

## PART III: INTRODUCTORY SESSION - BASIC PRINCIPLES AND MAIN THEMES; THE NATIONAL SCENE

**Speaker: Adam Scott**

**Link: [JustCompetition – Training Module – Part III](#)**

It is a great delight to be back here in Romania and wonderful to see so many of you taking an interest in the Damages Directive.

Why?

Well, because despite the recognition by the European Court of the right of anyone in the European Union who has been damaged by an infringement of competition law, to come to Court and to claim damages, when the authorities began to look at this, they found that in 21 Member States nobody has succeeded in claiming damages.

So, back in Regulation 1/2003, much of the enforcement of the European law was delegated down from the European Commission to national authorities and also to national courts.

And what that meant was that a national Court who had an action brought before it, for infringement of national competition law, but who noticed an effect on trade between Member States, should immediately apply the Treaty. However, that was honoured more by inactivity than by activity. Back at the beginning of the Regulation, an Association of European Competition Law Judges was created by Christopher Bellamy who with Graham Child was the author of a very early work on European competition law.

When it started it was a slender volume now you can do weight training with it, because it's now two heavy volumes. So, we gradually built up these documents, and we have been looking at these documents in the earlier sessions of this course and today, though largely later on, I want to focus on the things that are in red.

And the communication on quantifying damages is a very slender document, worth reading. The practical guide is a long document.

The Oxera Report is even longer.

But all of you could and should read the communication.

Now, as I say, one of the difficulties is that most national courts have never applied this law.

So, right away across Europe, we have many judges who have no experience of how to apply the law and, the purpose of recording this and putting it on the Internet is that a judge who suddenly finds him or herself dealing with a competition law claim, should have access to material that introduces them to the law and the practice.

Now, what is very important here is that a judge should be able to manage the case from the beginning and should have an idea of the points that should be in their mind as they manage the case.



So, the overall concepts are these: effectiveness and equivalence are enormously important here, and the communication seeks to draw attention to the fact that much of what happens, happens because of the way a national Court applies national principles in awarding damages.

And that is the principle of equivalence that in applying European law a claimant should get no less than the sorts of damages that national law applies.

However, the court must also have regard to effectiveness, and effectiveness means that full compensation should be available to each person, notwithstanding limitations that have existed in national law.

And then you get these very important points in red.

And these have now to be transposed into the national law of each Member State.

And the points up there are these two points: that it must not be practically impossible to get your damages nor must it be excessively difficult.

What that means is that, as a judge is managing the case, they have to have regard to those two principles.

They also got to have regard to the proportionality of what is going on.

In other words, as you move through the process, and as you order evidence to be disclosed, you mustn't make that so great that the costs go up and up and up with lawyers.

We have had a damages action before us in the UK, where the damages awarded

I think were in tens of thousands of Euro and the costs were in millions of Euro.

That is not proportionate.

So, that's the other side of those reds points.

So, setting the national scene, right across the European Union.

At the moment, legislatures are in the process of transposing the Directive.

In other words, putting that into national law.

And that will be different, depending on national circumstances, but that has to be complemented in each Member State by having the rules and the procedures in place so that Courts and the parties before them understand how this is going to work.

Now, in the case of the United Kingdom, what that means is that you have the main law, you have the rules of the Court and then you have the practical guide as to how we do it.

We've already been working hard on private enforcement.

So, we've already have much in place.



Some of that will have to change in order to comply with the provisions of the Directive.

To give you an example, at the moment, if there has been no public enforcement and no fine, or if there's been public enforcement but no fine, we can order punitive damages.

So, we can order a penalty against an infringing party and we have done it.

Under the Directive, that becomes illegal. You are not allowed to punish, as part of private enforcement, you can only award full compensation, not overcompensation.

And that's because of the worries of the United States and the doctrine of triple damage.

So, by the time we reach transposition, those first three things need to have happened and judges need to have thought about how we are going to deal with the case that arises.

National competition authorities also need to have thought about this because the Directive provides various circumstances in which the court can look to the national competition authority for help.

Now, I have been in discussions with your competition authority about this. The senior economist in the national competition authority here has a doctorate in competition policy and I have to tell you rather quietly that competition policy does not help you very much in quantifying damages.

Quantifying damages means being an economist who is prepared to deal in figures.

And 16-17 years ago, I was chairing a group of authorities for the European Commission, persuading authorities around Europe that you can put numbers into economics.

Many of my economist friends haven't heard about this, they are very happy with qualitative statements, they're quite happy with algebra, but they have difficulty when it comes to actual numbers and the problem for judges is that judges have to produce a number, they have to say that this full compensation amounts to a number, and in Germany there has just been a case which started in millions of Euro and ended up with 51 cents.

Now, I have to tell you I think that's amazing and I think what happened was they went on the computer... click, click, click, click, click, they put in all their thoughts and it came up with this number, and they went and awarded this figure of 51 cents at the end and I have to tell you, that's too accurate.

You are not going to be able to do it that accurately.

Actual practice and case law is what's going to train us all, right away across the European Union.

We have to have some cases; we have to learn from each other.

So, the themes: full compensation – Article 3; effectiveness and equivalence – Article 4; sincere cooperation – that's where you get help from across Europe, and if necessary ask questions of the European Commission.

As Valentin said, this is about anyone. Anyone.

And that is why there's been a recommendation on collective actions.



The European Commission was not able to reach agreement eternally about collective actions.

But there's a recommendation that each Member State should have collective actions as part of the repertoire. Why?

To give you an example, in England, football shirts are very important.

There are many parents whose children are begging them they must have the latest England football shirt or the latest Manchester United football shirt.

And those football shirts cost 39 pounds and 99 pence at the time I'm thinking about.

And that was because all the people involved in the football shirts went to visit the home of somebody very important to see his new bathroom.

When you put your bathroom into your house you do invite all your competitors to come and see the new bathroom, don't you?

And you would never have discussed prices when you did so?

One of them went in his helicopter and part of the evidence was the air traffic control report on the movements of the helicopter.

And when he said in his evidence that he quickly rushed and saw the new bathroom and left, he was asked: did he set on the ground on his helicopter, waiting for quite some time before taking off or was he actually in the house having a coffee and having a little discussion with his competitors about the pricing of football shirts?

Not only were they fined 16.7 million pounds but also, our original idea of collective action, an action brought by a consumer association on behalf of consumers was brought.

Now, the difficulty was that very few customers actually had the shirt and the receipt to get the 20 pounds per shirt compensation.

Now, for 20 pounds, individual consumers are not going to bring a court case, usually.

We had a big case about school fees.

Only one couple brought a claim, though thousands of parents were involved.

And so that's why the idea of collective actions is important.

So, anybody, natural or legal, ....

Red: courts should be able to order disclosure.

We're very used to that in common law countries, that's United Kingdom, Ireland and Malta.

Not so common in civil law jurisdictions, now you're going to be able to order parties to produce documents.



Be careful, or you will be swamped.

I have been in cases with hundreds of thousands of documents; I have been in one matter with two million documents.

One of the worries that the European Commission is concerned about is access to the authority's files and I've been part of a study that, in one case, just doing that process, took 200 man-days of time in the Commission and 600 man-days - I should nowadays say person-days, it could be a man lawyer or a women lawyer -, 600 person-days of time just to deal with the documents.

So, be careful what you order, because it can become very time intensive.

So, courts have to be empowered to estimate.

So, back to effectiveness and equivalence, it's about the judge being empowered to say there was damage, I'm never going to get it to 51 cents, I have to make a decision, on the basis of the evidence I have, incomplete though that evidence is likely to be.

There's a rebuttable presumption of harm in the case of a cartel.

There was a question, should we put a number it?

In a words of one of my economist colleagues, there is not much point in having cartel for 10%, much better to have a cartel that raises prices by 20%, and in some cases cartels will succeed in raising prices by more than that, but you have to look to some evidence of the level of that.

Commission provides practical guidance and the national competition authority can provide help.

Now, both in relation to disclosure documents and in relation to quantification of damages, national competition authorities across Europe may not be ready to do that.

Most economists in public service are not used to doing this.

Many of the lawyers in public service are not used to doing this.

And so, we have been in discussion with the European Commission about the European competition network, to try to ensure that national competition authorities are ready to cooperate with the Courts.

But, don't be surprised if they're not as ready as you're going to be by the time you finish today.

So, what are we looking at?

Well, one of the interesting things about the documentation is that we acknowledge that we don't know all the answers, that this is going to be an evolving process, that there are areas of damages which we all know about from our national experience, but they may be areas of damage that we haven't yet thought of, that must be included for full compensation and, later on, when we do a case study, we'll look at some of that.

Interest. Interest has been applied differently in different Member States.



The law does not say how it should be apply but it does say that you must be able to apply interest.

Why is that important?

Because sometimes it takes a long time for a cartel to work through.

My biggest cartel claimed before me, the cartel started in 1938, the whistle was blown in 1998, the Commission decided to start there, finding an infringement from 1988.

We had seven years of discussion about jurisdictional use, limitation, jurisdiction under the Brussels regulation, and after seven years of that, the claims were eventually settled last year.

So, 1938 – 2015. Things can take time. Limitation – we're not going into limitation, but it can be very important.

Causation – we are not going to get into causation. Judges should know about causation, we may touch on causation but that's where your experience comes in.

Quantification – we're going to come back to this. So, estimation and the communication and the practical guide.

As I said, the communication acknowledges that what is going to go on is an amalgam of the national law you already applying and EU law.

