PART II: INTRODUCTORY SESSION - THE DAMAGES DIRECTIVE: GENERAL PRINCIPLES AND CHALLENGES

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Link: JustCompetition – Training Module – Part II

Good morning, ladies and gentlemen, I am very pleased and honoured to be in Bucharest, in this great city, as part of a three men team dealing with, as Adam has said in his opening remarks, a contribution to knowledge with regard to this Damages Directive right throughout Europe.

In those opening remarks, Adam set out what the aim and ambition should be and is with regard to all European law not simply the European law on Damages Directive.

It is, in fact, that each Member State would, at the same level, apply the same consistency, and apply the same uniformity with regard to all principles – principles, whether they arrive in the TEU or the Treaty of the Functioning of the European Union and now the Charter of Fundamental Rights or the Damages Directive.

That's the ultimate ambition in fact, if it could ever be achieved.

But it could only be commenced, I think, on a step by step basis, and if at the end of this process we can get something collectively from the Damages Directive it will be, in fact, a step in that direction.

This is not really a conference in the normal sense or a seminar in the normal sense, where people who were nominated to deliver papers do so, either by way reference to the papers or speaking to it.

It is a little less formal than that; it is more of an educational process that we can all engaged with.

My contribution is simply to outline what the general principles of the Directive are.

It is not intended that you necessarily will leave this seminar with full knowledge of the Damages Directive.

I will be referring to a number of slides where I have set out in considerable detail what I propose to say.

From time to time I will skip those; they're there in the background.

My ambition is to, so of speak, whet your appetite. If I can encourage you to have an interest in the Damages Directive, if I can point out the highlight problems that we have already encountered and are likely to encounter for several years to come, then that will be a good thing.

Do not for a moment be concerned about understanding all of this or following all of this.

If you, in fact, obtain an interest in it, then you will, from time and time refer to it and you will from time to time pick up -incrementally - more knowledge in relation to it.

We know it was brought into force in 2014 and I'll come back to that in a moment.

But, can I say just a little bit about the state of play throughout Europe and with regard to competition law in general?

As you know, there's a considerable diversity between Member States as to what type of entity deals with competition law.

In some states, there are designated Courts, in other states there are Tribunals, both first instance and at appellate level.

But there is a vast difference to be found, right across Europe, with regard to those entities, with regard to their staffing levels and their expertise that you can find within them.

Some are full-time, some are staffed by qualified lawyers, economists, forensic accountants, for example Adam's Tribunal in London is probably one of those.

And the throughput of cases corresponds largely to the big Member States, and also reflects the degree of expertise that these bodies have at first instance and at appellate level.

So, it's not surprising that countries like United Kingdom, France, Germany, the Netherlands, and I'm sure several others have quite a throughput of cases, they have developed at a pace, perhaps, greater than others and all because of this expertise, all because the expertise's being fed by this experience of a variety of cases going through them.

We have a kind of a second tier in some member countries where you have a respectable number of cases and you have a respectable variable and diversity of use.

And then we have smaller nations, and I'm including Ireland in relation to that, were Articles 101 and 102 largely can be incidental to once working life.

We, judges, combine the application of competition law with many other and different functions.

There are cases, from time to time, but they can be quite infrequent, and thus, one may not be able to get the same experience as can be obtained in bigger and more experienced tribunals.

With regard to Ireland, for example, all competition cases on the civil side start at the High Court level, which is a constitutional Court and our major trial Court.

There is no dedicated section of the High Court dealing with competition law, there are no dedicated judges in the High Court dealing with the competition law but, generally, there are one or two who have an interest in competition law and thus the throughout of cases go before them.

For the rest of the time, they do commercial, they do I.P. law, they can vary into different brunches.

And yet, from time to time, we are call upon to deal with competition law.

And when that occurs, as Adam has said, we're obliged by European law to apply uniformity and consistency as much as we can, compatible with the French, the English and the other bigger countries where they have really these expert tribunals and throughput of cases giving them quite a degree of competence in relation to this matter.

So, our challenge really is to try not in any way to neutralize those countries but, in fact, to uplift the second and third tier countries to bridge the gap of experience, to bridge the gap of knowledge that some of you might think exists with regard to this matter.

I always find that if you're going to talk a subject you should say something about the background, you should say something about its history because it's so much easier to understand the key concepts if, in fact, you understand why it was necessary in the first instance for the measure in question to be enacted.

I've always thought, from the lawyer's point of view, that if you can get your head around what the concepts are, filling in is purely a matter of detail, it's purely a matter of reading, it's purely a matter of time, it's purely a matter of acquiring knowledge.

But if you cannot enter really big concepts, if you don't know where they fit, if you don't know how to apply them, then all the reading in the world, all the knowledge in the world is capable of going off on cup-de-sacs without any fruitful end.

So, it's quite important to understand, I feel, why it is necessary, why it was thought necessary in the first instance to bring the Directive in, to try and understand the major concepts, and you will do so by having a knowledge of the difficulties that preceded the enactment of the Directive and then, as we go through the Directive, you will see the key areas.

This first slide is simply an introduction, it's telling ... it's in Part 1 of the presentation you will see, I have referred to what`s behind it;

Part 2, the essential provisions, and then there is a recommendation for collective redress.

Everything, of course, hinges on Article 101 and 102.

Look at the general application, they have direct effect, in other words, they have an application between private individuals, in private litigation, outside entirely the relationship between the state, or any such bodies, and individuals.

They create rights and obligations.

Once rights and obligations are created under EU law there is an obligation on every national court to implement it, and there is such an obligation to make sure that individuals who suffer any loss or damage can have access to it.

This is (...) the next slide talks in a little bit more detail about what Article 101 is; everybody knows we're talking about agreements between undertakings, decisions by associations, concerted practices, affecting or capable of affecting inter-state trade with the object or effect.

This is all very standard stuff, and then we know within the provisions of the Article itself, we set out what is sometimes referred to as the hardcore provisions, which you will see listed here: price-fixing, limit or control in production or markets and market sharing with suppliers and others.

Of course, it's always possible to get a reprieve from any of those prohibited infringements if you comply to Article 101.3 of the Treaty.

Equally so, when we discuss 101, we immediately link it correctly with 102 because both are the essential provisions dealing with competition law.

This deals with an entirely different concept but equally as damaging, when it is in place, as the carteliars are under 101.

This refers to an entity, an undertaking in a dominant position and that undertaking is abusing its dominant position which, of course, is affecting inter-state trade in the internal market or any substantial part of it and that likewise is prohibited as being incompatible with competition law.

Once more, the conditions are specified in there.

Ladies and gentlemen, this next bit that I propose to deal with is a little background leading up to the Directive itself.

You will all be familiar with Regulation 01/2003.

That really created a seismic reform of antitrust procedures right throughout Europe.

For the first time ever, the direct enforcement of 101, including 101.3 and 102, was giving to national courts.

The ECN, a network of national competition authorities and the Commission, is established and they work in close harmony so as to apply the provisions in this uniform way of both 101 and 102.

Regulation 1/2003 also made provision for an exchange of information, opinion and advices between the NCAs and the Commission, with indeed also making provision whereby judges of Member States can obtain the opinion of the Commission on any matters that might fall within their ambit.

So, it created a structure, which heretofore was vested entirely in the Commission, at local level now.

Prior to that, as you know, all 101.3 applications were dealt with by the Commission only.

That resulted in the Commission really been engulfed in such applications, with the result that they were overwhelmed.

As part of the principle of subsidiarity, Regulation 101 - or Regulation 1/2003 was invoked.

And that freed up the Commission to concentrate their resources, limited as they are, and in chasing serious infringements of 101 and 102; essentially, under 101, the carteliar activities.

So, what was the necessity to concentrate? On what?

Private enforcement.

Why was it necessary to concentrate on private enforcement?

Because after several years of assessing what the situation was, most people involved realised that public enforcement on its own was not sufficient.

For the full effectiveness of competition law, it was necessary to combine, in a proactive way, private enforcement with the already existing public enforcement.

Because, if you can have two that meet at crossroad and travel together, it is very much likely that the full effectiveness, which is a principle of the European law, the full effectiveness will be achieved to a far greater extent than otherwise.

This principle of effectiveness runs right throughout European law.

This principle of giving an effective remedy, of Member States being oblige to have in place rules, whereby any rights created by European law can be enforced at domestic level, runs right throughout treaty provisions, secondary legislation, it runs throughout the charter now and runs right throughout what are called general principles of European law.

I will come back to those in just a little while.

And this full effectiveness bit, as you will see from the slide, was required in order to enhance the efficient function of the internal market; to facilitate at the local and domestic level those who might suffer harm from infringements of 101 and 102; and it also was necessary so us to provide some deterrent message for those who might be involved in such activities, or in fact those who were.

The necessity to concentrate arouse because of the difficulties which existed at national level and for individuals who might, in fact, be thinking of taking private action.

This stemmed, in the first instance, from the nature of competition infringements.

Generally speaking, there's a deliberate concealment involved, generally speaking even if experts can be retained on behalf of an intended plaintiff it will be extremely difficult, even to a sophisticated technical eye, as I said, to understand what the infringement is, to be able to obtain sufficient information that might allow you assess whether or not you have a credible case.

And all of this is deliberately carried out.

Activities by carteliers are not accidently bumped into. It's not like somebody you might meet on a shopping street.

They are generally speaking well thought out: they go from being a concept to a plan, to an implementation of the plan.

This involves a lot of people, it involves a structure, and it involves a deliberation at every turn by those involved.

In fact, I am convinced that many people, who deliberately engage in this type of activity, do, what we will be familiar with, a cost/benefit, I have it in the slide here, a cost caught analysis.

So, they try and work out what benefit, what financial benefit they will gain by entering into this activity, by pursuing this activity as long as they possibly can.

They will, of course, also assess the risk of being caught, the risk of their activity coming to the attention of the NCAs or the Commission, and the risk of action being pursued, and then they will make a judgement call: is it worth it, or is it not.

And that's the level of sophistication that many of these major enterprises undertake ever before they start this.

So, it's extremely difficult for a private individual, even if the individual in question is a SME or even a big company in a Member State, it's extremely difficult to go after and pursue harm which you obviously suffered on account of this.

Then, what happens even if you get this information together?

A part from engaging experts, whether they are accountants, whether they are economists, whether they are lawyers or otherwise, you must engage with us, judges.

So you must engage with the national legal process.

And that brings into play our familiarity with the subject matter and also, of course, brings into play, very significantly, what rules are at the local level.

Us, judges, like things, largely speaking, to be fairly compact, to be fairly net, to be fairly well defined.

If we can come up with a fairly simple answer, to adjudicate in any particular case, why not take it?

Why would you look for more complicated process?

Why would you want to engage in some in-depth analysis if, in fact, a solution is more ready-made for you?

So, we tend to look at the problem we have on a first page basis.

Now, that's slightly unfair to some of us, because we sometimes want to look behind that. We are not all always able to do it because of local rules.

We are not always able to do it because we may not have the experience gathered from the throughput of cases that I've mentioned earlier.

But we've still got to do it.

So, judges are faced with lots of difficulties.

They are face with this interaction between public and private enforcement; they are face with this problem about limitation periods, which frequently arise; they want to know what is the scope of any decision from the NCA and the reason why that is necessary because, on some occasions, the intended plaintiff, the intended mover, can rely upon that decision.

They will want to know what kind of decisions have been made and addressed to whom.

They will encounter jurisdiction issues, because inevitably, before Articles 101 and 102 can apply, there will be cross-border elements.

And then, if they get all through that, the judges, that's only the half-way stage.

The whole purpose of mounting an action is, of course, to get to the bottom line, i.e. to obtain compensation for the harm suffered.

So we then get into this question of compensation. It's absolutely simple at a theoretical level.

It's absolutely easy at an abstract level, but once you start working your way through various issues with regard to the claim mounted - whether the facts are sufficient; what are the theories behind it; what are the suppositions there. You have economists.

I remember in a case, maybe five or six years ago, when I was in the High Court in Dublin, we had a stream of economists on both sides – all highly qualified individuals, many of them PhDs – and the issue was net enough and they gave diametrically opposed evidence on the same point. I rant a little with regard to that, because if you recall what duty an expert is supposed to have, in the first instance, his duty is to the Court.

And if, in fact, we, judges, can insist upon such experts honouring that duty makes our life much easier.

In essence, in fact, of course they entirely reversed it, they play piper to the person who plays the tune, and that's their client.

And here we had, literally across the table here, PhDs, professors, on the same narrow point giving diametrically opposed evidence.

It really makes our job extremely difficult.

So, once we get into this compensation, it was in truth a bit of a nightmare for many of us that had to do it.

Then there was a move, there was a recognition of the urgency, that the Member States would not be able to achieve a level of uniformity to themselves.

National rules differ from place to place.

We have our common-law system in England and Ireland; we have a civil-law system with considerable variations amongst European states.

If you look at the third indent there, it covers matters like what court does one access; what are the rules; how do you start the action; are there any evidential presumptions; what about disclosure; the investigation file of the NCAs; and you have various, various problems that all of us encounter.

Look at the third indent from the bottom: forum shopping.

Of necessity, there is this cross-border element when 101 and 102 come into play.

Why would not large undertakings, who have set out deliberately to embark upon cartelier activity, why would they not have lawyers to advise them that

If you sue in Germany, you would have a better chance of winning than in France, or than in Bucharest, or than in Dublin?

Of course they do, they have a network of experts at all disciplines available to them and they tap into them because this is a business in itself actually.

So, forum shopping is quite significant.

That brought uncertainty; that gave them a great advantage, in fact, it gave them a competitive advantage on the market place, as well.

So, over a period of time, various entities energised a drive that led to this Directive.

You will see there I mentioned the Court of Justice; these are several cases, please note the time gap between Sabam in 1974 and really the critical driver with regard to all of these in 2001 [Courage v. Crehan].

And then we have a series of cases which I'll touch on in just a moment: Manfredi, Pfleiderer, Otis, and the rest of them.

So, the Court of Justice really put its shoulder to the wheel of the drive towards 2014, when the Directive came into place.

The Commission was also terrible conscious of this for several years.

The Commission invested - the Commission commissioned the Ashurst Report in 2004; that led to the Green Paper etc.,

Proposal for the Directive in 2013, and then we get the Directive.

Side by side some member states, at a pace, and to a degree perhaps more than others, brought in reforms at national level.

That's really a snapshot of the history. From 1974 a gap of 27 years or more, Courage, and then we have the Directive.

There were a number of milestones judgments. There can be no doubt what so ever that Courage v. Crehan in 2001 was probably the start point that energized both Member States and the Commission to do something collectively about the private enforcement.

Courage v. Crehan laid down very simple rules.

If the EU confers rights on a private citizen, there's an absolute obligation on Member States to have in place a structure by which those rights can be enforced.

They are directly applicable at a horizontal level - of course they are at a vertical level - they are directly applicable at a horizontal level.

And once that became established, it meant that two private individuals could go to a local court and could sue on their domestic equivalent of 101 and 102 if, in fact, it could establish an infringement and it has suffered harm.

That really was a cataclysmic moment in the enforcement of competition law.

We have other cases then that immediately followed which supplemented these quite significantly as well.

We had Manfredi and we had Pfleiderer, as we know, and then we had Otis.

Manfredi created a situation whereby the principle of the domestic Court being in charge of procedure was upheld.

It was subject only to the principle of equivalence and the principle of effectiveness.

Pfleiderer, I recall well when the decision was given, created consternation in certain states.

It's said: no longer was an absolute prohibition on a private individual having access to a file of a national competition authority.

It said that in principle there was no reason why access could not be gained to such documents.

Any law from a Member State which created an absolute ban is incompatible with the full effectiveness of competition law.

It said, however, and this was one of the difficulties, that it was for the national court to asses on a case by case basis what documents one might have access to.

Then we look at Donau Chemie, which, again, spoke about access to the file of the NCA and then we have the Kone decision which is quite a significant decision in its own way.

It permitted an individual who came with the umbrella principle to sue for any harm that he might have suffered.

So we have a series of cases which really underpinned the drive for, if it's not harmonization, definitely the drive for more coherency across the EU.

That is a very brief background, there is more detail on Part 1 of this presentation about what let up to the Directive.

As you can see, that's the broad outline of [Part 2, referring to slide], which speaks for itself, this summary of the main changes is a slide really worth looking at.

In the first instance, it makes provisions for easier access to the evidence.

Diana is going to deal with that subject a little later in the presentation and I will not dwell on it, but that was an absolutely critical feature with regard to making it possible to bring a private action.

The rules with regard to discovery, disclosure, and access to documents, are within the province of each Member States.

The rules differ.

Some have blanket immunity on a certification by a minister that it is the public interest, others not so.

Some are less inclined, some judges, some courts are less inclined to permit access than others.

Some Member States feel that an NCA file is sacrosanct and cannot be looked at whatsoever.

But the change brought about to the evidential material within the Directive is well worth a serious consideration.

The second bullet point is that in future, a private individual can in fact take a benefit of a decision by the NCA, or the Commission, which has established the liability aspect of the infringement in question.

I will come back to the limitation periods in a moment, because they are indeed quite generous and can potentially raise difficulties under the [European] Convention of Human Rights.

The passing on defence – we will deal with in more detail later this afternoon.

The Directive makes provision for full compensation, in other words, it implements the principle of "Restitutio in Integrum": whatever you have lost on account of the infringement, in theory you should be able to recover it.

It excludes punitive or exemplary damages; I'm not sure how many Member States have that and, in principle, I know England has had it, I think since a famous case in 1964, and it is also available in Irish law.

It deals specifically with certain presumptions, certain evidential matters, when the infringement in sought under 101, and it deals with joint and several liability.

The next slide is really a little more of what the overall purpose of the Directive is, and it largely fleshes out what I have previously just stated.

Ladies and gentlemen, this question of direct effect of Directives is a very important issue and I'm not sure how often we all come across it.

As you know, there is a major distinction between Regulations and Directives.

Directives are binding as to their result on Member States, but they leave to Member States a certain amount of discretion as to know how they transpose that Directive into national law, whereas Regulations, of course, are directly applicable, and not only are they directly applicable, they also have direct effect.

When can a Directive, if at all, have direct effect?

Of course, you must immediately make the distinction between a vertical direct effect – that is, in an action involving the state or any emanation of the state – and a direct effect on a horizontal level, that is, between private individuals in an action where no emanation of the state is involved.

This topic has become very evident, with the enactment of the Charter of Fundamental Rights.

As you know, under Article 6 of the TEU, the Charter of Fundamental Rights now has the same legal value as Treaties.

Questions have immediately arisen as to whether or not the provisions of the Charter can have direct effect.

The principle of direct effect equally applies with regard to all Directives, including this Directive.

So, you will see there from that slide that, VDE is Vertical Direct Effect, that I am suggesting that a Directive never has any direct effect at all, either horizontally or vertically, until the expiry date for its transposition into domestic law has passed.

If that date has gone, and if it hasn't been transposed into domestic law or, if inadequately transposed into domestic law, it can, in fact, be invoked vertically, that is when the state is involved.

There are certain conditions that must exist before that takes place: the Directive has to be clear, unconditional, and, in fact, there is no further requirement to give it expression in domestic or European law.

In other words, within itself, you can see what the rights are and you can see what the obligations are.

That's vertical direct effect and we're probably generally familiar with all of that.

It's the next bit I think that's really controversial and that's really interesting, and that's the horizontal effect.

When we talk about competition law, when we talk about making private enforcement more accessible to the individual at domestic level, that is the critical line that we are referring to.

Not so much that you sue the state, but, in fact, when you want to sue a cartelier, when you want to sue a dominant player in the market yourself - for whatever reason, the NCA may not have got involved, may not do so, but you want to do it.

So, the first point is that at a horizontal level a Directive can never take effect.

That is whether the limitation date has passed or not.

That is, even if the Directive is clear, if is unambiguous and if it is a full expression of the intent of the European element; it just doesn't apply.

They are certain compensations for that – they have been referred to by Advocate general in a case called AMS as "palliatives measures".

The first is, of course, when we are looking at a Directive, we must adopt an interpretative technique, which has regard to the wording of the Directive, has regard to the purpose of the Directive, and that interpretative technique must try to achieve the result specified in the Directive if that's possible.

So, when you are interpreting a piece of domestic law in the context of the Directive, you must keep those in mind.

Of course, there are limitations.

You must adhere to the principle of legal certainty, you cannot retrospectively apply it to it, and you cannot strain the interpretation to such a level that it becomes what is known as contra legem.

When looking at domestic law for this it's quite important, bear in mind, that you can look outside the immediate provision in question.

For example, if the Directive is intended - or if the national measure is intended to reflect a particular provision of the Directive, and if you're not able by this interpretative tool to read national measure in conformity with the Directive, you might be able to read a different national measure in conformity with it, which will have this "knock-on" effect on the provision in question.

So, just bear in mind that last indent: that you must look at the whole body of the domestic law when you're interpreting that.

The second one is the broad conception of the "state" – that speaks for itself.

State liability for a Directive: If the state has failed to transpose the Directive, or transpose it directly, then in certain circumstances a private individual can sue the state.

Three conditions must be satisfied: the purpose of the Directive must be clear and must relate to the conferral of right on individuals.

Secondly, those rights and the corresponding obligations must be evident from the wording of the Directive itself; you cannot look outside the Directive to see if that's the case.

And, of course, there must be a causal link between the Member States' failure to bring the Directive into play and the damage that you have suffered.

General principles of EU Law: if you start researching what they are, if you start trying to identify a particular source you will have difficulty, and, indeed, you will spend some time doing so.

But, they are there and they are recognized in Treaty provisions.

Again, if you are looking to Article 13, I think, of the EEC which is now Article 19, if you look at the Article 6 of the TEU, it talks about the Charter of Human Rights - it talks about the [European] Convention on Human Rights and it talks about the general principles of the EU Law, having a Treaty status or their equivalent.

In those cases, Mangold and Kücükdeveci, the Court, for the first time, invoked this general principle of the EU Law in the context of a Directive.

Kücükdeveci was an employment contract case.

It involved a German lady working for a German company and the length of notice which her employer was obliged to give her in order to terminate her contract.

Under German law, that length of notice incrementally increased with the amount of service that you had with a particular employer.

However, any service up to the age 25 is disregarded.

This lady was employed by the firm Swedex from age 18 to 30.

But, in fact, they only gave her two months or three months notice because they were obliged to the domestic law only to have regard the period of time after age 25 to the age when they propose to fire her.

She said: “That’s discrimination” on age grounds; she said it absolutely has nothing to do with anything else.

She goes before Labour Court in Cologne and they say: “We are bound by domestic law, the domestic law is quite clear, we agree that there is a difficulty here about its compatibility with European law, we can’t do anything about that."

Under the German constitution, or under the general principles of European law, as you know, if a national measure is incompatible with any EU law measure, then we are obliged as judges to step aside the national measure.

Under the German Constitution, a serious question mark arose about that process because the German Constitution obliged and obliges courts to enforce the law on the statute book until the Federal Constitutional Court has said it`s unconstitutional. There was a Reference to all of this.

The Directive in question could not be relied upon because it did not have horizontal effect, it didn’t have horizontal application.

So, what did the Court do?

They said: look, there’s a general principle of EU law dealing with non-discrimination on age grounds.

It is to be found in Article 19 of the Treaty of the European Union, and it’s to be found in Article 21 of the Charter of the Fundamental Rights – that’s a general principle.

OK, we have the non-discrimination Directive, I think it’s in 2000, but that only creates a general framework giving further expression to this principle of non-discrimination on the age grounds.

We couldn’t apply the Directive for the reasons I’ve mentioned.

So, the Court ignored the Directive and said:

We have a general principle and if there is a general principle it must be that it can be applied horizontally.

So, arising from Mangold, followed by Kücükdeveci, and followed by AMS, and followed by Dominguez and three or four other cases, the Court has carved out what might be a very interesting development in the future with regard to matters covered by a Directive.

It's said that if those matters can be traced back to and can rest upon a general principle, then even though the Directive doesn't have horizontal effect, the general principle will have horizontal effect.

And that's quite an important point that might come into play, with regard to the Damages Directive. It applies generally but it can indeed apply to the Damages Directive.

The next series of slides are almost practical matters.

Who can, for example, sue?

You might think that's a very obvious question; indeed it is a very obvious question, but is there a very obvious answer?

There are some obvious answers, but also some answers that are not entirely obvious.

You will see from the second indent that if your claim is for damages, you must have suffered harm – that's a quid pro quo to the institution of any proceedings where that is your remedy.

On the other hand, if you're looking for an injunction, or if you seek a declaration, it is sufficient if you're threatened with harm, you do not at such have suffered harm.

"Harm", in this sense I use for the purposes of establishing standing to bring the action: locus standi.

Harm has another aspect to it, which is of course the quantification of the damage.

As you saw, factors such as causation, remoteness, all of these points are governed procedurally by domestic law, subject - and always remember this please - to the principle of equivalence and to the principle of effectiveness.

But they're used in a different context than harm in this slide, which is all related to whether or not you can mount into an action in a domestic Court for a breach of the domestic equivalent of 101 and 102.

Incidentally, under Regulation 01/2003, a domestic Court is obliged, when hearing this action, to apply 101 and 102 if there is any element of cross-border activity involved.

Now, who may sue you?

Again, that's just an add-on to the second one.

It is any person who has suffered, directly or indirectly, any harm.

The second indent – Articles 12 and 13 – is something I'll come back to in a moment.

Who can be sued?

It is an obvious question; it can pose difficulties for lawyers.

It's critically important, obviously, to get the correct defendant, otherwise you can be non-suited at a very early stage and at great cost.

Addressees of public law decisions in a follow-on action; Non-addressees in a standalone action.

As you will see, I've pointed out in subparagraph (d), it's very important that, when there are groups involved, when there's a complex structure involved, that you consider whether or not it`s the parent or any sibling or offshoot of the parent.

Liability, in principle, don't forget, is joint and several, a point I will come back to when briefly looking at Article 11.

[The forum] is another quite important practical matter that we consider if any case came before us.

Us, judges, when looking at cases, might have a short, quick list of points we would want to tick off.

Has the plaintiff established standing? Is the correct defendant identified?

Are there any other defendants that should be in place? Is this the right Court?

Is this the right court - is this the right jurisdiction rather than court. Is this the right jurisdiction in which this type of action is to be brought?

What about if, in fact, the named defendant has carried on activities through a variety of subsidiaries, in different jurisdictions?

Who is the dominant jurisdiction or which is the dominant jurisdiction in which the action should be brought?

How are you going to interplay with the other jurisdictions, if proceedings are already in being, either by the same plaintiff or by other plaintiffs?

It can become quite complex, quite a difficult issue, but it's one we just, from time to time, may have to grabble with.

Look at the paragraph (d), there I speak about parallel actions and this really can be quite difficult.

When can you sue?

It's a fairly obvious question; I'm not talking about limitation periods now as such. I'm talking about: are there in existence sufficient ingredients for an action, which can be mounted before a court?

I'll come back to Article 9 and I'll come back to Article 10 in just a little while.

Another matter on your quick list, might be whether or not the Directive applies at all.

In other words, what is within the scope of the Directive?

And there are numbers of matters that are very simple and I'm quite certain that all of you are very conscious of it, that you should immediately have to the fore.

Evidently, if the course of action occurred before the Directive was brought into force, it's out.

Evidently, if the Court was seized of it before December 2014, the Directive doesn't apply.

Watch your limitation periods, because they are set out into the Directive and are fairly critical. Some serious complications can arise.

As I say, what happens if the plaintiff`s only course of action is really dependent on proceedings taken by the NCA or before the NCA?

The second point is: When should that period start?

I'm going to leave that for a moment, if you don't mind, because I have a slide or two dealing with the limitation periods set out in the Directive, and I'm going to make some comment on what difficulties they can give rise to if played out in a big way.

I was at a conference, I think in London, where Peter Roth, the Chairman of the Competition Appeal Tribunal, spoke on the Directive and voiced his concern that if in fact the limitation periods and the suspension provided for those limitation periods in certain circumstances, if they were played out fully, you could in fact have an action running for 10 or 12 years, ever before getting to a court of first instance, and ever before a decision, and ever before the appeal process has run its course.

That intuitively doesn't sound right; that intuitively is a bit of a problem, I would have thought.

I'll just come back to that for a moment.

Definitions – I just put it in for information purposes. There is not much to be said about it.

Obviously, is quite important that you understand what a leniency statement is or what settlement submissions are, but it's there for you to have a look at in your own time.

Equally so, [the slide] is just telling you again in some form as to what the overall Directive seeks.

As you can imagine, the Directive says a lot about evidence. Evidence is absolutely critical.

As indicated, Diana is going to talk to you about evidence and I'm not really going to say anything about it, even though there is something on these slides, but it really is only touching the iceberg, you could spend an entire conference, confidently, discussing even one aspect of Article 5, the disclosure of evidence; one aspect of Article 6, dealing with evidence contained in the file of the Competition Authority; you could spend a lot, a lot of time in relation to it.

Running right throughout the evidence is the concept of proportionality.

This concept of proportionality must be understood by us all, and hopefully, at this stage, it has the same meaning in all Member States.

There are certain matters specified in Article 5(3), which you must take into account when considering this question of proportionality, and, in fact, there are further matters which you must add to that if you're dealing with a file of an NCA.

I suppose, in essence, proportionality, even tough we all know what it means, if you were just, you know, asked to write a description of it in three or four lines,

I wonder whether the result would be very similar for all of us, and I doubt it would be.

Again, you can almost see what an elephant is, but just describing it is more difficult.

Is it much different from making order which is appropriate? Is it much different from making an order which is reasonable?

Yes, there is a difference between proportionality and reasonableness.

Reasonableness imports a lot of subjective thinking, a lot of subjective analysis, a lot of subjective intuition, really, by each of us.

What I consider reasonable, either judged by an objective man or not, must have a degree of latitude within it than what you or any of you might think the same thing.

Proportionality has more an objective approach.

Proportionality can be tested in a manner in which reasonableness cannot.

So, they are not the same thing and I suppose it`s trying to keep a balance between: what is required to mount in action; what is required to bring home an action, what is not oppressive to the defendant company, what will keep a leniency programme going, where will the balance between the administration of justice and access to documents fit in with the balance of confidentiality, fit in with the balance of commerce or fit in with the balance of business.

And where will it fit in with national competition authorities or the Commission doing their job on the public enforcement side.

But, in itself again, it is quite tricky.

This is quite an important Article and it can be used to great effect by those who wish to sue for infringements of 101 or 102, or their domestic equivalent.

The effect of national decisions: ever before the Directive was published, there was a principle that if the Commission had made the final determination on the question of liability, then, in a follow on action, the infringer was bound by the operative part of the Commission's decision.

I remember spending days in a case where there was an issue between the parties as to what the operative part of a Commission finding was.

In fact, the case was Irish Sugar, which was one of the most appalling cartel activities ever to be conducted in Ireland.

It thus become quite difficult even in follow-on actions for intending plaintiffs to rely on the Commission decision on the question of liability because of those difficulties.

Add to them, of course, that, procedurally again, the obligation remained on the plaintiff to establish causation, damages, all of those things.

So, Article 9 is to be absolutely welcomed,

In that you will see once an infringement has been found, by final order, then, that is irrefutable evidence of its establishment in the Member State where it was so found, and even in other Member States it can be used to a high advantage because before their courts it is given the status of having prima facie evidence.

Limitation periods: I suppose the purpose of limitation periods is to make sure that an intended plaintiff is given a reasonable opportunity to bring the action.

Has Article 10 achieved that reasonable balance? I wonder.

You will see that the minimum period is five years.

You will also see that the period does not start before the infringement has ceased and I suppose an equivalent in our domestic law might relate to trespass on the civil side.

Trespass - if you're in somebody's property and you shouldn't be there - is a continuing tort.

So, if you wish, until that completely ceases, then the limitation period does not start.

That's not fully a good analogy because, in truth, every trespass itself is a cause of action. So it's a cumulative of trespassing, so to speak.

But here until the infringement has ceased it doesn't start; not only that, but the claimant must know or reasonably must know, not only of infringement, but that the behaviour in question, equals that; must know that the infringement has caused him harm; and must or ought to know the identity of the infringer.

Now, if you look at those individually, what happens?

Before a plaintiff can be said to have satisfied all of those criteria, and thus time begins to run, does he have to go to a lawyer?

Is that reasonable for him to take time out? An economist? An accountant or other expert? When should he go to those?

What efforts should he make to establish the underlining behaviour?

How does he know whether it constituted an infringement or not?

He surely can't be expected to make that decision himself.

You can instantly see that it can be running into months, years, years, years ever before it starts.

And then there's a provision whereby if the competition authority takes proceedings, the period is suspended, and it shall end one year at the earliest, one year after the infringement decision has become final, final and un-appealable, and so, suspended, if you want to go into alternative dispute resolutions.

It is not difficult to see that it could easily be 10 or 12 years before the action ever gets to trial, as I said.

You have a five-year minimum period.

It doesn't start no matter what, until such time you have identified the behaviour in question, until you know or reasonably to know that that constitutes an infringement, you know the identity of the infringer, so all of that gives scope for the extension of the period in question.

Then if, during it, the national competition authority should get involved: stop.

If, during it, there should be a reference to the alternative dispute resolutions: stop.

At least in that context, presumably, the infringer becomes part of it.

And then, you mount the action, you go to a court for the first trial, you get a decision and there's an appeal process, easily a decade or more.

What's the position, then, under Article 6 of the Convention?

Article 6 of the Convention is exactly the same as Article 47 of the Charter of Fundamental Rights: access to a trial with reasonable expedition.

How does this comply with that? Query, query, query...

I suspect that if an issue came to it, Article 6 would be interpreted in such a manner as to create serious difficulties for this.

Now, it will work itself out in due course but they are very generous limitations periods and one must realise that a forefront principle of all of this is to make sure that justice is administered.

I want to just say something about joint and several liability.

There's a principle and it's a correct principle in law that if you're a joint tortfeasor you should be jointly and you should be severally liable for the wrong caused; no question about that.

There is a derogation for SMEs, in certain circumstances. That derogation is stood down if in fact the SME in question is the ringleader.

There are also different provisions for an immunity recipient and contribution.

Can I just say one thing about contributions, contributors, indemnity between joint and several tortfeasors.

You might have a situation where a plaintiff sues three defendants for the same wrong.

He might want to settle with the defendant 2, but cannot settle with defendant 1 or defendant 3.

All three defendants have served notices on each other claiming contribution on indemnity.

In other words, what defendant 1 says is that look, if the plaintiff wins against me, I want to win against defendant 2 and I want to win against defendant 3.

In those circumstances, how does defendant 2, who wants to settle, how does he in fact protect his position?

Because if he settles, remember, he still has these notices from defendant 1 and defendant 3 outstanding.

It created quite a bit of debate in a couple of conferences that previously we attended.

It's been part of English law since 1954; I know that because we cogged their statute in 1961 word for word.

And what can defendant 2 do in fact?

He goes to Court and asks the judge to rule on whether or not the intendent settlement between the plaintiff and defendant 2 is reasonable.

If it's reasonable in the context of the claim, it can in fact give him certain protection against defendant 1 and against defendant 3 if they should come after him later.

Complicated enough provisions; difficult enough in practice. Unless it's sorted out in some meaningful way, it will make the settlement between the plaintiff and defendant 2 very difficult in fact, because defendants will be most reluctant to do that if they continue to have exposure to their joint tortfeasors.

But in principle, undoubtedly, if you commit a wrong resulting in harm, and if there's several of you involved, each of you should be fully liable in relation to it.

Many of these provisions will be fleshed out over time. Each one of our Member States will have to bring in a domestic measure to transpose it.

It will be interesting to see whether there will be much difference between what each of us does in that regard, and when that happens, maybe we should all came back and have a look at all of this again.

There's a long journey ahead for this Directive but it's truly to be welcomed. It's a step into the right direction; it will in fact penetrate into domestic situations and will eventually make it easier for individuals, before each of our Member States, to in fact mount actions from the private side – which after all is the entire objective of combining private enforcement with public enforcement.

The rest of the stuff you can look at in your own time. Thank you!