PART VII: MANAGING A CLAIM IN COURT

Speaker: Liam McKechnie

Link: JustCompetition – Training Module – Part VII

This is really almost an examination in the obviousness.

What do you do when you're faced with a claim which, as I said, brings into play these provisions of the treaty and also their domestic equivalent?

I suspect that each of us in our own jurisdictions has rules of court – howsoever termed or phrased – by which cases are managed.

And, I have had a quick look in so far as I could identify what common features there might be of such a case-management scenario, using that phrase – case-management – in a very broad sense.

As I said, what follows in the sequence of slides, which you will see in a moment, is really an exercise step by step in trying to identify the essential features, which one should look out for when faced with a case.

There will, evidently, be differences between Member States, but by and large the essential features are here.

The first slide has the heading "Admission to List". The list I am referring to is a competition list.

Because, unless, in fact, competition cases are separately dealt with, it's going to be very difficult to identify what are the salient features of that case from other cases, which, all together, might go into a general list.

You've got to firstly be satisfied that the case is appropriate for admission to the competition list.

There are varying models by which that might be satisfied, but generally you have a qualifying criteria: are you quite satisfied that articles 101 and 102 are involved and are you quite satisfied that the domestic equivalent provisions are also involved.

It may be that the latter are unquestionably the case, but there might be a doubt as to whether or not inter-state trade is affected.

You will have to search that, even at a preliminary level, before being satisfied that the qualifying criteria has been met and thus admit the case to the list.

Secondly, you may have a monetary threshold.

In other words, not every case involving an alleged breach of competition law may be suitable to go in to the main trial court in your country.

It may be that under a certain level the case is more properly dealt with at a regional level or, indeed, elsewhere.

I think in our jurisdiction the claim has to be for a sum in excess of 1 million Euro before it meets the criteria.

That in itself can create difficulty. Of course, paper does not refuse ink.

Thus, if one says: "I want to claim x millions", that may not at all be realistic.

But remember, you are making this decision at the very early stage of the proceedings and, thus, you must rely on the parties, I think, to be genuine in putting forward evidence to meet that threshold.

You must be satisfied that all necessary parties have been served and, as you will see from the last indent, that the issues involve 101 and 102 and their domestic equivalent.

What happens if you have a case that is pleaded which involves issues of competition law, undoubtedly, but also involves other issues, for example, of a pure commercial nature?

There might be contractual issues, there might be IP issues, as well as competition issues.

In those circumstances, do you admit the case or do you not?

Do you try and separate the issues or do you, in fact, determine it by asking whether or not a predominant feature of the claim is competition-related, and, if so, bring all the issues together?

You might separate the issues; you might bring them all together; it's a question I think of efficiency, it's a question of, I think, how best can you deal with cases which undoubtedly have the requirement, both monetary-wise and issue-wise, to meet admission to the list.

The second thing you have got to do then is watch the pleadings.

Pleading is the exchange of documents, as you all know, and we have had considerable difficulty in trying to manage really the pleadings.

All of this involves a lot of time for the judge.

Unless, in fact, you have other officials designated by law who are in a position to effectively case-manage, and then, under your supervision.

You've got to know what is done and what is required to be done.

We have fairly strict rules dealing with the sequential steps.

We have time periods, which you must set for events and for various things to be done.

Those time limits, despite your every desire for a speedy resolution, must be realistic.

There is not much point in setting a time limit that from kick-off you realise cannot be met.

It in fact undermines the judge's ability to properly manage these cases.

Also, if these time limits are not met, what should happen?

You might say: "by the end of the 30th of January, the working day, various submissions might have to be in".

They're not in, but they are submitted to the registrar one week later.

We have a strict rule: the registrar cannot take them. The registrar cannot make a decision to extend time himself.

So, what happens?

The registrar rejects those papers. He informs the parties that the next step is a court application. It is listed. The parties come in.

If the excuses offered are exceptional and are unlikely to occur, they will be overlooked. If they are not, there will be consequences.

And the consequences are, of course, the parties will be reprimanded and there may well be a cost order made against them for non-compliance with these time limits.

One has to be careful, of course, in relation to this, because at first blush you might say "I will not accept this submission at all", but then, when you go on through the case, when you come to making a decision, you are in effect determining the matter without the benefit of submissions, which, of course, is pretty crucial.

The next thing you must do in this case-management process is to have a look at all interlocutory matters.

What I mean by interlocutory matters are the various steps necessary so that the case can proceed in an ordinarily manner up to the time of trial.

They might involve people seeking further particulars of the claim, on both the claimant side and the respondent side; they might involve some parties seeking permission to issue interrogatories.

Now, the phrase “interrogatories” is quite common in the common law world, I am just not certain if you are familiar with it in those terms, but probably you have in some other terms.

Interrogatories are a series of questions which can be phrased to elicit information about the case from the other party.

But the difference between interrogatories and particulars is that interrogatories are in sworn form.

In other words, a party decides on what questions they might like to ask, they have to phrase them in a negative way or as close to negative as possible, and then, the document is sworn and the reply is like-wise, must be sworn.

It is a practice that in former times elicited quite a lot of useful information.

In more modern times, given the availability of other tools by which the issues are flushed out, it has fallen into somewhat disuse, but it is still there.

If it is raised, you need to be conscious of it.

And, of course, the next dot will lead you into an area where you might exit rapidly or you might get bogged down for quite considerable time.

It deals with third parties, it deals with access to documents, and, in that, you may be faced with an application for third party discovery.

I don’t want to talk too much about documents, because that is going to be part of Diana’s presentation when she deals with evidence, but it will be a very live issue for any judge who is dealing with a case.

Is third party discovery required?

In other words, is either the claimant or the defendant seeking information from an individual who is not a party to the proceedings?

It may well be that that is the case. It may well be that all of you have individual rules by which that process can be conducted.

It is not necessary to join a third party as a party to the action, but of course such an individual must be put on notice where documents are sought from him, given an opportunity of either consenting or disputing any such order, and his reasonable costs must be paid by the seeking party if the application is successful.

When you are considering the question of documents, you must involve a fairly rigorous examination of the necessity for it.

You may have to ask yourself: “Are the documents central to any major or pivotal issue in the case?”

You may have to ask yourself: “Is the information, which is being sought, available from a party to the proceedings, rather than from a third party?”

You may again inquire whether that information is obtainable by some alternative means.

The mere fact that you want to prove a particular issue, the mere fact that documents might be in the possession of a third party, which can prove that, does not per se lead to an order for third party discovery.

If alternative evidence of the same value is equally available without going through that process, then you will not do so.

Of course particular care is required if access to the file of the NCA (National Competition Authority) or the Commission or public authorities is looked for.

We have had several seminars, several conferences, and there is a multiplicity of papers dealing with this question of documents, dealing with documents in particular that might form a part of a leniency programme or a leniency application and how the court should look at it.

Again, from going through these conferences and hearing colleagues from all sides, it is quite obvious that Adam’s (Adam Scott, speaker) jurisdiction and my jurisdiction would be much more at ease when dealing with this type of application, than, in fact, some civil law countries.

I recall our colleague on the Association (the Association of European Competition Law Judges) from Germany rather being horrified at the prospect that one could in any way access documents on a leniency programme, and genuinely being horrified in case the public interest in such a programme by the NCA (National Competition Authorities) and by the Commission will be undermined.

One answers by saying: “Well, what about the administration of justice, from the claimant’s point of view?

What about the full implementation of private actions on the enforcement side so as to complement the public matter of enforcement?”

Whatever argument is advanced, some civil law countries have had conceptual difficulties in understanding that there can be occasions when access to such documents is required.

We, of course, had a lot of cases, Pfleiderer in 2011, which caused quite a stir amongst many countries on the basis that the Court of Justice decided the application would have to be dealt with on a case by case basis, balancing the two conflicting public interests.

In any event, we have the Directive now and we have guidelines on those types of applications.

Please bear in mind the point I mentioned yesterday about the Directive.

If you are dealing with a domestic breach of competition law in conjunction with an effect on inter-state trade, then the Directive applies to both.

That could have a lot of significance when you discuss the question of access to documents.

The last point is that your examination of the necessity for making an order with regard to documents must be rigorous, but it cannot be oppressive or it cannot be disablingly restrictive.

And what I mean by that is: we are all familiar with the concept of proportionality and with the courts' unwillingness to breach that and order discovery of documents or access to files.

On the other hand, given the secrecy of a lot of cartel activity, given the manner in which steps are taken to conceive the activity and the documents in a great number of cases, it would be almost impossible for a person who alleges an infringement of such activity, unless there is a reasonable opportunity of getting access to their papers if such papers exist.

I recall one case, not very long ago, when an order of what we call discovery, that is an order for access to documents, had already been made covering a class or category of those which existed.

It had not been fully complied with.

Nobody realised this until maybe two days from the completion of the trial, when counsel on behalf of the party who was obliged to make discovery got up and said to me: "Judge, we have overlooked this series of documents."

And, in fact, they were probably three of the most important documents determining ultimately what the case was.

So, access from a claimant's point of view is critical, but of course you must be alive to proportionality, you must be alive to avoiding imposing oppressive standards or oppressive demands on a defendant.

When all of that is done, then you have – what I term – a mop-up review: Where are we now? Is everything that should be done, done on time?

And how do we now progress to get the case ready for trial and fix a date?

So, you might have the parties in, you might ask for clarifications in writing; one way or the other, you need to be satisfied as to what the issues of law and the issues of fact are.

A simple yardstick is: “Are you satisfied that those issues are clear, have been defined and are definite in nature, or are they still general and ambiguous?”

If they are general and ambiguous you should not go forward, because if you do, you will get into all sorts of difficulty as you move ahead.

It is really important, in so far as you can, to have what the issues are defined as early as possible.

And if you have to compel the parties to bring greater definition to their claim or greater definition to their defence, then please do so.

There is nothing more important and there is nothing more enlightening than when commencing a trial to know: 'I have four issues to concentrate on, these are what the four issues are, this is the area of law that will be applied.'

Then, you might want a list of the issues – a document referred to by Adam (Adam Scott, speaker) yesterday.

My experience is that unless you are very demanding on the parties, they will eventually come back and say: “I am sorry, we couldn’t agree on the list of issues; this is my list; this is the other party’s list.”

And it is an entirely useless exercise if that is the case.

Unquestionably, you want a list of witnesses and all of this should be exchanged – witness statements also – at that time.

A list of witnesses is important because each party should know who intends to call anybody else.

Of course, the party is not bound totally by that list.

They can withdraw witnesses, but only with explanation. They can add witnesses, again, but only with explanation.

Furthermore, the witness statement is an important document because for the first time each party is now going to be able to see, in writing, what the experts might say on their case and what comments they might give on the response.

Those witness statements sometimes can be used, can be admitted into evidence, and can be used as constituting a witness’s evidence in chief.

In other words, you call a witness into the witness stand. He takes the oath. The witness statement is put to him. It is admitted that that is his statement.

It is taken as read and then cross-examination occurs. It simply shortens the process.

Another possibility you might consider is whether or not the experts should meet.

Remember and remind them that their primary obligation is to the court and not to the party who has engaged them.

In that respect, if they are bona fide in complying with that obligation, there is no reason why they should not meet in a "without prejudice" situation and make even a report to the court which is not binding.

At least they could make a report setting out the issues that they agreed upon.

Perhaps it's more difficult with the issues which are still in contention or the issues which are marginal, but undoubtedly those that they agree upon should be set out in writing. And there is no reason why the court should not accept that.

There is no point in the experts meeting unless they meet on their own.

If they meet with lawyers it is a total waste of time because they will feel inhibited, they will look for instructions, they will act according to party lines.

That's not the purpose of it. So, they should meet in general, but as I say the result is not binding.

Then, the documentation is done. You know what the issues are. You know what witnesses are going to be called.

And now you must make a pivotal decision: What type of trial is best suited to efficiently dispose of the issues?

Again we touched upon this yesterday – if you can in fact identify a pivotal aspect of the case, which is likely to have a substantial effect on the entire action or even on a number of other important or major issues, you might decide to deal with that separately.

Sometimes those issues will require an evidential framework within which they must be decided.

If that is the case, then the facts, the assumptions or inferences must be agreed.

I have often had cases were the parties say: "Yes, I agree with what is pleaded on behalf of the claimant purely for the purposes of having this issue determined".

An order is made to determine it in this way, it comes on for hearing, and then there is a dispute not about the admission already made, but actually as to what is the meaning of what has been pleaded.

So it's not at all sufficient, if a factual matrix is required, it is not sufficient that the facts are simply agreed or that the assumptions are not in dispute.

You must know what both mean. And you must have an understanding as to what each party's belief is as to those.

There might be other cases where you don't need any facts and these are really delightful issues if you can identify them.

So, you have an issue of law that is not dependent on a factual matrix, its decision, one way or the other, will have a major impact on the running of the case: 'Go for it!'.

It unquestionably will be beneficial in the long run.

You might decide, no matter what the issues are, to split the trial.

You might say: "We will do an infringement first.

We will see whether or not the defendant has been dominant, without in fact pursuing, in any vigorous way, the consequences of that."

So you would leave over the question of damages, you would leave over the question of quantification, causation, remoteness… all of these things, until in fact you have made a decision on whether an infringement has been established or not.

You might embark upon a sequential trial, which I call a modular trial.

You might say that there are four discrete areas here, each, even though interlinked in the overall sense to the end result of the case, nonetheless, are separated by fact and law, which make them fairly ideal for the purposes of a modular trial.

One never knows how beneficial that is but frequently enough and if an issue is decided or two issues are decided sequentially, the parties may reassess their position throughout the entire case and may look afresh at the prospects of ending this litigation rather than continuing with it.

I have already touched on the last point.

Then, my final comment on this is you must, of course, if one can, be accommodating with regard to those who appear in front of you.

Sometimes it is difficult for either a claimant or the defendant to organise his witnesses, particularly if the case is scheduled to last for a long time.

Equally so with lawyers, but, unfortunately, one cannot succumb to the diary of any particular lawyer, as otherwise they will become the masters of your list rather than yourself.

You've got to watch your own commitments into the future and you might decide whether or not it would be worthwhile to have the evidence and the submissions recorded, probably in digital form – voice only will be sufficient, but it would give you an immediate recall and the ability to verify any contentious fact that might be otherwise alleged.

Now, we are almost now at the situation where the parties will come in to court and say: "We are ready to go on and we will start the action."

You want to know how long will it take and how are the parties going to divide the time that you are going to allocate to them.

I am not quite sure whether you impose time limits at a court of trial or at appellate level with regard to an action like this.

And I am not sure if you are strict with regard to the overall time limit or if the case runs on then unfortunately it runs on.

Previous experience has informed us that the more time you give a party, it's like nature, they will take it.

They will never be avoiding it, they will run and run and run.

So, some time limit is required, but again it must be realistic.

On the other hand, some appellate courts, like the US Supreme Court, not quite sure about the Supreme Court of the UK, will in fact cut you off mid-sentence if the clock has stopped.

If you've got 30 minutes to make a submission and if you are about to come to the crucial point when the second hand meets that deadline, you are gone.

That's the end of it.

We, in Ireland, have a practice somewhere in between, but in recent times we are moving close enough to what they do in the US Supreme Court.

And I am not altogether satisfied with it, I have to say.

This equally applies with the European Court of Justice; of course, you have very strict and narrow time limits.

Unless one is careful, you might end up with a situation where you get no benefit – I am really talking about appellate level rather than trial level now – you might get no benefit of having any oral presentation.

And I have always found that there are certain issues, no matter how well expressed in paper, that require elaboration via a verbal submission.

The trick, I think, is to try and identify the crucial ones, to try and work them out within the documentation you have, and confine the questioning to the key points that are involved.

But it is important at appellate level to be careful about this, it is less so at trial level because you must get the facts.

So, you have three days for this case, or you have three weeks – whatever the case may be.

What time is going to be allocated to the claimant and what time is going to be allocated to the defendant?

You might, in fact, consider looking at the time with regard to category of witnesses or with regard to issues.

This will all be very fact-specific. It depends on the nature of the case.

It depends on what the issues are. How complex? Do they require specialised evidence? Can that be agreed, can it not? Etc.

Just be careful of direct examination.

That can be avoided to a large extent if the witness statements have been properly prepared, if they have been exchanged, and if they are clear and definite.

Those statements can be taken, in principle, as constituting the direct examination of the evidence in question and you can go straight into cross-examination.

Cross-examination has to be pertinent.

Essentially, it is for the purpose of searching out the evidence given by the expert on the issue which he has given such evidence on, and then you have re-examination.

So, all of these points have been agreed, you might then say to the parties: “Look, we are pretty much now ready for kick-off, two-three days, unless anything emerges, and we are going to make a final order in this case.”

The final order will inevitably involve closing submissions; many of you might like to leave that until the factual side of the case has been completed.

We have a practice of acquiring written submissions in any case of importance.

They are augmented by oral presentation, but once again time limits are fairly critical to be careful of, as otherwise, submissions can tend to be very, very long.

If you are sufficiently confident of what your decision is and of being able to deliver it on time, then, you might indicate to the parties that it will be given on a [blank] day of [blank]. But be careful!

It is by far more preferable not to commit yourself unless, in fact, you are quite certain that you are capable of meeting that commitment.

So, these are just some thoughts as to how you might go about it. It's very much a question of being case-specific.

You will have issues dealing with aspects of 101 and 102. You will have to try and ring-fence those.

If the Directive comes into play, as it undoubtedly would, with regard to the question of quantifying damages, the parties will need to be thoroughly familiar with what the Directive says, with what it imposes or requires, and what any relevant case-law might be.

As otherwise, people, in fact, will not be able to present their case or deliver their response to their case within the necessary parallel lines that are required for a proper case management.

As I say, that's very much just a very, very generalised comment on perhaps how we will manage a case.

The second aspect to this, of necessity, touches upon Regulation 1/2003 – the Interactions with other bodies: the Commission, NCAs (national competition authorities) and other courts.

You will all now be familiar with Regulation 1/2003. You will all be familiar with the necessity for its enactment in the first place.

It was found at the time that Regulation 17/1962 did not really meet the requirements of effective administration, on the one hand, and of proper functioning, on the other, as one went through the 60s, 70s and 80s.

It happened essentially because the Commission was the only body who was able to deal with 102(3) or 101(3) applications.

It became engulfed with applications for exemptions beforehand and it found that its enforcement ability was being severally curtailed.

Consequently, some other method had to be devised by which the enforcement on both public and private side could be more effective and streamlined, and, hence, we had this Regulation in 2003.

You will see there – as I say – a slide dealing with "Why it Happened?".

I have touched those points.

There is one point there, indent number 3, that's worth mentioning even though it has been said on previous occasions.

The Principle of Subsidiarity is a very important principle of EU law and it applies to competition matters, needless to say, as much as it does elsewhere.

By giving NCAs (National Competition Authorities) and national courts power to enforce 101 and 102, and in particular NCAs and national courts to make a decision on 101(3), then, the Commission was implementing this principle of subsidiarity in a very powerful way that could be seen nationally by all courts.

And that, indeed, was to be welcomed and is to be welcomed, and has had an important bearing in the subsequent relationship between NCAs (National Competition Authorities), national courts and the Commission.

You will all be familiar with the doctrine of acte clair.

That is a decision by the European Court of Justice back, I think, in 1992, in which it set out five principles which would determine a national court's position on referring any question to the Court.

Let's deal solely with a final court of appeal.

It is obligatory in that court to seek the opinion of the Court of Justice if, in fact, a decision from the European Court is necessary to deal with the issue before it.

There are five reasons as to why you may not have to seek the opinion of the ECJ (European Court of Justice).

One of them is that if the issue in question has no bearing on the case in front of you – that is very obvious; one, if the issue has already been determined by well established law – that is very obvious; thirdly, if you are satisfied yourselves that you can make a decision on the issue then, you may not require to refer.

However, before you can reach that decision, you must also be satisfied that every other appellate court in the other 27 Member States of the EU would likewise reach exactly the same decision.

That in fact is an impossibility, if for no reason other than the language barriers, or the language of each individual country and your own national language.

How would it be possible for a court in Dublin to say with confidence that Latvia, Lithuania, and any other country that's represented here, will come to the same conclusion on this issue as I am about to come to? Impossible.

So, it's a very clever decision in that it has been portrayed and it has been imaged as an exercise in subsidiarity.

In truth, it's an exercise in retaining very substantial powers for the Court of Justice without that court so saying.

In any event, since it is there, you got to be very careful with it when it crosses your path.

But that's why we have 101, or rather that's why we have Regulation 1 of 2003.

Now, the players who feature greatly under that regulation – you will see, obviously, the Commission, you will see, obviously, National Competition Authorities.

But the Regulation created for the first time what's known as 'the network'. And that's a network of competition authorities.

They include the individual NCA (National Competition Authorities) of each Member States, as well as the Commission itself.

And, whilst it's beyond this paper to go into the Regulation in any substantive way, you will see if you read though it that it provides for the exchange of information at a very high level of intensity between each and collectively all NCAs (National Competition Authorities), as well as the Commission.

You have then of course the relationship between the Commission and the National Courts.

We have had recommendations and guidelines from the Commission as to how that interaction can best be satisfied.

You have the relationship between National Courts and NCAs (National Competition Authorities) and the Network.

There is a lively tension, certainly, in the debate between the type of reaction that might, or the type of engagement that might occur between a national court and a NCA (National Competition Authority).

And the practice differs and differs very considerably from one Member States to another.

In Ireland, the National Competition Authority is circumscribed by our constitution in the manner I indicated yesterday and I will not go back on that.

But it's important to say the following in the context of whether it is worthwhile to have a more fulsome engagement with them or whether it is better that the engagement should stand some distance apart, one from the other.

The National Competition Authority can enforce any investigation they might have conducted via a court process.

So thus, it can become a claimant before the High Court on any issue arising from an investigation undertaken by them.

It can also sue in its own right, seeking injunctions or declarations or subsidiary orders.

It cannot by its very nature seek damages, but it can in fact and has successfully sought other forms of relief from our Court.

So, it can very much be a player in the sense of being a party to an action before the courts.

In small jurisdictions, if we have one, or two, or three judges dealing primarily with competition law, that would be it.

Certainly in Ireland, you might have two, maybe three, but no more.

And thus, at various conferences, at various seminars, book launches and so forth, we will tend to meet with members of the Competition Authority purely in that informal way.

When the Competition Authority is then a party to an action, it comes before the same judges.

And parties against whom such actions may be taken would not at all commend us if we got any closer to NCAs.

And that is very understandable in the context of the European Convention on Human Rights.

It is very understandable for the appearance of justice and for the appearance of judicial independence.

It does suffer from deficits, because undoubtedly the overall enforcement of competition law would be better enhanced if the relationship between the national court and the NCA was a bit more intense, I think, at the Irish level.

There has been no outcry that that should be so.

Nobody has brought it into the public domain that either side might engage even in an introductory examination of that, so probably we will leave it where it is.

It is very much a matter for each jurisdiction, very much a matter for how comfortable you feel you are with such an engagement.

Recently, a delegation of us went down to Karlsruhe, to visit the Supreme Constitutional Court of Germany.

Germany has a network of courts, a network of supreme courts, and a network of courts in different sectors, which is a bit intriguing, but it functions quite well.

The Constitutional Court, as I say, the Supreme Constitutional Court is in Karlsruhe. "Why do you sit here? Why don't you sit in Bonn? Why don't you sit in Frankfurt?"

Interesting enough, the president and the vice-president – the very first and immediate answer was – "we had to keep a geographical distance from the politicians".

Even – it is entirely true – for a court that's very well established, for a court that has its own budget, the budget has to go through parliament, but they have never been asked a question on it.

I don't think they have ever been asked to sit when the estimates are going through parliament.

They are never queried, they have state of the art buildings etc. etc. etc.

In fact, their practice is if a constitutional challenge is taken.

For example, to some aspect of the European Stability Mechanism whereby some countries, like my own, who got into difficulty in this crisis, required a bailout.

They will have a practice of sitting, of requiring the relevant minister to come before them and to explain what does this really mean.

What do you propose to do? Do you have any views if we say no to this? How can you treat it? Etc.

So they have that engagement, but their overriding concern in having that distance between the centres of power and where they sit is this distance and the perception of distance from the politicians who might influence them. I thought that was quite interesting.

So, in terms of the relationship between national courts and the NCAs (National Competition Authorities), just, probably is best to be worked out on case by case basis.

We have of course then the relationship between the ECJ (European Court of Justice), the General Court and the national courts.

This engagement might be quite central to us and quite helpful to us.

It works at a formal level and at an informal level. What do I mean by that?

The national court always has the right to seek an opinion from the Court of Justice, of course, when it requires to do so.

Any court, including any tribunal, at any level, has that authority.

It's not simply vested in the ultimate appellate court. The rules applying to the latter are slightly different, in that there is no appeal from it.

So that's the formal level of engagement.

It can seek the opinion, it can go back and seek clarification from the Court of Justice, if its opinion is unclear.

May I say, the Court of Justice doesn't readily like a reengagement of its decision, but it has happened on a number of occasions.

There are also engagements at a less formal level, in the sense that there are various papers that are exchanged at an international level and at a national level.

More so, on several occasions, if the court, if the ECJ, wishes to be helpful it has the ability of rephrasing the questions asked of it by a National Court, if it thinks that by rephrasing it can be more beneficial to the application of the principle in question.

That's the Network: the NCA of each Member States and the Commission, 28 in all, power to each National Competition Authority to do 101(3); it doesn't apply to mergers or state aid.

It's important to realise that under Regulation, or rather under Article 3 of Regulation 1/2003, the National Court must apply 101, 102, even in the context of a domestic dispute, if interstate trade may be affected.

This is just a graphic picture of the overall structure. There you have DG's group.

You have the ECN's plenary sessions, the working groups underneath it: cartels, competition, cooperation, forensic IT etc.

You have mergers on the far side and those sub-groups.We don't really have to go into those.

What I really want to say about Regulation 1/2003 deals with again this question of communication between the parties and brings us on to Article 15.

Article 15 is quite an interesting provision dealing with the engagement of NCA/Commission with National Courts.

The National Court under that article can request from the Commission any documents which they might have or to furnish any information which might be of assistance in proceedings before the court.

That has raised a number of practical difficulties for national courts, many of them being uncertain as to when in fact they should seek such information or request such documents.

It's very much a question of fine tuning.

There is not much point in seeking information or the opinion of the Commission unless the case has been established to a certain level.

You must really know what the factual background is. You must really know what the evidential scaffolding is.

You must really know what issues of law arise and then you must identify, of those issues, what items would benefit from the view of the Commission.

If you continue until the case is completed, it might be too late to seek the opinion of the Commission.

If you look for it too early, it might mean that when you get it, when you continue with the case, the information is irrelevant as the trial proceeds.

Secondly, you might have to consider what type of documentation you submit to the Commission for this purpose.

Frequently, we have been told, they get the entire file; they will just not open the entire file.

And perhaps you can see why there could be inundated with simply a photocopy mob of paper without any pure guidance on it.

But it is a feature of cooperation that's available.

The Commission keeps on encouraging national courts to seek their opinion.

It hasn't been availed of, I have to say, to any great extent up to now, but it is there and if it can be of any use to you in a domestic case involving 101 or 102, please – of course – you must do so.

Furthermore, what drives that are concepts that we were speaking about yesterday: uniformity, consistency in interpretation and in application of Union law throughout the Union.

This is just a slide dealing with the same line of communication. On this occasion, you can ask the Commission for its opinion, which, if given, obviously will not be binding but will have influential consequences for your decision.

I'm just developing that a little more. The opinion can be sought in a wide range of issues: market definition, qualification of a practice of abuse, applicability of 101(3) to agreements etc.

Interestingly enough that third dot gives you the information.

From 2004, for 10 years, only 28 such opinions have been sought and the majority have issued from courts of first instance, rather than appellate courts.

We have been told on several occasions that the Commission is anxious to develop this practice if at all it can do so.

The other aspect of article 15(3), which you may have come across, is the Amicus Curiae aspect of it.

Again, it has been used very infrequently.

I identified 15 occasions, 9 Member States, including France, Belgium, Slovakia etc. who have made intervention of it.

My own experience of the Amicus Curiae provision is a bit uncertain, I have to say.

Frequently, the Commission might engage counsel to come in and say we would like to make a submission in this case.

Largely, they would have been prompted to do so by the NCA (National Competition Authority) and that immediately raises concerns about the impartiality of the NCA and the Commission, certainly at a minute level; above that, at a general level, of course not.

It becomes particularly acute if the NCA is itself a party to the proceedings.

One is immediately suspicious of any involvement by the Commission as an Amicus Curiae, if in fact the NCA is a party.

Almost invariably, and as you would expect because of its obligations under the Regulation, the position of both the Commission and the NCA (National Competition Authority) is identical. They have the same view and they support each other.

A defendant in those circumstances is extremely critical of the court placing any great reliance on that opinion.

There was an issue, which I came across, about what the Commission wishes to do with any submission they might make as Amicus Curiae.

In one case, which is reported, after the Commission was given permission to make a submission, after it have made a submission, but before the submission was open in court, the parties came in and said that they settled the case.

Nonetheless, the Commission wished to publish on their website the opinion which they proposed tendering to the Court and they sought from the Court its permission to do that.

The Court had no control of course over what the Commission might or might not put on their website, but the latter were concerned lest it should be thought they might be in contempt or otherwise find displeasure or disfavour in the court.

Eventually that matter was never resolved but strangely some politician in the European Parliament put down a question and asked for sight of the opinion which the Commission proposed to give in the case that had been settled and that had never been open before the court.

I just don't know where that prompting came from but the opinion got into the public domain in any event.

That's the other aspect of article 15(3), which involves what they can make submissions on, what sectors they can be usefully asked to contribute to etc.

You will see a curious provision in 15(2), which imposes an obligation on the Member States to give copies of the judgments to the Commission on the application of 101 and 102.

They have received 380 to date, mostly from those countries.

Sweden, which is a country of interest to me, doesn't like this provision very much.

I don't think it has ever engaged with it, despite the fact the Commission has taken them to the European Court dealing with this matter.

Regulation 1 of 2003: just point out that slide 47 relates to contact and communication at an informal level.

During the course of various meetings, it has been pointed out time and time again that there is this method by which people meet, they develop personal friendships, they are members of professions and contributors to academic publications, and in that way they exchange useful information about their work.

The third aspect of what I should say something very briefly about concerns jurisdiction and staying proceedings on competition side.

The first attempt at internationalising this question of jurisdiction came about with the publication of the Brussels Convention in 1968 on the recognition and enforcement of judgments in civil and commercial matters.

As we have moved almost 50 years from that, things have changed quite dramatically as you can imagine.

Businesses have become more mobile. Companies move with greater frequency and speed than ever.

We have electronic communications permitting the exchange of information, the doing of business in multiple jurisdictions while sitting on one desk.

We have such an interaction across the entire business world, whereby individual elements of a transaction are conducted, perhaps in several different jurisdictions, that if there is a breakdown it becomes frequently a very difficult matter to identify where to bring the proceedings.

So there was an update on the convention in 2001, with Regulation 44/2001, and even since then, in the 10 years which followed, it was realised that the 2001 Regulation required improvements in terms of clarity, in terms of advising courts when they had jurisdiction, when they should assess if they had a jurisdiction, when they should stay proceedings when jurisdiction was vested or attempted to be vested in other cases, and when it was desirable that they would do so.

Consequently, we have what is referred to as Brussels Recast or Brussels 2 Regulation 2012.

That Regulation evidently applies to competition matters.

It is at the level of principle clear cut as to its scope. It covers civil and commercial matters.

We know it doesn't cover several other types of actions, including, for our purpose, the only one of relevance might be arbitration.

It's of interest to note that there are special provisions dealing with non-mainland territories of Member States, France and Spain in particular, and they are governed by Articles 355 and 349 TFEU.

The main provision is that you sue the defendant where he is domiciled and that is the overriding requirement of the Brussels Regulation and has been the overriding requirement even of the Convention of '68, certainly the Regulation 44 /2001, and definitely the Recast Regulation in 2012.

If matters stay there, then a national judge would not have great difficulty in applying it.

But, of course, that's too simple as it is stated at the level of generality and as it does not deal with many situations which in practice arise.

Thus, we have special jurisdiction in Articles 7-9.

I am disregarding consumer contracts. I am disregarding insurances.

I am disregarding, largely, agency and other areas which are specifically and separately dealt with in Brussels 2.

The second insert there deals with this question of contract.

And as you know we have the Rome Convention dealing with the obligation of the place of the performance in question.

Contract is unlikely, I think, to feature very prominently in any action that might come before you.

But if it is, nonetheless, you must just be conscious of the possibility that a court has jurisdiction outside the domiciliary state of the defendant to embark upon a contractual dispute where the place of the performance of the obligation in question is to take place.

Far more likely is the next insert dealing with tort, delict or such other similarly understood concepts in law.

And that is where the harmful event occurred or may occur.

Again, at the level of principle, that's simple enough to understand.

It can give rise to tremendous complications in practice and competition law is a very good example of a sector where it can arise.

You can have a myriad of different entities which are branches of the same tree with regard to any particular undertaking.

You can have a parent company. You can have sister subsidiaries. You can have brothers. You can have cousins.

You can have a whole host of different legal entities, juristic persons, eventually leading from the very top tier of ownership down to the very base level at which the infringement may have taken place with consent, knowledge, acquiescence, and or indeed even at the prompting of several of its more influential shareholders or controllers above the line.

That equally applies on the defendant side.

You, of course, have multistate business dealings between various parties.

This can be done probably electronically.

You may in fact have the infringement as such taking place in one jurisdiction; it may have a knock-on effect in several other jurisdictions.

What ultimately is meant by 'harmful event' may have to be considered.

You might be faced with really a hearing within a hearing in order to determine precisely who or what has jurisdiction in relation to a competition case.

It will not always be that difficult, but it might.

In the vast majority of cases, you should be able to identify from the pleadings, certainly from the discussion with the parties,

as to what harmful event they have identified and that they intend to rely upon as constituting their cause of action.

So that's the special jurisdiction.

It is an abrogation of the main principle contained in the previous Article, Article 4: Sue in the domicile of where the defendant resides.

Interestingly enough, if you look at the last indent, disputes regarding branch agencies, where these are established, they may well come into play in a competition case.

Then we have exclusive jurisdiction in a variety of actions.

The first indent really is put in for informative purposes only.

The second indent deals with dissolution and reorganisation of companies.

And the third you might indeed come across as being quite complementary to a competition action: an action involving an infringement of IP rights, whether patents or trademarks.

That jurisdiction is exclusive.

In other words, neither Article 4 nor the special jurisdiction provision in Articles 7-9 come into play if Article 24 applies.

Where it applies that is the court in which the proceedings must commence, must continue and reach their finality.

There is always the option of the parties agreeing on what jurisdiction should cover any disputes that might arise between their dealings.

This will only arise where agreements have been entered into; they will be enforceable unless the chosen jurisdiction itself declares that such agreements are null and void.

So, these are the jurisdiction provisions simply identified at a broad and general level that you must be conscious of if such an issue should arise before you.

It may be that the issue turns itself into an argument as to whether or not the proceedings in your court should be stayed, on the basis that some other Member State is already seized of the cause of action.

And if you so find you may well be forced to decline jurisdiction either by permanently staying the proceedings or at least staying them until the other court has accepted jurisdiction or has declined jurisdiction.

You will see I have given examples then of where you will stay the proceedings and if those circumstances should arise in a case before you and it is not necessary to really do them in any depth.

So, consequently, you've got to be careful of that regulation if any major issue as to jurisdiction arise before you or if a part is urging you to decline jurisdiction on the basis that some other Member State is already seized of the course of action.

And, finally, I simply refer to the Rome Regulation dealing with the applicable law to contractual obligations; if in the event of that becoming an issue you will be conscious of it.

So, just in broad terms, this is a kind of generalised presentation.

It covers how you in fact might manage a case before you.

It just touches on the players that might come into play, essentially governed by regulation 1/2003.

And it also alerts you to what you have to be careful about if a question of jurisdiction should arise, or if you are asked to stay proceedings on the basis of you not having jurisdiction.

Thank you very much.