PART VI: THE CLAIM (1)

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Link: JustCompetition – Training Module – Part VI

Ladies and gentlemen, my name is Liam McKechnie, as Adam has told you. I come from Ireland and I sit as a judge in Dublin and, for my sins, I have been a judge for 15 years – the first 10 years in our major trial court, called the High Court, and for the past five years in our Supreme Court.

And again, as Adam has said, Ireland is obviously a small country, but it's a small common law country essentially, though heavily influenced now by many regulations and other forms of legislative measures that emanate from Brussels and the surrounds.

My introduction to Competition Law, believe it or not, came a bit late in the day, as it did with European Law in general.

When I was going to college, European Law was not on the agenda at all.

In fact, I was a barrister practicing in Dublin and a lot of barristers stood fastly against getting involved in any way, to any extent, in European Law of any dimension.

That was in 1969-1970-71. In any event, I travelled through practice, doing a lot of commercial stuff and so forth and I eventually decided – I became a judge in 2000 – and I eventually decided in 2003 that my deficit with regard to European Law, and in particular Competition Law, was such that I could not let it continue.

So, I decided to go back to University College Dublin and do a Master's Degree in European Law, concentrating on Competition Law.

That created a bit of a difficulty for a full-time judge who didn't want the President of his Court or anyone else for that matter to know what I was doing.

So, I enlisted the aid of my daughter who had then qualified as a barrister but who had not decided if she was going to practice law.

We both did a full-time, full one year course together, taking exactly the same subjects, substituting for each other when we could not get to a lecture and thereafter crossing notes.

So, in that way, I had to sit at an exam at the end of it which is the most frightening prospect for any individual who had not done so or who had not engaged in that process for about 30 years previously.

Be that as it may, I did, and then I became the Competition Law Judge for the High Court in 2004, a position I held until I went to the Supreme Court in 2010.

All claims, both civil and criminal, went through our major trial court, the High Court, and thus, all claims came through me.

Interestingly enough, we might have had maybe two or three claims a year.

In the latter half of the period I mentioned, we had one or two follow-on actions.

Some of the stand-alone actions did go to judgment and did go to appeal but very few of them.

Some of the follow-on actions, likewise, but significantly most of them settled.

Thus, the experience which I got over that 6-7 year period, whilst invaluable, nonetheless, it is likely to fade into insignificance if you compare it with the kind of experience that Adam would have in any given 12-month period in the tribunal in London.

Be that as it may, we have a serious interest in Competition Law, we are kind of an active, without being overly active, litigious country, and we have lots of judicial people who held posts either in the European Court of Justice or the Court of First Instance – John Cook who was a colleague of ours, also on the Association, in fact he was there for 12 or 13 years, and the former Chief of Justice was there, and several others, including an Advocate General.

So, there is kind of a broad background of an introduction for me coming to Competition Law.

The Supreme Court is our final appellate court and we deal with everything.

Any point of law that can be phrased by a qualified lawyer, can find its way to us from a decision of the High Court.

Because of the variety of cases that come up to us, interestingly enough, very few competition cases have emerged for appellate court jurisdiction in the past 5 years.

Thus, one has concentrated quite heavily on conferences, on seminars, on both participating and on filling roles that you have today.

So, I am fairly familiar with the period that led up to the adoption of this Directive and what went behind it.

In the presentation that I am about to give, I have given some the background in Part A of the slides. It's not necessary to go into any great depth.

I will refer to one or two, just to add a bit, a slight bit more flavor to what Adam gave you of the background.

But it's a rather intriguing process which had to be gone through before the Directive was, in fact, published in 2014.

If you look at that slide, its heading is “Why did it happened”. Accurately, it should be ‘Why did it have to happen?’, but it had to happen on the civil side.

From early stages, the authorities in question realized that public enforcement just simply wasn’t sufficient in itself, in order to enhance the proper functioning of the internal market and to avoid any unnecessary distortion in that.

It was thus essential that that public enforcement would be supported in a private way.

That process, of course, had within it the intrinsic value that individuals who suffered harm, or who suffered loss, as we would call it, could in fact institute proceedings themselves and could get compensation.

Neither the Competition Authority nor the Commission is empowered to compensate any individual or groups of individuals who may have suffered harm because of some infringement of 101 or 102.

In addition, of course, if carteliers and dominant players realized that in their own national territories people could invoke private actions then, that might have some sort of deterrent effect on them.

That process of thinking certainly enhanced itself in an accelerated way with the passing of Regulation 01/2003.

Prior to then, of course, we had the Commission probably being the sole investigator at European level with regard to such infringements.

And while success undoubtedly followed in what could be described as several nuclear cases, nonetheless, because of limited resources and because of the ability and finance of carteliers, it became increasingly more difficult really to have any worthwhile and effective overall enforcement of the competition rules, thereby interfering with the internal market, with its proper and efficient functioning and, of course, in the process distorting competition.

I’m not going to go through many of these, but I do want to highlight a couple of points as to the background which gave rise to the necessity for passing this Directive.

There were many obstacles in the way of private individuals who might institute proceedings, in Ireland and, I suspect, in many of your countries.

There is one little oddity about Ireland which is this. I’m sure there must be many, but the one I am speaking about is on the Competition side.

Our National Competition Authority does not have a rule that mirror-images the European Commission, at the order level.

That’s because under our Constitution, only judges duly appointed can administer justice in courts established by law.

So, whilst the National Competition Authority can investigate complaints and can issue recommendations, it cannot, in fact, come to any definitive finding, either on an infringement; it cannot impose any fine or other sanction; it cannot impose any remedial requirements such as desisting from certain practices or, for example, off-loading certain subsidiaries – it cannot do any of those, it must go to the Court to do so.

So, in that respect, Ireland and I think there is Denmark, I'm not quite sure – there is one other nation, there is another member of the EU which has a similar situation to us.

Consequently, our domestic competition law also designates the Courts at every level as being a National Competition Authority.

This, in theory, should create a problem because there are certain obligations imposed on National Competition Authorities in its reporting structure to the European Commission.

And, in theory, since we are also a National Competition Authority, one would expect that we would have to follow the same reporting regime, one would expect we might have to follow the same process of getting permission etc.

In truth, we don't. And, in truth, the Commission recognizes that there would be a problem with regards to judicial independence if that was taken too far.

So, we, in effect, operate in the same way as if we were not designated as a National Competition Authority.

The difficulties before this Directive, and indeed which will continue thereafter, for some time at least, which arose from trying to take a civil action, were multiple.

One, and very obvious, was the nature of the infringer and the nature of the infringement.

By their very nature, carteliers tend to be secretive, they tend to conceal a great deal even from the sophisticated eye, even from those who go in scientifically and drill into the information available to see what the result might be.

They are also, of course, promoted, on occasions, by lots of money, sophisticated access to top-class lawyers etc.

So, it can be terribly difficult to break that barrier.

Secondly, even though Common Law countries never suffered from the same inhibitions as a lot of Civil Law countries did with regard to access to documents – that, even in a fairly liberal regime, as we have in Ireland, was also quite difficult on behalf of the claimant.

In Ireland, the Courts, if there was a claim of privilege, if there was a claim of confidentiality raised with regards to any document, and if it was contested, the Courts take it upon themselves to look and examine the documents.

They would then balance the requirement of the public interest in maintaining that confidentiality or privilege – the public interest – against the competing public interest in the administration of justice – which inevitably means that, of course, the more documentation is available to a judge, the more likely it is that the resulting decision would be better than if such documentation was not.

That has been in existence since 1972 – we, in that year, by way of judicial decision, abolished any privilege that would attach to the executive by reason of the executives claiming such privilege per se.

Prior to then, as it was the situation in the UK, if a minister swore an affidavit to the effect that this was a document within the executive, in respect to which he wanted privilege, then ministerial privilege would attach to it per se.

We did not follow that practice in 1972, and ever since, we had this balancing exercise that I have mentioned.

Consequently, this new regime with regards to access to documents fits in very comfortably with us.

We really have no difficulty at the level of principle, either by judicial control or practitioners in their assessment of it, in coming to a decision on documents.

Even so and even given that liberal regime, you had to prove – at least – that there was a plausibility of such documents existing. And, of course, because of its nature, it was very difficult to do so.

Thirdly, there was no question of any collective redress system, I think, throughout Europe, thereby making it very difficult for small consumers, who may in fact have suffered loss, making it very difficult for them, individually, to be in a position to demand an action.

Fourthly, there were no rules really on the passing off defence and of real significance, I think, to judges and to intended claimants, it was a difficulty in quantifying harm – how do you go about it?

So, all of these difficulties were in play.

They were supported by a belief that the interaction between public and private was the best way to thoroughly enforce the competition rules.

And hence, steps were commenced to be taken at different levels which, in fact, were the forerunners to this Directive.

If I just take it out to Slide 8, and I won't read it for you, but this is the influence of the ECJ on what ultimately transpired in 2014.

In fact, Adam mentioned a decade and, of course, he is right because if you look at the second heading there – the Commission's Commitment – with the Ashurst report in 2004, that is a decade.

But if you go back, in fact, to BRT v. Sabam, in 1974, that really was the kick, the first real decision whereby the seeds for Courage v. Crehan were eventually laid.

So, you have influence of the ECJ, you have influence of the Commission, you have reforms at various national levels, all being supported by what is undoubtedly the most major significant, the most major decision in this area, at that time, Courage v. Crehan – you are familiar with it, so I won't even attempt to summarize it for you.

This is really a graphic presentation of the various inputs that I've mentioned.

And, of course, after Courage v. Crehan, we had the Green Paper and the White Paper, then we had more activity by the ECJ, Manfredi, we had Pfleiderer, Otis, Donau Chemie, Kone and hence, the Directive.

I was about to say hence the long awaited Directive, but that would be unfair unquestionably.

The Commission and the various Directive generals, and commissioners, for several years, were quite keen to put some concrete proposal on the table, which would, at least throughout the European Union, approximate how various National Authorities and national judges approach this problem.

And it is a difficult and trying area, they put a great deal of work into it.

And it is to their credit, in fact, that this Directive was published in 2014.

These are the main ingredients of it, these are some of the main changes: easier access to evidence; benefit of finding infringement decision by NCA (National Competition Authorities); limitation periods – I will come back to in a moment because there can be some striking oddities perhaps emerging from the full payout; passing on defence – critically important to know not only in substance what it is but how, in fact, it can operate in practice – thus, the infusion of presumptions which have helped a great deal along the line; full compensation; just before I leave that, cartels; joint and several liability, which is a concept I am not sure if you are really familiar with in domestic law or not.

We had a conference in London sometime last year on this and many people were unclear as to, in fact, how this would work in practice – that if you had a claimant suing three or four defendants and if the claimant decided to settle with one defendant or one defendant decided to settle with the claimant, what would be the position vis-à-vis the claimant and the remaining defendants or the settling defendant and the remaining defendants.

There have been rules, certainly statutory rules in England since 1954 on that, because Ireland called them in 1961 into the Civil Liability Act and again, it is a concept that, in principal, we are fairly familiar with.

That is just a very broad brush look at what the background is.