PART XI: CASE STUDY I: NOTUL AIRPORT

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Link: JustCompetition – Training Module – Part XI

We have a little group of companies here. We have Multiple Airport Holdings (MAH), which owns 51% of the shares in Notul Airport Limited, which owns 100% of the shares of Notul Airport Bus (NABTL), and 49% of the shares are still held by the Town Council (NTC).

Now the Treaty talks about an undertaking.

So, the first thing we need to identify is how does the word 'undertaking' relate to these companies.

Now, that may not be immediately obvious because this isn't a 100%, this is 51% and 49%.

A justiciable issue about 'What is the undertaking with which we are concerned here?', 'What are the boundaries of the undertaking?'.

What sort of possibilities do we think we have in terms of the boundary of the undertaking? Would you, in your Court admit a claim against all 4 defendants or would you reject any of them or would you say you will listen to arguments or would you say you want to receive evidence?

And what arguments might occur about who should be in this group of companies?

The airport serves an area. So, you've got an interesting question about what's the market here. Are there rival airports? Are there other possibilities?

What market are we considering? It's a market for bus services from this airport.

The fact that there may be another airport, may or may not be of any relevance.

The buses, some of them go to resorts in Notul and some of them go to resorts across the border in Wesland.

So, there are a series of resorts along the coast and the buses are going from the airport and some of them are crossing a Member State border.

You may have to apply both national law and consider Article 101 and 102. You've got the question of the scale of the fees and, interestingly enough, my computer went and changed, I have put fair, F-A-I-R, but it had of course seen buses and coaches so, it changed it into F-A-R-E, in other words, the amount that you pay for a bus fare. It should be fair and reasonable. So, there was as investigation earlier on.

So, there's already a file in the National Competition Authority in Norland – we're in paragraph 7.

But that investigation didn't lead to any decision, it led to an undertaking. So, the file ends with an undertaking by the Town Council, an undertaking which expired in 2009. And then, the following year, free from that undertaking, the Town Council sells off a 51% share. Now, a 51% share normally will speak of control as between 51% and 49%.

But you might have interesting discussions about what is really going on in here and who is really managing.

When you begin to consider disclosure, you may want to consider asking: Is there a management agreement? Do you want to see the minutes of board meetings? Who is appointing the management? What is the reality of these relationships? What are the realities of this relationship?

You see, these people up here (pointing at the flipchart) may say 'this is entirely independent, we never knew about this.

This seems unlikely, but it would be a matter of evidence. By the time you get to paragraph 8, there are significant increases taking place in the fees

In other words, fees which were fair, reasonable and non-discriminatory are suddenly no longer – are you familiar with FRAND?

'FRAND' is the abbreviation for fair and reasonable and non-discriminatory. And suddenly there is a significant increase in fees, although at that stage there is still open access, so, anybody can take their bus into the airport.

And at this point, Wesbus complained to the Norland National Competition Authority (Norland NCA).

So, there may be papers relating to that complaint, but as a matter of administrative priority, the National Competition Authority does not act.

So, then, in 2014, they still want more money from this facility and so, they put it out to tender and they gave some indications of the minimum acceptable tender.

And because of that, the responses they get are substantially identical, because each party is trying to meet the requirements, but no more.

And so, in 11 (paragraph) what happens is that Notul Bus gets the exclusive rights and is required to pay a particular set of fees.

Now, at that point, Notul Bus is concerned that this may infringe European Law. And so, they go to the authorities, in this case the European Commission, and they make a leniency application.

But the Commission does not get started their investigation.

So, that's the situation before we get to any claim.

So, the first question arises is 'Where do you bring the claim?'. Now, it's worth looking back at this diagram and asking yourself.

'What are the financial realities likely to be?'. We know that there was substantial borrowing here to enlarge the airport.

This is a big multinational company based in Spain. And you remember the fundamental rule in the Brussels regulation is that you sue in the country of domicile of a defendant.

Multiple Airport Holdings is domiciled in Spain. These three entities (pointing at the flipchart) are all domiciled in Norland.

So, there is a choice for Wesbus Services and Wesbus Coaches of where do they sue – 'Do they sue in Norland or do they sue in Spain? Or both?'

Now, why might they sue in both? Well, they might sue in both and they've got to be very careful in which order they sue in because the moment they launch an action in one country, that court becomes seized of the matter. They may want to sue in another country for protective reasons.

So, if they want the primary action to take place in Spain, then, they sue first in Spain and secondly in Norland.

And they might sue in both in order to get the advantage of protective measures to protect documentation or to obtain documentation in the second country.

Or they can do it the other way around. So, it is possible for them to start an action in both places, but one will be the first action and they will then be seized of the matter.

You remember that there has been a leniency application to the European Commission and within the European Competition Network they will have to decide under Regulation 1/ 2003 which authority is taking a lead. And, in this case, you will see in paragraph 13,that it is the Norland Authority that is taking a lead. And so, there is now a file in the Norland National Competition Authority.

So, in 14 (paragraph), the first request is for an injunction. The injunction has two parts: the first part of the injunction is that their access should be restored to the airport and the second

part is that access should be on fair, reasonable and non-discriminatory terms and then they are also seeking damages in costs.

I don't know, in your system, at this stage, is an injunctive remedy possible in Finland?

– Yes, it is! (from the audience) – In Belgium also. (from the audience) – In Belgium? – Yes. (from the audience)-And in Romania? – Yes. (from the audience)

Now, the reality is that that might bring the whole thing to an end. If the airport will be forced to go back to fair, reasonable, and non-discriminatory terms, the terms of the undertaking given back in 2004.

But what actually happened in the case in England was that Peter Roth refused the injunction and sent it for a trial.

Now, the reason for that is that they were arguing that there wasn't actually spent. So, in the judgement, you get a nice picture of the airport.

And what they said was 'Bus stands are full of buses, there is no room for any more buses'.

Now, this raised some interesting issues and Vivian Roads decided to go and visit bus stands and have a look for herself.

Peter didn't have that opportunity. So, there was a conflict of fact about whether it's possible to get any more buses on.

And what they discovered was that people were leaving their buses and going off and having lunch and things.

So, there was possible to get more buses in.

So, it's possible, the whole case could be solved very quickly.

It's also possible that it won`t be solved very quickly.

That's what Wesbus want. They want to be back in the airport.

You've then got Notul Bus. They want the contract declared void.

And... they feel they've been overpaying. So, they want damages.

Now, the reality is that, for them, a return to fair, reasonable and non-discriminatory terms with open access would deny them their monopoly, but it would at least get them back to where they were in the 2004 settlement.

So, those are all people who are intimately involved in what is going on because they are the people who are actually providing or, in one case being denied the opportunity to provide the services.

The forth claimants are a major package tour intermediary, specializing in this market but registered in Luxemburg.

Now, they're a Luxemburg business, can they sue in Luxemburg?

No?

Quite right, they can't sue in Luxemburg.

The fact that they are registered in Luxemburg does not allow them, they are not a consumer. The harm has been done in Norland.

The defendants are registered in Luxemburg, they are domiciled in Luxemburg, they can't sue in Luxemburg.

What are they doing? They are passing these costs through.

They are seeking damages for overpayment.

What heads of damage do you think they can claim? - What in Finland do they claim? – Loss of profit (from the audience). - Loss of profit? Yes, they can claim for loss of profit.

They can't actually claim for the overcharge, because they've passed the overcharge straight through.

We'll come back to why that's important because we're going to have to assess that loss of profit.

So, now, we then have the fifth claimants, they are registered in England and Wales, because we've already seen they can't claim in England and Wales because that's not proper under the Brussels convention. They don't have any direct contracts, because they contract indirectly through a Guernsey registered company.

One of the things which amazes me nowadays is if I go on a train from London to New Castle, in England, on my credit card statement that is a transaction which is handled in Luxemburg.

But quite often in these transactions you've got a maze of companies. And trying to spot what money is where is interesting.

Now, these people, again, they are seeking damages for overpayments. And what we are going to be thinking about, as we think about these damages?

Again, we are going to be thinking about 'Did they pass these costs through, to their customers?

Or is the market for holidays such that they couldn't raise the prices without deterring people from taking their holidays in Norland and Wesland?'. And again, that's an issue of fact to which we will need to return.

So, there we are, we've got an action which may have started in Spain, may have started in Norland, but we do at least know which action was started first.

And now we've got to think about how we are going to manage this and on what matters are we going to need evidence and what sort of evidence do we need people to provide. Now, some of the evidence will be evidence that is sought by the claimants and some of the evidence sought will be evidence sought by the defendants.

The defendants will seek to minimize their liability. They are absolutely entitled to do that.

They are absolutely entitled to say 'some of these claimants suffered no loss because they passed it through', 'or no loss because Wesbus wasn't making any money anyway and they saved so much money on labour costs and fuel costs and leasing buses' that frankly their losses were minimum.

And there you have an interesting question of fact, for example. So, think for a moment.

What sort of evidence are you going to be looking for when it comes to disclosure? What sort of documents are you going to expect these companies to reveal? Then we will look at some of the issues and ask ourselves what might be thought.

So, if one looks in the Treaty, what the Treaty talks about is all agreements between undertakings and one or more undertakings with a dominant position.

Thrown in here is the undertaking and there is case law on what is called Parental Liability.

There is also an article by Hurley and Scott on parental liability in European law.

So, it is actually a matter of fact, how control is being operated in this group of companies. And the question is quite right.

What you would be looking for is 'Is there a management agreement?'; 'And what are the actual facts of who is appointing the management and what control is being exercised either through the board or through management control arrangements?'.

And you have to look at what is happening right away through.

So, you've got this question about control.

Would that be sufficient documentation? Is there a rebuttable presumption?

Now, if there's 100% shareholding, there's a rebuttable presumption of control. That 49% raises much bigger issues. The 51% may or may not.

So, you can examine that in terms of the facts. So, does it have a dominant position? Now, remember, we've got to think about what is the market here, it's not a market for air flights, it's a market for the buses and the coaches.

Now, in our Court, we have held that the crematorium in a small town can have a dominant position.

There are other crematoria in Britain, but the distance between this crematorium and other crematoria means that this one crematorium has a dominant position.

So, my suspicion is you don't need much evidence to demonstrate a dominant position.

Now, you could ask the parties 'Do you agree that there is a dominant position?'

Now, actually what happened in the case underlying this was they left that issue on one side and went straight to abuse.

So, they held a hearing on the basis that they would assume dominance and would only come back to dominance once they have dealt with abuse

Now, what's important about that is that sometimes examining the abuse helps you to understand whether there is dominance.

In other words, when you examine what is actually going on in terms of the behaviour, it helps you understand the nature of the market.

- Any other evidence you would need in relation to dominance? - (From the audience) And so, you don't have to examine first the dominance and then the abuse? You can't switch it?

In our system, you can switch it. You can, as a matter of case management, take the abuse as a preliminary issue without dealing with dominance.

There are other circumstances, in telecommunications law you have to demonstrate dominance before anything else happens.

Now, the reality is that if the allegation of dominance was challenged, then, you would need to examine the allegation of dominance.

And if the allegation of dominance was challenged, you then need to educe evidence as to the nature of the market.

Now, much of that evidence will be available to you from public documentation.

In the case of the United Kingdom, there's a civil aviation regulator who probably already publishes statistics on the airports.

Now, in your country, the same may well be true. So, it may well be evidence from public sources.

– (From the audience) But, you said for evidence, not national evidence, for this area, no? For the area where the case is.

- That's right! So, it's the usage around the airport.

– (From the audience) And, there's just one question, you searched for national evidence for a long period of time or just 1-2 years?

That's a very good point. Now, remember that there is a file in the National Competition Authority dating back to 2004.

Now, that investigation ended with an undertaking.

Can you order that evidence which relates to this party, under the new directive?

– (From the audience) Ok, so, now we go back only to 5 years. Is it that what you are suggesting?

Well, it's an interesting question because of course it all dates and pre-dates and I am not sure I have an instant answer.

What do you think the answer is? A previous settlement or a relevant matters? (pointing towards Mrs. Diana Ungureanu).

Ms. Diana Ungureanu: - Well, I'm not sure.

I think you might have an argument.

But it is well worth knowing that the file is there.

Remember, you could invite the Competition Authority to come and talk to you about it.

But certainly, if dominance is challenged then you may have to get some evidence about it. I think, in this case, it's quite difficult to challenge dominance.

So, if we go back to 101, we have to ask ourselves what is going on here in relation… is there an agreement?

And the answer is 'we know there is an agreement because there was a tender and then there was a contract'.

And so, at the very least, you are going to be asking for a copy of the contract. The claimants will provide you with the tender and either you are going to get a copy of the contract from Notul Bus because they are also claimants.

So, they are likely to provide that to you straightaway.

So, then… You've then got to ask what is going on. And again, the evidence of exclusion and refusal to supply is barely straightforward because you've got the evidence of the tender and you've got the evidence of the contract. So, you probably don't need to go much further than that because that evidence is before you.

Have you now got sufficient evidence to determine whether there is an infringement?

So, we've got an undertaking, for we got the evidence related to the undertaking. Will we now have enough evidence to determine whether there is an infringement of 101 and 102? Anything else we need at that stage?

– (From the audience) I think we have to prove that … - Ah, ok, right.

So, there are two questions about abuse. Question 1 is 'Was there exclusion?'. And we've got the evidence for exclusion.

Question 2 – and this is the question in the Notul Bus action – is 'If there was overcharging?'.

What sort of evidence are we going to need to demonstrate that?

Now, this is the company here... that operates the bus terminal.

So, are you wanting to see the management accounts?

How are you going to assess the reasonableness of these charges? What numbers do you want produced?

– (From the audience) The normal profit margins in that sector

- Normal profit margins? So, a comparative analysis from other airports, yes? And indeed, you could – this is where a third party comes in-

– you could inquire of other similar airports what they are charging. And that will enable you to do a benchmarking exercise on what would be reasonable. Now, this is a point where you may have an expert, you could have an expert appointed by the parties jointly, you could have an expert appointed by the court, you could have rival experts appointed by each of the parties.

There are a variety of ways in which that could be assessed or you can assess it yourself. But you need some way of assessing how reasonable are those costs and what is a reasonable profit margin.

Now, that may also get you into the question of the cost of capital.

Remember that there has been quite a lot of borrowing here and you may have to ask yourself the question: 'Is there a state guarantee going on here?'

See, this was the Town Council. And it is quite possible that behind the borrowing by a Town Council, lies a state guarantee of borrowing, very different if this is a commercial borrowing.

So, you've got some interesting questions about the cost of capital and also the cost of dividends being paid by this company to that company and what is reasonable there, as to state what is actually going on. I mean, the cost down here may be because an enormous amount of money is being taken out of these companies, in management fees. And it was very reasonable, we have improved the management so, we just charged a small 50% management uplift on the income. Very reasonable because of the shared quality of management that we have brought to the bus station.

You understand? So, you're going to have to examine, you're going to need sufficient evidence of what is in those costs, to see whether the costs underlying the prices are abusive or not because it's quite likely that in a group of companies some interesting things are going on. Now, if the tax levels in Notul are higher than the tax levels in Spain then it's quite likely for profits to be made in Spain and if it's the other way around, it's quite likely for profits to be made down here. So, there are going to be interesting questions of what is going on there.

So, an understanding of the accounts. So, proportionality…

Do we just want one year or do we want to go back to look at the progression of these fees?

Now, remember there was an undertaking about fair and reasonable which ran out in 2009.

Do we want to examine the series of fees from 2009 to the present day? Would that be reasonable and proportional? Not much trouble? Probably ok.

That is all about infringement. Anything else you want on infringement? So, we've got an undertaking, we've got an infringement.

So, the next link we've got to consider is causation.

How far are the damages to these various defendants caused by the behaviour of the alleged infringer?

And what evidence do we need to demonstrate causation between the infringement and the damage?

So, some of it may seem fairly straightforward. In the case of Wesbus, there has been a refusal to supply which have stopped their services dead.

They can't collect passengers or deliver passengers to and from the airport.

Clear causal link – do you need any evidence on that? Any further evidence? Seeking damages for overpayments – the causation of the overpayments is fairly straightforward you've got the contract in front of you which gives the payments; you probably don't need much more in the way of evidence for them.

So, go to the forth claimants, PTO.

This is where life is going to become a little more interesting. How do we spot the causation between what is going on and their losses? So, they are providing these virtual services, they are passing through the costs.

So they are claiming loss of revenue opportunities. What sort of evidence are they going to have to produce?

Now, here you've got an interesting situation: if it's a cartel, then there is a presumption of harm and the burden shifts to the defendant to demonstrate that there was no damage, in qualitative terms. If it's an abuse of dominant position, then there's a sentence in which proving abuse demonstrated that there was an abuse. But here you have somebody claiming loss of revenue opportunities.

And how far is that causation between their loss of revenue opportunities and what sort of evidence do you need there?

– (From the audience) The number of tourists, the number went down. - That's right. So, you have to look at the elasticity of demand.

And it's a cross-elasticity of demand between… Well, there are two aspects of the cross-elasticity: (1) is `Does the total number of tourists go down?` and (2) `Do tourists actually go elsewhere?` And then you'll have to ask yourself the question: 'In terms of PTO, do they lose that market because they are specialized in Norland and Wesland, or, if they have a wider specialization, do the tourists really go to Lanzarote instead?

So, you are going to need some evidence from PTO on what happened to their numbers and some estimate of elasticity of overall demand and cross-elasticity between these holidays and other holiday opportunities. Now, how you achieve that is an interesting question.

That's where economists may come in and have opinions. Now, what matters here is understanding where the burden lies and who is going to prove what to whom. So, you have to bare that in mind when you're thinking about that.

So, then you have the fifth claimants – they are major sellers of package holidays, including holidays to Norland and Wesland.

Now, arguably, when the customers are going through on the Internet or going through the brochure and they see the prices in Norland and Wesland are a bit higher this year, then they go to Lanzarote or wherever it is instead.

So, there is going to be a real issue of what losses they have suffered and how far they have been able to pass through the costs to their clients. Now, I have to tell you, this is where it becomes quite difficult.

And you can to have economists who take quite different views on this. And, as a court, you will want some information, but you've got to recognize that this is going to be a matter of opinion, at the end of the day.

And what the Directive empowers you to do is to estimate.

In order to make the remedy efficient you have to be able to estimate what has happened here.

So, the defendants are going to be looking for evidence and, actually, nothing much happened: the number of tourists didn't change very much, there were no real losses. Yes, then they have been slightly overcharging, but it was very minimal and none of these people suffered.

Wesbus may have suffered but, as I have explained, Wesbus ... Let's ask ourselves. What evidence do we need about Wesbus and their coaches?

What did they lose? Now, what sort of numbers are we looking for, for Wesbus?

Because, if I am the defendant, I need to understand the nature of Wesbus' business and whether they were making money, losing money and maybe this was a God sent to them: they were losing money on their services, they should be thankful to us.

They had been competing so strongly that this is going to be the argument, you know, that it was an enormous benefit to them to stop providing these services.

So, what sort of evidence do we need from Wesbus and Wesbus Coaches? – (From the audience) Evolution of their figures?

Evolution of their figures and an understanding of their fixed and variable costs. See, in operations like this, many of the costs are variable costs.

So, the drivers, the fuel, the maintenance, and to some extent the leases on the coaches are variable costs. So, they may not have lost much money.

So, you've got to analyse what was the loss of profit and understand their numbers.

Now, again, proportionality…

How far back do you want to go?

Are you going to go back to 2004 when the undertaking was given? Or 2009 when the undertaking came to an end?

Or 2008, to give you a year of signed operation? And to give you some sort of ... Now, you know, you'll have to make up your mind.

How far back do you want the numbers to go? What depths of numbers do you want?

Do you want what's happened to their staffing number, their overheads, their fuel costs and so on?

Does anything we've said so far seem disproportional to this case?

Or fairly proportional? Now, there are questions which we've seen.

Those elasticities are going to be questionable because it's unlikely that anybody has got really crisped numbers about the elasticities.

And also, the parties may argue that circumstances changed – the weather last year was really bad and that was depressing numbers.

How do you deal with that? You may have to look at what happened to overall holiday numbers in a much wider sense and see if there are industry-wise statistics available, so to understand what was going on in the background.

And sometimes, that's important too, to put a context on the numbers that you are being given from the parties.

So, now, we have the quantification of damage.

And we've got various parties, making various claims as to overpayments. So, actual loss and loss of profits from lack of opportunity.

Some of those are exclusionary losses. In other words, Wesbus and Wescoach couldn't provide the service at all.

Others, the Notul Bus would say: 'Well, because of the increase in prices, demand went down and so, we didn't get this much business'.

Indeed, many customers faced with increased bus fares went and used taxis or many operators took their business and went to other resorts. So, how are we going to address that?

Is that a matter of simply looking for papers or will you want expert advice on those aspects of loss?

– (From the audience) I think it would be useful. - You think it would be useful?

The overcharge is going to come from the expertise. We've just talked about it in terms of the analysis of costs and prices.

Now, when you are looking at loss of profit/opportunity, you may want some expertise to help you with the economics of that.

So, here you are talking about the third, fourth and fifth claimants.

The European Commission will have provided, hopefully soon, guidance on passing on. But you may want a better understanding if there is an argument about how far these costs were passed on to ultimate consumers.

Now, we haven't talked about ultimate consumers and this is quite a complicated case because many of these consumers will have come from outside the jurisdiction, be it Spain or Norland. And we have not introduced consumer action here. The consumer action here would be quite complicated.

The British collective action scheme only allows an opt-out option on collective actions for those who are domiciled in the United Kingdom.

It has to be opt-in for consumers outside the United Kingdom and it's going to be very interesting to see how that works.

But in these holiday cases, we have to contemplate that one day there may be the case in which we have to deal with a collective action brought, on behalf of consumers, from more than one Member State. But I have not included that in this case study because that's really quite complicated and I'm not sure how many of our Member States are anything like ready for that.

- In Finland? – (From the audience) We have to be ready for everything.

- In Romania? – (From the audience) We will wait for several years to implement the Directive, to acknowledge the associations and after that we will have the opportunity, a real opportunity for the final customers to ...

- In Belgium? – (From the audience) The possibility of collective action suits…

There is now a really new legislation and it's possible.

- That's right. So, Belgium has got the legislation in place. Now, can that involve people not domiciled in Belgium?

– (From the audience) I couldn't answer… But I think so. You just have to prove that you have interest to start the procedure.

- So, we built up the evidence in relation to the undertaking, the infringement, the causation, the damages.

We still have to manage the overall costs and we still have to manage

what happens at the end of the day in terms of interest. Now, as Liam said, there are varieties of approaches to interest.

An interest is, to some extent, still a matter of national competence. Interest is a qualitative concept and is required by the Directive.

But the rate of interest is not set by the Directive. Now, it may be that in due course we ask the Commission to provide some soft law guidance on the setting of interest. But that hasn't happened at the moment.

I don't know how you deal with interest at the moment.

- In Finland, do you have a standard rate of interest for ...? – (From the audience) Yes, we have.

– (From the audience) In Belgium, there are... We have special interests between commercials, between undertakings... – Yes, it's the same. We transposed the same Directive.

- Ok, now, so, let's deal with costs.

Is there anything, at this stage of managing the case, that you want to do to warn the parties that whoever wins will be limited in the amount of costs they can recover? Is this a case which is of a scale where you think that a party should be warned that they may not recover their costs if they spend too much money?

– (From the audience) Maybe the fourth claimants? It's not only a victim, I think, because they have 10% commission on costs that were too high.

- Yes. They have enjoyed the 10%, very interesting point.

You see, they have an offset on their damages and so, what's going to have to assess the value of that offset?

The other question about the fourth claimants and the fifth claimants is that they are not in the jurisdiction. Do you wish to make an order at this stage for security per costs? I don't know whether that exists as a possibility. Here we've got some parties who are not going to be…

This case is going on in Spain. These parties are not in the jurisdiction. In fact, they are the only parties in the jurisdiction.

Do you want to have any money paid into escrow to underline these cases, so the parties are committed and there is money there if they are not successful?

– (From the audience) No. - You content that the money will be recoverable?

– (From the audience) In Spain, yes. Not, for example, in Angola or something.

- OK. So, there are circumstances in which, at this point, you might – not perhaps in this case – but there are circumstances in which you might want to have security per costs. There may also be circumstances in which you may want to protect a small company from the defendant's costs getting out of control.

- Can you do that in Romania? – (From the audience –Ms Diana Ungureanu): No, we only have it in our law, for specific cases, this possibility to secure, as you said, the cost.

We have it in cases like insolvency, for interim measures for example, things like this, but not for all cases.

Ok. So, we manage the case in terms of the proceedings, we decide whether all the issues must be trialled or some issues are going to be admitted by one side or the other. What about consensual dispute resolution or alternative dispute resolution?

The Directive provides that we can send people off for up to 2 years to try and find some ways of sorting out their differences. Good idea?

– (From the audience) Why not? - Why not?

So, that's one question. Next question: Do you want help from the National Competition Authority? We talked about experts, but the expertise could come from the National Competition Authority. You're going to inform the National Competition Authority what's going on.

Now, remember, there is a leniency application there. What's the next question that is going to come into your mind?

Do you 'stay' the proceedings?

And if you are going to stay the proceedings, at what stage do you stay them? In other words, do you wish, at this point, to get the documentation in from the parties? Or would that be disproportionate, given the possibility of an investigation by the National Competition Authority?

So, you're going to need to make an inquiry, which you probably should address to the Norland National Competition Authority and to the Commission, they, in fact, they are liaising, on 'Is there an ongoing investigation?

And should you stay for there is a public law case running?'

Similarly, if parallel proceedings have been started in two places, then again, the court, which has not ceased to matter, has got to decide.

Do they take any actions in relation to disclosure? Or do they just stop everything, for the time being?

Now, this is going to be a matter which depends on the nature of the case, on the nature of the parties and how far you trust the parties and their lawyers not to destroy evidence. And there is a big argument now going on about the interaction of Article 25 with fundamental rights and the right to a timely trial. So, there's an interesting question about the speed with which things actually happen and at what point you have to say to the National Competition Authority – 'You've had enough time, we must get on with it!'.

So, that, I believe is going to be a live issue. I think we have to watch Luxembourg to see what decisions come out about these time limits because there are some inquiries which, by the time they've gone up to Luxembourg and back, particularly if they get remitted, they seem to go on for a very long time.

And that's the real issue because the witnesses get old and retire and their ability to remember the facts of the case begins to dwindle.

In our big cartel case – the cartel started in 1938, the whistle was blown (Ms. Diana Ungureanu: and the defendants disappear) in the 1990s, the decision eventually emerges from appeals in the next century. And, you know, by the time you get to a substantive hearing

(Audience): - You have to go to the cemetery) – You have to go to the cemetery.

So, that's going to be a live issue – How do we keep these matters going at a reasonable speed?

So, we've got the written evidence, we've summoned the expert, we've cleared the evidence and now, we've got to think about making the decision and the nature of the evidence we've heard.

Now, we have been empowered to estimate.

Estimate is an estimate, that's the word that we are engaged with.

This is not going to be, at least if it is an accurate number, you know, 2,446,524 Euros and 17 cents – that it's spurious.

It's going to be an estimate.

And there you are, you've heard all the evidence and you are sitting down and you may be sitting down with the National Competition Authority, because you can ask for their help.

How do we go about producing a reasonable estimate?

– (From the audience) In Belgium, you are not bind by the price of the ..... - Right, you have to make your own decision.

- But you have to motivate if you… - So, the situation is that the advice of the expert is like soft law you must listen to it, and if you are going to differ from it, you should explain why

you are differing from it, the good reasons you have for deciding something else. And there is in the Commission's soft guidance a variety of advice about how you approach the topic. So, for example, you may find that there is another airport nearby, still subject to an obligation of fair, reasonable, non-discriminatory pricing, which has modernized its bus terminal, very beautifully, and it's charging prices at this level.

And, you may say, it would be reasonable to take the prices here and the prices there, take this from that and say 'that is the nature of the overcharge'.

You could say that you believe that the prices in 2009, which were subject to the undertaking of fair, reasonable and non-discriminatory pricing, were at a sensible level and you will look at how those would be indexed up to today.

And you may even make an allowance for investment and improvement. And then you take that figure and take it away.

Or, you can say 'We've been given the costs. We have analysed the costs in association with an expert. We have allowed a reasonable profit margin and we will take that number away'. So, those are three ways in which you could achieve your estimate.

When you are going to do the loss of profit, you've got to make some assumptions as to the elasticities, as to the loss of profit opportunity that occurs.

And an expert can help you with broad, brushed ideas of what that's likely to be, but at the end of the day, you are going to have to make a judgment on what that loss of profit was. And it's probably going to be fairly obvious whether it's ridiculously low or ridiculously high, but if it's not obvious to you, it may be obvious to the Court of Appeal, when it gets to the Court of Appeal.

And if it gets to the Court of Appeal, what are you going to apply? Here you have this assessment of loss of profit opportunity.

– (From the audience) For sure I will follow the causality. (…) I will calculate the damage. But I will go for the limit.

- I will be very sure to not give an over-damage. - Yes. So, giving an overcompensation is illegal under the Directive.

It is not our task, under the Directive, to give to be punitive – it is to do full compensation, but not overcompensation. So, it's not good saying 'this was a wicked monopolist, we must award lots of damages'– that would be illegal and the Court of Appeal should strike you down.

So, it's got to be a plausible explanation and one which the Court of Appeal would acknowledge. Now, the Court of Appeal may say we need to understand what overcompensation means – 'we will send a question to the European Union Court of Justice –

what does the word ‘overcompensation’ mean when it comes to a court judging loss of profit opportunity, which is necessarily as the Directive tells us hypothetical?’.

And I feel sure that, at some stage, there will be a reference to Luxembourg for the judges to explain what overcompensation looks like in the context of a hypothetical factual matrix.