PART IX: ALTERNATIVE DISPUTE RESOLUTION AND COLLECTIVE REDRESS

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Link: JustCompetition – Training Module – Part IX

I think what I would like to add refers to Recital 28 in the Recommendation

And in the way in which we have introduced collectivity in the United Kingdom, the CAT (Competition Appeal Tribunal) is the 'test bed' for it.

But we have two different sorts of proceedings that can occur: the first is a collective action which can be on an 'opt-out' basis so far as those domiciled in the United Kingdom are concerned, but which has to be on an 'opt-in' basis for those not domiciled in the United Kingdom.

Now, part of the recommendation is to deal with the fact that many of these things embrace more than one Member State and so, it is necessary to try to ensure that procedures do not prevent a single collective action taking place in a single forum that embraces more than one Member State.

And so, in the way in which we have implemented this, that is the way we've tried to do it: recognizing that the 'opt-out' option did not prevail in the thought of those writing the recommendation.

The second thing is to talk about the other form of proceeding that can take place with us and that is a collective settlement proceeding.

This is where, rather than starting an adversarial collective action with claimants and defendants, the parties come to the CAT to get the settlement certified.

Now, the way in which Recital 28 puts this is in terms of verification by the courts that there is appropriate protection of the interest and rights of all the parties.

And so, the task in a collective settlement is for the court to assess whether this is a settlement that meets those requirements.

So, we have those two different options.

Now, as Liam said, if parties choose to go for settlement during the process of investigation, then there is a sense in which that is to be encouraged.

Now, I do take the point about the fairness of fines.

We have had unfairness proceedings in front of us, of various sorts.

And then it will be interesting to see what would happen if there was an approved collective settlement, followed by a challenge to fines which vary by whether you were part into the collective settlement or not.

And I think the public policy reasons they may well be an argument: that to encourage collective settlements would mean that the possibility of a varying fine basis was a proper one.

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I don't want to say that that is what we would decide but I think there are public policy reasons for encouraging a collective settlement approach.

Could I ask just one question, if you don't mind?

Those fines that we're talking about in England, are they categorized as being criminal in nature?

Are they categorized as being civil in nature?

Or is there some hybrid classification for them?

That's a very good point and the answer is: it's a hybrid, in the following sense so far as the burden and standard of proof is concerned, the burden is settled by our Regulation 1/2003 and the burden is on the person who is claiming that there is an infringement to demonstrate that there is an infringement.

But the standard of proof, we have decided, is the civil balance of probabilities, not the criminal, beyond all reasonable doubt.

Having said that, two problems arise.

Problem (1) is that in the way in which we do these things, fines are normally levied on undertakings.

In other words, legal, not natural persons.

Whereas natural persons are subject to criminal sanctions and that gives rise to interesting issues in the witness box, where you have a natural person who may be liable to criminal sanctions and, therefore writes against self-incrimination.

There is also the question whether, in terms of fundamental rights, the penalties are such that in those terms, but not in terms of the standard of proof, these are criminal penalties.

And the reality is that you have to keep both these thoughts in mind, that you have to think about both your national approach to the nature of the proceedings that are going on and the approach that you need to take bearing in mind the Convention and the Charter and the scale of these penalties.

If I understood it correctly, basically, this double standard you have it in your national legislation or it is a double standard…?

Because we also have the same problem, but it is not from our legislation; we have a double standard because, you know, according to Regulation 1/2003 and according to our national legislation, they have an administrative nature and according to the European Court of Human Rights, they have a criminal nature; that's the double standard for us.

But, as I understood it, you have it in your national legislation.

It could be criminal in some aspects and civil according to your domestic law, or not?

It's worse than that.

And the reason why it's worse than that is: this is not a matter of legislation; it's a matter of common law.

And that's the difficulty, that we have on the one hand the common law and on the other hand we have the Convention and the Charter.

In Ireland, we would consider any fine of the character we are talking about to be essentially criminal in nature.

And thus, it would be subject to proportionality; it would have to reflect not only the nature of the infringement and its duration and its seriousness etc., but it would also have to reflect the individual position of certainly a natural person, if not, to some extent, a non-natural undertaking.

So, it becomes quite tricky for us, but we have determined that if there is a fine imposed or if a fine is imposed by one court and it comes back to another court, then both must be merged to see whether or not the end penalty imposed on an individual can be said to be proportionate.