

Now, what is the share of the harm and how does one in fact even approach assessing that?

Does one concentrate on the question of causation?

Is there causative link between the settling infringer's conduct and the plaintiff's claim?

Is the reduction to be determined solely by that? Does one have to look at relative responsibility?

Does a concept like blameworthiness come into account when determining that?



And in any event who does it?

The whole purpose of taking the action from the court or withdrawing the action from the court and engaging with this other forum is in fact to avoid the necessity of pursuing the action through the Court process.

It may be that the plaintiff will, external to the ADR or within its umbrella, agree with the infringer that it will be settled on a certain basis.

But unless that basis represents the settling infringer's share of the harm, there is going to be a problem down the line.

Does that mean in fact that the individual who is responsible for the consensual dispute negotiations or process, does that mean that he has to determine it?

And of course, that would make no sense in many respects.

It would involve the parties engaging in a process the reference to which was designed to avoid.

In any event, the plaintiff's damages are to be reduced in the manner of what I said.

And the plaintiff's, then, remaining claim is against the non-settling co-infringers only.

If you look then at this Article, it makes provision by saying that the non-settling infringers – I don't have a better phrase to shorten that, even though it's a mouthful every time I say it – but the non-settling infringers can't recover contribution for the remaining claim.

If one goes on, you will see that there is a saver for the plaintiff in that if the remaining infringers, the non-settling infringers, are not in a position to pay him full compensation he may in fact go back to the settling infringer to seek full compensation.

Don't forget that the whole purpose of this Directive is that a person who has been injured by an infringement is entitled to full compensation - actual loss, loss of profits and interest on that.

And the effectiveness of that underlying and core value of the Directive would be undermined very much if in fact by reason of a multiplicity of defendants the plaintiff could not do that.

So, he can in fact go back against the settling infringer and claim the balance of his compensation if the non-settling guys can't do it.

So, what's the incentive for the settling infringer to enter into, on a unilateral basis, negotiations and thus a settlement with the plaintiff?

There is a saver and the saver is that if it is made an express part of the resolution worked out between the plaintiff and the settling infringer then it is going to be binding, which means that the settling infringer is not thereafter further exposed to any remaining claim by the plaintiff.

Adam, during the afternoon presentation, spoke of something that is becoming and is a real life problem in the recovery of damages.



You will remember he said: “Well, where is the money? What entity has the money?”

And he gave examples, concrete examples where you have a parent company and a number of sibling companies and the sibling or one of the sibling company is truly at the forefront of the claim but that's stripped of its assets – it remains technically a legal entity and in being – it's stripped of its assets; the plaintiff has no recourse thus to anything other than an empty shell to try and recover the compensation.

Now, if the co-infringers who have not settled adopt some sort of strategy like that, then what can an injured plaintiff do?

There are numerous risks in settling with one co-infringer without trying to tie down your liability or your engagement with the co-infringers.

And, yes, the underlying purpose has been in our law for fifty, sixty, seventy years: if you can settle at all, you should settle. Finality of a claim is a public interest in litigation.

But if you do so in a multiplicity of defendants where the issues are complex, one has to be terribly careful in advising a plaintiff in what to do.

So, there is much work, I think, to be done on that in order to see how it works out in practice.

In theory it's fine, in print it's fine, at an abstract level it's fine, but we've got to be careful about it in practice.

The second topic I want to quickly comment upon is the Recommendation contained in that publication, the title of which you have in slide 45 – Collective Redress.

You will immediately observe that this is not part of the Directive and stands outside.

Its status is that of a Recommendation only and thus even as to its result it is not binding.

The reason why it was not included in the Directive is that the Commission found it impossible to reach a broad consensus of agreement between Member States as to what they individually would sign up to with regard to this question of collective redress.

Hence, the Commission Recommendation.

And hence the review in a number of years' time to see in fact whether as recommended here, each Member State has put in place roughly the same type of mechanism by which actions on a collective basis may be taken.

I wonder, if a survey was done throughout the Member States, what would be the results with regard to the existence of a mechanism by which, collectively, individuals can get together and sue an alleged wrongdoer or wrongdoers?

Does every state have some sort of process like that in existence? Is it called collective redress?

Is it called representative actions? Or does it have some other title?



Are there some states in fact where that is not permitted?

And indeed in Ireland we have not developed this practice whatsoever.

A representative action in my jurisdiction is quite different and it means that you have a group of plaintiffs all bound together by a particular action and they nominate one or two persons to represent them for the purpose of the action.

That is quite a different thing.

A collective redress mechanism is where it is possible that different individuals, disparate groups, can assemble together for the purpose of pursuing an action.

An immediate difficulty arises as to how in fact you are going to establish the criteria which will determine whether or not, in the given circumstances, it is appropriate to have regard to this collective redress.

How do you even go about it? Is it related to the subject matter?

In other words, if the infringer by certain conduct has caused harm to a multiplicity of people is that particular harm sufficient?

Is there a geographical limitation to it?

Is there any requirement on the individual in question not being able to pursue an action in their own right?

How otherwise are you able to determine whether the particular situation is suitable for movement through this process?

As you could imagine, a great deal of work has been done on this.

It has also been done also by the ELA, of which I am a member.

I suspect, we have produced a document running to about 200 pages – believe it or not – purely on collective redress, going through the various options, dealing with each individual matter that we could identify.

And one of the matters, of course, we were really concerned about is litigation culture; is the involvement of lawyers essentially for their own purpose, rather than as they are bound to, essentially in the interest of clients.

The process, for example, of what occurs in many states in America was frowned upon by virtually every one of our team.

Again, I don't know what the situation is in different Member States as to the question of fees.

Some Member States have what are known as contingency fees, others do not.

In Ireland we have no such thing as contingency fees.



By contingency fees, I mean that lawyers who have been successful in pursuing an action on behalf of a plaintiff are entitled to recoup out of then damages a certain percentage.

It simply does not exist in our jurisdiction.

Many cases in Ireland are taken on a pro-bono basis, i.e. solicitors and barristers undertake to represent a client and they will get paid only if they are successful in doing so.

But the payment will come from the defendant, will come from the person against whom they have got the verdict.

It will not in any way impinge upon the damages which the client may have.

Other countries, like England, have looked at this very actively for over a period of 20 years and from time to time have changed and have altered their process.

Other countries still now have very well-known insurance policies whereby a client on the instructions of his lawyers can in fact take out a policy of insurance to cover his costs in the event of a failure to succeed.

We were worried, very much so, and I think the Commission also very much so, that if we left the question of lawyers' fees to themselves, then actions may be commenced which were not justified to do; that actions may be prosecuted to an end conclusion which was not justified; and actions would not be settled on a reasonable basis which would have been in the best interest of the clients in question.

You shall see from recital 30, on that slide, number 36, that the Commission's view is that Member States should not permit contingency fees.

The reason simply being that if there is a contingency fee, the contingency fee increases with the amount of damages that a client may recover; lawyers can see at the end of it that that will increase the remuneration which they have.

That gives them an incentive to litigate and to keep the litigation going. That's against public policy and I think rightly so.

The Commission, in what it is asking the Member States to do, has turned its head against that.

Various safeguards are suggested with regard to preventing the risk of abuse which I have mentioned there.

So, consequently, this is really a work in progress.

The Commission had hoped, in fact, that it might be even be able to introduce a system, whereby Member States could opt into it or Member States could opt out of it, but nonetheless have in existence a template which could be productively looked at, engaged and operated if Member States saw fit to do so.



It hasn't worked out, it's a constant process, it's under review, and I will be very interested to know whether your individual Member States have in fact introduced such a system by whatever its name and in whatever terms.

There are five slides there and they go through this in a bit more detail, but in essence this is where we are at European level with regard to collective redress.

My final couple of remarks on collective redress are this.

In my view, it unquestionably is a process which can be very worthwhile and can serve litigants.

There are quite a number of litigants with little financial muscle, with great difficulties in accessing law and with even more difficulties in trying to get experts on board to mount an action for example in breach of 101 or 102.

Those people will be denied access and those people will not recover damages caused to them if in fact they have to pursue, individually, this action.

Subject to trying and preventing an abuse culture developing, subject to restrictions on what lawyers may try and extract from the damages recovered, then it is worthwhile to consider it.

It may also act as an incentive against cartellers and against players under 102 from continuing with the action, which otherwise they might.

So if there is a real substantial risk that the small ultimate consumer can group together with others and sue the wrongdoers or the infringers, that may have a deterrent effect which, of course, is one of the ambitions of merging both public and private enforcement.

So that is really all I want to say on those two points.

