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European Competition Law Judges



Justice William McKechnie
Judge of the Supreme Court
of Ireland

Bucharest, February 2016

Session 1

The Damages Directive (2004/104/EU) on Antitrust Violations Affecting National and EU Law

Pathway of Journey:

Part 1

- Key drivers?
- Enthusiastic helpers?
- Arrival date?
- Worth the wait?

Part 2

- Essential provisions of the Directive

Part 3

- Recommendation

Introduction:

(1) Arts 101 and 102 TFEU:

General Application:

- Direct effect – re relationships between individuals
- Creates rights and obligations
- Role of national courts
- Protecting subjective rights under Union law

(2) Art. 101:

- Agreements between U/T:
- Decisions by Associations of U/T and Concerted Practices:
- Affecting (capable of) I.S. trade:
- Object/Effect:
- Prevention/Restriction/Distortion of CPT:
 - Prohibited as void –

(3) Hardcore Provisions:

- Price-fixing
- Limit/Control: production, markets, etc.
- Market sharing – suppliers

Reprive:

- Art 101.3

(4) Article 102: Abuse of Dominance:

- Internal Market/Substantial Part of it:
- Affecting Inter-State Trade:
- Prohibited as incompatible:

Specified Conduct:

- Trading Conditions: (P/S/P)
- Limitation: Production/Markets – Prejudice of Consumers
- Dissimilar Conditions/Equivalent Transactions
- Imposing Unacceptable Contractual Conditions

Part 1:

Necessity to Concentrate:

- Full effectiveness of Competition Rules:
 - Enhance the efficient functioning of an undistorted internal market:
 - Facilitate victims to obtain full redress at national level for harm caused:
 - Deterrent message to carteliers and abusers:
- Complement public enforcement with Commission (“COM”) and NCA’s:
 - Better use of precious resources in pursuing major cases:
- Remedies in national jurisdiction more extensive/practical than at EU level:

Why? The Covert Difficulties:

- Feature of Infringement: Deliberate Concealment:
- Even from sophisticated, technical and knowledgeable eye:
- Underpinned by intricate schemes and big money:
- Impossible (almost) - to identify:
 - Infringement: nature, scope and duration
 - Infringers: parents, subsidiaries and siblings
 - Obtaining access to documents/potential evidence
 - Lack of effective collective redress system
 - Absence of clear rules on the passing on defence
 - Absence of clear probative value of NCA's' decisions
 - Possibility of relying on an infringement finding by the NCA to ground action for damages
 - How to quantify antitrust harm
- Success?

The More Obvious: But No Less Difficult (1):

- Access to evidence/documents/objects, howsoever created/stored: from →
 - Alleged Infringer(s):
 - Third party(ies):
 - NCA's:
 - COM:
 - Prosecuting authorities:
- Costs: Investigation/Litigation:
- Relentless Litigation – Confrontational Barriers/Unlimited Resources:
- Onus and Standard of Proof:
- Private Individual/SME: Large and Well Funded Undertakings:
- Establishing Liability:
- Identifying Causative Effects: Proving Harm:
- Quantifying Claim:

Judicial (Un)familiarity (2):

- Interplay between public and private enforcement:
- Limitation rules/periods:
 - Successful leniency application by one cartel member:
 - Appeals by others:
- Scope of public law decisions [substantive]:
- Corporate coverage where addressee firms of a decision are limited within a multinational undertaking:
- Jurisdictional rules:
- Estimation of compensation: Theory – OK: Practice – Nightmare:

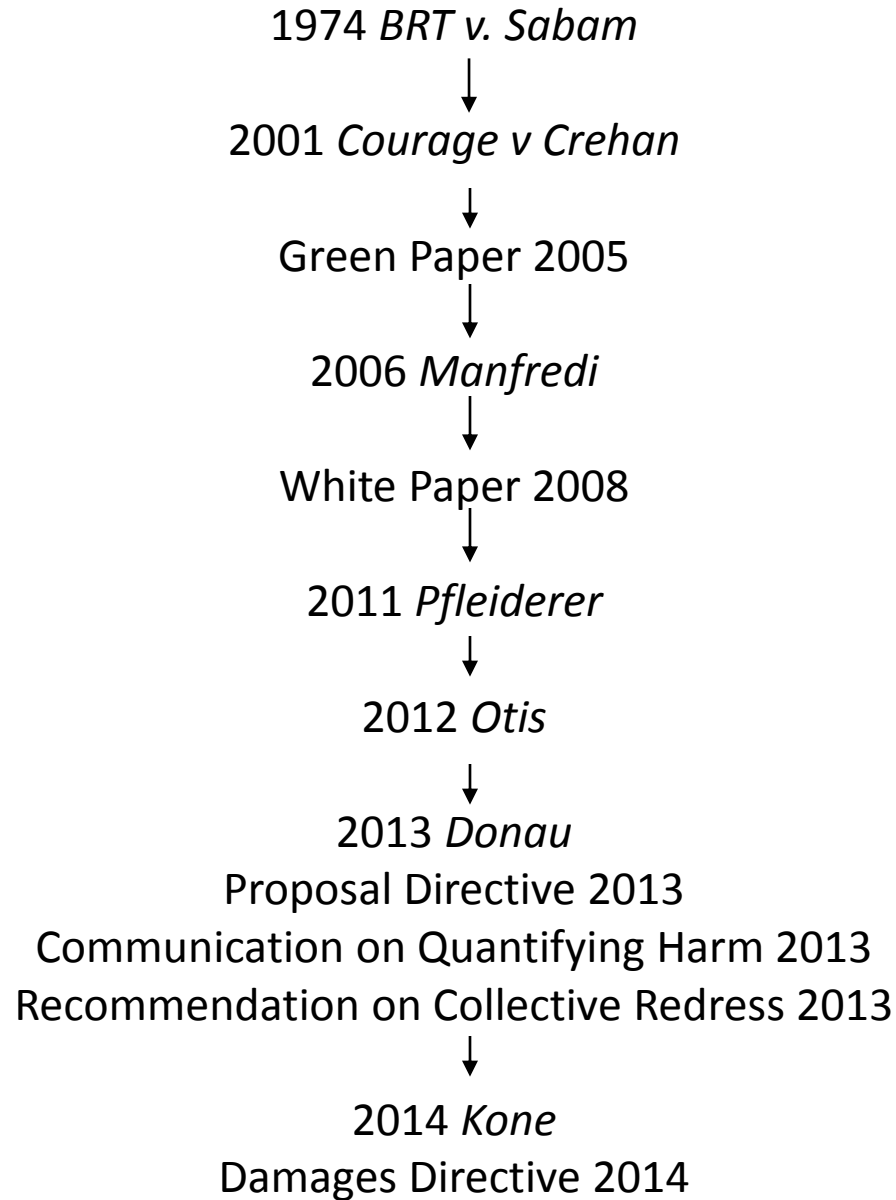
The Move: The Urgency:

- No harmonisation:
- Divergence - Significant:
- Member States: individual divergent rules: securing Arts 101/102 rights:
 - What Court: What Rules: How initiated: Presumptions: Inferences:
 - Disclosure: Discovery: (Parties – Non-parties):
 - NCA's: Investigation File: Leniency – Settlement – Information:
 - Limitation Periods: Start Date: Prohibited Agreement/C.P./Commencement Date:
 - Assessing Damages: Set Criteria
 - Subject only to Principles of Effectiveness and Equivalence: [*Manfredi* para. 3-5]
- Victim: Address?:
- U/T: Forum shopping:
- Germany, Netherlands and UK – Holiday favourites:
- 21 Member States (Nov 2013) - No successful FOA:

Promoters: Formal/Informal:

- Court of Justice:
 - *BRT v. Sabam* [1974]:
 - *Courage v. Crehan* [2001]:
 - *Manfredi* (joint cases) [2006]:
 - *Pfleidere* [2011]:
 - *Otis & Ors* [11/2012]:
 - *Donau Chemie* [2013]:
 - *Kone* [2014]:
- Commissions Commitment:
 - 2004 Ashurst Report:
 - 2005 Green Paper:
 - 2008 White Paper:
 - 2013 Proposed Directive:
- Reforms at National Level:
 - UK
 - Germany
 - Italy
 - Ireland
 - Bulgaria
 - Czech Republic
 - Denmark
 - Hungary

A Snap Shot of History:



Milestone Judgments (1):

Courage v. Crehan: C-453/99 [2001] E.C.R. I - 6297

Building on BRT v. Sabam [1974] - Articles 81/82: Direct effect/individuals/horizontal level/national courts
[Right to and conditions of Individual Liability:]

Courage was pivotal:-

“25. As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that...the national courts whose task it is to apply the provisions of Community law...must ensure that those rules take full effect and must protect the rights which they confer on individuals...”

C v C:

- “26. The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.
27. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.”

Milestone Judgments (2):

- *Manfredi v. Lloyd Adriatico Assicurazioni* (C-295/04 and C-298/04)
- *Pfleiderer AG v. Bundeskartellamt* (C-360/09)
- *European Commission v. Otis* (C-199/11)
- *Bundswettbewerbsbehörde v. Donau Chemie AG* (C-536/11)
- *Kone AG v. OBB-Infrastruktur AG* (C-557/12)

Part 2:
Damages Directive (D.D.):
53 Recitals: (VII) Chapters: 22 Articles:

Key areas

- (1) Disclosure of Evidence (Ch. II):
- (2) Effect of NCA decisions (Ch. III):
- (3) Limitation periods (Ch. III):
- (4) Joint and Several Liability (Ch. III):
- (5) Passing on Defence (Ch. IV):
- (6) Quantification of Harm (Ch. V):
- (7) ADR (Ch. VI):

Summary of Main Changes:

- Easier access to evidence:
 - By documents from other parties/third parties;
 - By category of documents precisely and narrowly described;
 - Obtained by court order subject to proportionality and confidentiality.
- Benefit of final infringement decision by NCA and Commission:
 - Such decision by NCA equals full proof before court's of that Member state; and
 - *Prima facie* proof (at least) before courts of other Member States.
- Generous limitation periods:
 - At least five years to sue from first possibility of discovering harm caused by infringement;
 - If period suspended by intervention of NCA – victims will not be disadvantaged;
 - Post final infringement decision – at least one year available thereafter;
- Passing on Defence:
 - Legal consequences clarified;
 - Redirect purchases – if passed on infringer not liable to them;
 - Re indirect customers: subject to infringers overcharge –
 - Has rebuttable presumption in his favour of some harm;
 - Over compensation – avoid it.
- Full Compensation – Actual loss: loss of profits: interest payments
- Cartels:
 - Rebuttable presumption of causing harm;
 - Based on finding that 90% cost prices increases:
 - Where cartel activity does not cause price increase, infringer can so establish.
- Joint and Several Liability:
 - Infringers can cross claim against co-infringers;
 - Not applicable to infringers who have obtained immunity for fines in return for their voluntary cooperation with the NCA during an investigation.
 - Such will normally be obliged to compensate only their direct and indirect customers.
 - Special conditions for SME's.

Overarching purpose of D.D.:

- Effective enforcement: public only not sufficient: private enforcement a critical supporting feature: interaction between both optimises enforcement: it ensures victims get full compensation
- Full compensation (Article 3)
- Legal Certainty: uniformity
- Remove differences between national jurisdictions
- Establish level playing field:
 - Re Claimant:
 - (i) Formulation of claim
 - (ii) Pursuing the claim
 - (iii) Chances of success
 - (iv) Amount of damages
 - Re Undertaking:
 - (i) Equalising rules on liability
 - (ii) Equalising chances of disputing essential elements of claim, such as causation
 - (iii) Equalising awards of damages
 - (iv) Removing competitive advantages
 - Re both:
 - (i) Equalising access to documents/restrictions on such access
 - (ii) Abolishing forum shopping
 - (iii) Facilitates proper functioning of internal market

Direct Effect of Directives:

1. Vertical Direct Effect (VDE):

- Never any direct effect until post expiry state
- Thereafter if not transposed or if inadequately transposed, it may have VDE subject to conditions:
- VDE if: sufficiently clear, precise and unconditional (*Van Duyn*)

2. Horizontal Direct Effect (HDE):

- Never any HDE for directives, either within period for transposition or after expiry, even if it complies with requirements for VDE (*Marshall*)

“Palliatives” to limit the impact of the lack of HDE of directives (1):

1. “Indirect Effect”: Harmonious Interpretation:

- Obligation to interpret national law in a consistent and harmonious manner with EU law and “in the light of” directives (*Von Colson*)
- Must interpret in light of the wording and purpose of the directive and with regard to the result sought by the directive
- Unimplemented directive can be relied on to influence interpretation of national law even in case between individuals (*Marleasing*)
- Limited by general principles of law, especially legal certainty and the principle of non-retroactivity, and cannot serve as basis for an interpretation of national law *contra legem*
- May involve looking at whole body of law in that area rather than just at a single provision

2. Broad conception of ‘State’ (*Foster*):

“Palliatives” to limit the impact of the lack of HDE of directives (2):

3. State Liability for damage caused to individuals through failure to transpose the directive: Three conditions:
 - i. Purpose of the directive = grant rights to individuals;
 - ii. Can identify rights and obligations from wording;
 - iii. Causal link between damage and MS’s non-transposition of directive.
4. Interaction with General Principles of Law (*Mangold; Küçükdeveci*): can rely on general principle of EU law in private dispute even if time for implementation of directive has not passed; general principle itself has HDE
5. Incidental Horizontal Effects: directive can be invoked in private dispute to preclude the application of a conflicting provision of national law – only national law “cleansed” of the provisions contrary to the directive is applied???

Common Points of General Application:

Who May Sue? (1):

- Any person: natural/legal: Undertakings, Association of Undertakings, Public Authorities and Consumers.
- Such persons must suffer harm, that is if damages sole remedy.
- With Injunctions/Declarations: any such person who is threatened with harm.
- Harm: as an element of *Locus Standi*: quantification, causation, remoteness etc – different

Who May Sue? (2):

- Who may be or have been ... indirectly harmed; in fact anyone directly or indirectly effected may in principle sue.
- Including those harmed by higher prices caused by an umbrella effect (Articles 12 and 14 D.D.)
- Who may have been excluded
- In the context of different levels of a supply chain (Article 15 D.D.)

Who Can Be Sued? (3):

- a. Addressees of public law decision in a follow on or hybrid action
- b. Non-addressees of a public law decision in a hybrid or standalone action
- c. In brief, cartel members or abusive dominant players but the articles mention undertakings and a claim must be brought against a natural or legal person who engaged in the infringement either actually or through parental liability
- d. Within groups, aside from parental liability, that means considering sibling liability
- e. Liability is, in principle, joint and several (Article 11 Damages Directive) and that may result in claims between defendants, and potentially other parties, for contributions

In What Forum? (4):

- a. Options in choice of forum
- b. Initially a question of national law that, when cross-border considerations apply, rapidly engages the Brussels Regulation
- c. Raises issues as between tort/delict and contract law and the extent to which, if at all, contractual choices of applicable law remain valid in the context of infringement
- d. Issues of anchor defendants and of consequences for parallel actions
- e. Issues of service outside the jurisdiction of a national court

When Can You Sue? (5):

- a. Interactions between national law and EU law – Article 9 and 10, Damages Directive
- b. Interactions between public enforcement and private enforcement – ongoing investigations, criminal proceedings and appeals in national and EU courts
- c. Issues of what continues and what must be stayed bearing in mind issues of evidence:
 - i. Decay of human evidence as time passes and people move on
 - ii. Deliberate destruction of materials
 - iii. The need to get on with disclosure

Exclusions *ab initio*:

- Without “merit consideration”: a claim otherwise *prima facie* included may be rejected.
- Before the entry into force of the Directive – 16 December 2014
- Actions which were vested in national courts prior to 26th December, 2014.

- Because it has been brought outside the limitation period (LP) applicable.
- National Rules on all aspects of a LP cannot be unduly burdensome: in particular on the institution of a damages claim (Recital 36)
- Serious complications etc.

Serious complications can arise:

- (i) What happens if claim is dependent on proceedings by NCA?
- (ii) When should the period start?
 - Not before infringement ceases: Continuing violation
 - Not before claimant knew (or reasonably should have known) of behaviour.
 - Not before harm is known to the claimant.
 - Not before the identity of the infringer is known.
- (iii) Impact of these provisions on ECHR (Article 6)
- (iv) ADP – if engaged in, the LP period must be suspended
- Article 10(2) – limitation periods.

Article 2 – Definitions:

- “Infringement of Competition Law” = Article 101/102 TFEU or equivalent domestic provisions:
- “National Competition Law:”
 - Provisions with the same objective as Articles 101/102
 - When applied in parallel with those Articles, to the same case, but excluding:
 - Criminal sanctions on natural persons save when such penalties are how the Competition rules are applied to undertakings.
- “NCA” Body designated by Member State as such:
- “Final Infringement Decision”: NCA/Review Court – not appealable:
- “Evidence”: all means of proof/information howsoever stored:
- Leniency “Statement”: Voluntary Presentation, ack/acc -
 - describing infringement activity:
 - involvement of undertaking in such activity:
 - Drawn up specifically for CA to obtain immunity or reduction of fines.
- “Settlement Submission”: Voluntary Presentation, ack/acc
 - Describing undertakings and knowledge of and role in cartel activity:
 - Drawn up specifically for S/M to CA:
 - Purpose – immunity/reduction in fines under leniency programme:
 - Not including pre-existing information:

Raison d'être of Directive: **(Arts 3 and 4):**

- National measures – ensure – injured persons – harm:
- Full compensation: “*Restitutio in Integrem*”: Damnum Emergens (A/L): Utrum Cessans (L/P) (Sales): P/I:
- Major Caveat:
- Compensatory damages only:
- Effectiveness/Equivalence:

Evidence: access to/disclosure of - (1): (Chp. II: Arts 5-8):

Parties/Third Parties (Art. 5):

- Presenting threshold: (?)
 - Reasoned justification/facts and evidence (reasonably available):
 - Sufficient to sustain plausibility of claim:
- Court order: “parties/third parties/relevant evidence/within their control:
- Specific items/categories: circumscribed as precisely/narrowly as possible:
- Safeguards – Proportionality: (Art. 5.3)
 - Legitimate Interests: (L.I.)
 - Confidentiality/protective measures:
 - Legal professional privilege/ EU – NL:
- Minimum requirement:

Evidence: access to/disclosure of (2):

Competition Authority: [Arts 6 + 7]:

- Internal documents: EU/ N.L. protection takes precedent:
- Proportionality test: “additional matters”:
- Prohibited Disclosure:
 - Investigation Closed:
 - Info→Proceeding: CA↔U/T:
 - Settlement S/M: Withdrawn:
- CA: S/M – Proportionality:
- L.S.: S/M – Evidence Inadmissible [Art. 7]:
- Prohibited Disclosure: Never:
 - LS: SS:
 - Verbatim Quotations – Likewise (Recital 26):
- Safeguards:
 - National Court to determine:
 - Assistance ex. C.A.:
 - Authors may be heard:
 - No access: O/P: T/P
- Permitted Disclosure: Last Resort

Evidence: access to/disclosure of - (3):

Penalties: (Art. 8):

- To include Legal Representatives:
 - Non-compliance:
 - Destruction of Evidence:
 - Breach of Confidential Conditions:
- Effective, Proportionate and Dissuasive:

Effect of NCA's Decisions: (Art. 9):

- Once Final:
 - Infringement under Arts. 101/102 and NC Law, irrefutably established:
 - *P.F. Evidence B/F* N.Cts of T/P Member State

Limitation Periods - (1): (Art. 10):

- L.P., shall not start B/F infringement has ceased and claimant knows or can reasonably be expected to know:
 - “(a) of behaviour and the fact that it constitutes an infringement of competition law:
 - (b) of the fact that the infringement of competition law caused harm to it:
and
 - (c) the identity of the infringer.”
- L.P:- five years (minimum):

Limitation Periods - (2): (Art. 10):

- L.P.: suspended/interrupted:-
 - “If a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.”
- Final:- un-appealable by ordinary means:
- L.P. Suspended for A.D.R. period (Art. 18.1):

Joint and Several Liability: (Art. 11):

- Joint tort feasons: J & S liability for full harm:
But...
- SME: Derogation on conditions - save where:
 - SME is ringleader or recidivist
- Immunity Recipient: Derogation: Direct/Indirect Purchasers/Providers, unless:
 - Full compensation is not recoverable from other infringers:
- Contribution/Indemnity: B/F Joint Tort Feasons:
 - Based on -
 - “Their relative responsibility for the harm caused by the infringement”:
- Contribution/Indemnity: Immunity Recipient:
 - Part in some not exceeding the harm caused to its direct/indirect purchasers/providers:

Passing On – Overcharge: (Ch. IV – Arts 12-16):

- Direct and Indirect Purchasers can recover:
 - Compensatory damages only:
- Court – Power/ Estimate Overcharge:
- Defence: B/Proof on Defendant:
- Indirect Purchases: Rebuttal Presumption of Harm - on Conditions:
 - Infringement:
 - Overcharge to direct purchasers:
 - I.P. – purchased goods/services or derivatives, from the object of the infringement:
- Disclosure very Significant:
- Due regard to other Actions/Judgments for Damages *re* same infringement (Art. 15):

Quantification of Harm:

(Ch. V) (Art. 17):

[Communication]:

- Commission – Guidelines – Estimate Share of Overcharging [Art. 16]:
- Estimation Sufficient: where “it is practically impossible or exceedingly difficult precisely to quantify the harm suffered on the basis of the evidence available”:
- Rebuttable Presumption that Cartels cause harm (Art. 17(2)):
- NCA on request may assist National Court where appropriate:

ADR – (1) (Ch. VI) (Arts 18/19):

- Limitation Period – Suspended:
- National Courts – Proceedings – Suspended for up to two years:
- C.A. – Settlement Sum – Mitigating Factor Fine:
- N.Cts – Determining Contribution – Due Account of Damages Paid:
- No Contribution from Settling Infringer – for Residue of Claim:
- Claim Reduced by Settlement Sum:

N.R. – (2) Effect of Settlement on Subsequent Actions:

Art. 19:

1. “Member States shall ensure that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringers share of the harm that the infringement of Competition Law inflicted upon the injured party.
2. Any remaining claim of the settling injured party shall be exercised only against non-settling co-infringers. Non-settling co-infringers shall not be permitted to recover contribution for the remaining claim for the settling co-infringer.
3. By way of derogation from paragraph 2, Member States shall ensure that where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-

Final Provisions:
(Ch. VII) (Arts 20-22):

- Commission to Report to European Parliament by December, 2020:

- Transposition: by December, 2016: (Art. 20):

- Domestic Law: Substantial Provisions: Not Retroactive:

Part 3:

Recommendation 2013 L201/60:

Collective Redress – (1):

- Agreement could not be reached on provisions regarding collective redress or on promoting an opt-out solution for inclusion in the Directive:
- Thus, a Commission Recommendation (C.R.) was introduced:
- C.R. on common principles for injunctive and compensatory collective redress mechanisms in Member States concerning violations of rights granted under Union Law (OJ 2013 L201/60):
- Relates to EU law generally and not just to competition law ('mass harm situation'):
- Had to be implemented by the 26th July 2015:

Collective Redress – (2):

- Redress Mechanisms:
- Such mechanisms should be introduced by each member state but which follow the same basic principles throughout the EU. Whilst respecting the different legal traditions (Recital 10):
- Recitals 29, 30 and 32:
 - “29. The Member States should ensure that the lawyers’ remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties.
 - 30. The Member States should not permit contingency fees which risk creating such an incentive. The Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party.”

Collective Redress – (3):

- Recital 32:

“32. The Member States should ensure, that, in addition to the general principles of funding, for cases of private third party funding of compensatory collective redress, it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties.”
- Significant Risk of Abuse. Recital 20:

“In order to avoid an abuse of the system and in the interest of the sound administration of justice, no judicial collective redress action should be permitted to proceed unless admissibility conditions set out by law are met.”

Collective Redress – (4):

- Opting In/Out. (Recital 21):
“A key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions as well as in managing the collective redress actions effectively.”
- Of particular interest for law-value damage suffered individually by victims:
- Member States should ensure that the cost of legal representation does not act as an incentive to litigation:
- Contingency fees which risk creating an incentive to litigation should not be permitted:

Collective Redress – (5):

- Punitive damages, intrusive pre-trial discovery procedures and jury awards should be avoided:
- To rule out culture of abusive litigation (Recital 13):
- Use of ADR procedures as an addition to judicial collective redress recommended.
- Judicial collective redress action should only be permitted to proceed if admissibility conditions set out by law are met.
- Loser pays – principle (para. 13):
- Declare origin of funds (para. 14):
- Assessment of the Recommendation by the Commission by the 26th July 2017: Criteria which can envisage, include impact on: - Thus, a C.R. was introduced.
- Assistance will be provided to national courts in the application of Articles 101 and 102 TFEU.

End of Presentation