PART VI: THE CLAIM

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Link: JustCompetition – Training Module – Part VI

My essential function here, this afternoon, which is to talk about the Claim, that's at the focus of the second section.

For that purpose, I have broken down what I am about to say into four principal subheadings – about what? - in other words, what is being enforced; secondly, who should and can a claimant be; thirdly, can you nominate an appropriate defendant and are you quite satisfied that you have got the correct defendant or that you are not, by omission, excluding somebody who should be in; and finally, what about this question of forum and when do you, in fact, institute the claim.

I start then the substance of this, look, by just referring you once more to Articles 101 and 102 because, in effect, there's no doubt whatsoever, the entire purpose of the Damages Directive is to underpin the effective implementation of 101 and 102 and also to ensure that consumers have a high level of protection right across the European Union.

Article 101: direct effect, as we all know, impacting upon the relationships between individuals; creates rights and obligations which the National Courts are obliged by European Law to implement at a horizontal level and in so doing, they are, of course, protecting fundamental rights of EU Law.

The overarching purpose of the Directive - Adam has touched upon a number of these during the course of his presentation, and again, I will only touch upon a limited number.

I make the point once more, but it's worth making again – that effective public enforcement was not sufficient, we had to have both, and their interaction optimized enforcement right throughout the European Union and, of course, brings directly into play the position of victims of wrongdoing, who, by this Directive, are entitled, so declared by legislative provision, to be entitled to full compensation – I will come back to that for a moment.

But the mere phrase is really important, the mere image that conveys, the mere rights that it gives to a consumer and the satisfaction that that consumer can take by having that legislative provision under his belt, when, in fact, he decides to take an action.

Secondly, it introduces an element of legal certainty with regard to virtually all aspects of a claim -

I'm talking about the necessity for uniformity; how often have we heard throughout any conference we might go on the European Law generally, that the Commission and every enforcer of European Law strives to achieve this level of uniformity between Member States.

And in many respects, this is why the Commission is terribly anxious to have seminars of this nature because undoubtedly, each jurisdiction or several jurisdictions, just by the level of competition claims they might see, by the activity of individuals or lawyers dealing with competition cases, it is absolutely true to say that we have not all moved in unison.

And that's nobody's fault whatsoever, in fact, that's entirely to be expected.

We've had countries and we have countries, like the United Kingdom, Germany, France, the Netherlands, Belgium, and maybe a couple of others who have gathered a great deal of expertise with regard to competition cases – expertise at the trial level, which is utterly critical as well, because at the trial level the demands on a judge can be at least as great, if not greater, than at the appeal level.

Why is that? Because the trial judge has to make findings a fact, the trial judge listens to witnesses and determines what view should prevail – of course according to domestic rules, but he must do that.

And that is far from easy in a competition case if, in fact, you don't have some background in economics or if otherwise you are nervous or concerned about fully evaluating or assessing the economic evidence.

I remember on one occasion, sitting in a case, where I had two economists running various models, both extremely highly qualified - PhDs and if you could get something higher they had too – they gave diametrically opposed evidence.

And, as it was my nature then, even though I`ve gotten a bit calmer about it now, it was very difficult to understand how with basic facts – I'll come to the assumptions in a moment – it's very difficult to understand how with basic facts you could have two individuals who came to such a different conclusion.

This would be avoided and trial judges' jobs would be made much easier if experts remembered what their role was – their principal function, their primary obligation is to the Court, it is not to clients – I keep on preaching it, they keep on ignoring it and we have not moved whatsoever in relation to it.

I remember the model in question. One had a decimal point in front of three noughts and the other had a decimal point in front of one – it made an enormous difference and it just could not be right because it was a mathematical calculation.

It took a good deal of research and it took a good deal of questioning to uncover it.

So, the job of the trial judges is extremely difficult. I am not sure if any of you use assessors.

If you sit as a trial court, assessors would not be appropriate at an appellant level, but at a trial court, in some jurisdictions, there is the possibility of the judge saying that because of the technical nature of the case before him, he requires some assistance here.

The process differs from jurisdiction to jurisdiction – there may be a panel of experts that one can call upon, there may be agreement between the parties, subject to the trial judge having overwriting control on it.

Once the assessor is in place, various debates then ensue as to what his precise role is and to what his responsibility is – who can ask him questions? How can he intervene? Should he simply advise the Court? Should he simply explain the concepts to the Court? And so forth.

Whilst that is quite attractive, and I used it in one case, one has to be careful in that the assessor does not become the adjudicator of the case in question.

And it's terribly tempting for somebody who is reticent, in particular about the economic evidence — it's terribly tempting to, even subconsciously, place over-alliance of what the view of such an assessor might be.

But in any event, he`s there. The trial court so is very important in that regard.

The appellant level is, of course, critically important, but for a slightly different reason – the appellate level lays down ultimately what the law is and to that extent of course it assumes greater importance than the trial court, but the trial court for the reasons I have mentioned.

Thus, uniformity across all trial courts in Member States is what we must strive for and must continue to do so, even if the pace of some of our countries is slightly short of or not in parallel to other countries and that's to be expected.

A third purpose of the Directive is to remove differences between national jurisdictions.

It has done so, in certain areas, but not to a full extent and, of course, that is understandable as well.

In the areas not precisely covered by the Directive, the national procedural laws still play an important part.

It undoubtedly establishes a plain field for the claimants, for the undertakings in question and also for both.

If you look to the way I have categorized them, we have now a greater understanding as to how the claim should be formed, pursued – we now would have greater certainty about the chances of success and we at least have a knowledge of the parameters of what damages might be awarded.

So, a claimant has some certainty before embarking upon a case.

Equally so with an undertaking, because that undertaking realizes that the rules in liability have been approximated ever closer by this – they will be able to assess their chances of disputing essential elements, such as causation, in an easier way; they will also have some view as to what they might potentially be liable for.

And of great significance is the fact that it has removed competitive advantages and that directly links in to the second point in the last subheading – abolishing forum shopping.

Forum shopping – which again I will talk to you about when I mention the Brussels Recast Regulation – forum shopping was quite an active pursuit in competition cases in several countries and one can readily see why, not only from a plaintiff's point of view but also from a defendant's point of view.

And different competing interests would motivate the plaintiff to go to country A or country B and an undertaking who is sued to oppose vigorously the jurisdiction of either country to embark upon the hearing and instead suggest some other jurisdiction where he was more familiar with and where he thought he would have a better opportunity of either preventing the claim ever truly go to trial by making it as difficult as possible or even if it did go to trial, by getting a more favorable decision than otherwise.

"Overarching purpose of the Directive".

However, when you come to examine any case in front of you, you need just to be, even superficially, conscious of what's outside the scope of the Directive.

I have that first bullet point said "without merit consideration": several claims which otherwise might form within it, are rejected: obviously before the Directive came into force; obviously in accordance with the Directive; if cases have been instituted and are vested in a National Court, prior to that date, if the Directive is not transposed within the specified time subject to, of course, the doctrine of the direct effect; and then if it also falls virtually in liminie – by which I mean without a merit consideration by reason of the limitation

periods.

The limitation periods are going to be a source of considerable interest to a lot of people.

They are set out obviously in the Directive and they make detailed provision as to what is to occur in certain circumstances.

Adam has already identified two underlying principles of effectiveness and equivalence, and that is what the last bullet point on that slide is directed at; there cannot be an undue burdensome restriction placed on the institution of a claim or on how it is proceeded and those principles come into play.

This is the problem that we might encounter with regards to the limitation periods.

If you would care to look for a moment at the Directive, in article 10.2 it says that the limitation period shall not begin until, firstly, the infringement has ceased; secondly, the claimant knows or can be reasonably be expected to know three really important points: (one) the behavior that underlines the infringement; (two) having knowledge of that behavior he must also know as a fact that such behavior constitutes an infringement; (three) that the infringement has caused harm to him; and (four) he must know the identity of the infringer.

Well, if you take any one of these individually and you can see a great number of practical difficulties emerging at the beginning.

If you take the availability of knowledge, or if you take that also a claimant can succeed in having the time start only when he reasonably could have known of the infringement - how is he going to find out about the infringement? What steps does he have to take in that regard?

When both of those have been satisfied, he must also be satisfied that the infringement as a fact has caused harm to him.

Is he obliged to consult lawyers? Is he obliged to consult economists?

What steps does he have to take, in fact, before a defendant could successfully say that time has started to run and thus you're on the hazard?

I see a lot of difficulty with those provisions.

And in all probability they're designed, in article 10(2), they're more designed for stand-alone actions.

But then we have in article 10(4) which in fact suspends or interrupts the period if the National Competition Authority (NCA) should take an interest and if it should investigate the alleged infringement itself.

The period is thereby suspended or interrupted, it does not restart for at least one year after the final decision of the NCA becomes binding and there cannot be a limitation period less than 5 years at the level of principle.

I've added in there for interest's sake the top bullet point: What about the European Convention of Human Rights and in particular Article 6 and the right to a fair and speedy trial.

I could easily have put up another slide which, not in any way fancifully, could have a 10-year or 12-year period before a claimant gets a decision on his judicial claim

– alleging infringement – and before a respondent would know the result of that legal case hanging over from that period of time.

I doubt in fact if the European Convention of Human Rights would be entirely satisfied with that and certainly there have been numerous cases by the court invoking Article 6 which may indeed have an impact in any given case if the time limits or the time periods involved should extend in the manner in which I have indicated.

The next subheading is "the claimant" and of course many of you will obviously know - all of you will obviously know - that the prime and first identifier there is any individual, natural or legal; undertaking; associations; public authorities; and consumers.

During Adam's talk to you he mentioned "in person" and that that raised a possibility of litigants appearing in person to move competition cases.

I must say I'm not sure what the situation is in the United Kingdom or what the situation is in any of your individual countries with regard to lay litigants but I can tell you that we have quite a significant number of lay litigants in Ireland.

They fall into various different categories: some are single-issue individuals: and some are really public and frequent and possessed litigators.

I recall on one occasion an individual, Mister…– better not mention his name – who came to me trying to stop a re-run of the Lisbon treaty looking for an injunction the day beforehand.

And then I said to him "Mister so-and-so, well, what can I, what do you want from me?" "Anything you give me, judge, I take it!"

And we have those, we have people because of economic necessity can't afford lawyers, which I understand fully, but our experience is that the more complicated the case is, the more difficult it is to try and keep lay litigants within some parameters so that within the mire of material they generally produce some point of substance they have will not be lost.

That's always my great fear about lay litigants.

They dump everything into you and they think that the more paper there is the better chance they have of success.

They're probably not skilled enough, they're probably too nervous to identify points and say "Look, I have four points: best point, best point" – they never do that.

And of course we read it and try and read it again but the great danger is somewhere in there there's a nugget of a legal point that could be missed with all of this.

I cannot think that a lay litigant could really manage without great assistance from third parties, even if they're not lawyers, in presenting a claim, say under the Damages Directive.

Again I don't know what the position is in your individual countries about legal aid.

It is not really available in my country on the civil side, save in exceptional circumstances.

Subject to a means test on the criminal side it is widely available and it operates quite effectively.

On the civil side you might have the odd, technical medical negligence case. I have never come across a commercial case; even if an individual is hopelessly impecunious I've never even heard of a competition case at any level of complexity being mounted under the prospect of legal aid.

So, unless you belong to some group and that can call upon expertise in various different relevant areas, I just think it's going to be very difficult for lay litigants to pursue this, and hence that feeds into this question of collective redress mechanisms and representative actions which I'll go back to in a moment.

This slide and the next two or three slides really is about standing - what individual can take a case - rather than try to evaluate and in any way the merits of that case of how we should go about looking at the substance.

For the person to bring an action he must have suffered harm, if damage is not what he is looking for; if it's an injunction or declaration then he has to show he has been threatened with harm.

As I point out there – and this is an important point, I think - I use "harm" in this sense as an element of Locus Standi.

Can he bring the action? It has nothing to do with quantification, nothing to do with remoteness, causation or any of these other different concepts that we apply so as to get a proper handle on damages.

Damages then are harm recoverability – I just mentioned these in passing; we know, of course, the actual loss.

We know loss of profits; opportunity loss; loss of interest on recoverable damages.

I don't really want to talk about interest but it's a fascinating topic in its own right and could merit a paper as to how one goes about identifying the rate, how one segregates elements of the damages to which the rate might apply, the periods in question, should the rate be that at investment level, at actual loss level, compounded level and so forth.

I was at a seminar recently about this and it was quite intriguing.

The ultimate conclusion was that if some legal certainty could be brought by specifying a rate, then even that might not fully compensate an individual in some case, and might fraction or overcompensate and in another case, it will produce a workable formula which just might be more attractive than having to work on a case by case basis.

As Adam pointed out overcompensation must be avoided, and again in that context he spoke about punitive damages and I'm just not quite certain why in such a rigid way punitive damages or exemplary damages or some form of top-up damages could not be provided for even in exceptional circumstances.

And essentially full compensation has its rooting in the tradition Latin phrase of "restitutio in integrum". You put the individual back where he or she should be if the wrong doing had not occurred and of course there are compensatory damages which most of us are familiar with.

However, and in principle it is, one can see, in the vast majority of cases, quite sufficient, if the claimant gets full compensation in that way.

There are other cases, by famous English decision in Rookes v. Barnard in 1964 which identified three areas: egregious conduct by state agents, in effect, whereby you might have punitive or exemplary damages.

Yes, it would involve paying more to the claimant than compensation in the compensatory sense, but it would involve no hardship on a wrongdoer, on a carteliers, who has, every morning when he or she has got up, has decided to commit a wrongdoing, has decided to perpetuate that wrongdoing, has colluded with others to do so and probably has gained quite substantially out of it, not only to the detriment of consumers but also to other competitors who decided to comply with the law.

The absence of it certainly doesn't do much for the principle of deterrence or dissuasion which must be an intrinsic element of any enforcement regime.

Anyway, it's there, in the directive; I thought I would get that red herring out of my system.

There must be a causal relationship, everybody is familiar with that.

Again, principles of effectiveness and equivalence, direct contraction relation is not necessary, prior finding by the NCA is not necessary and if any of you should have a case which calls upon a quantification of damages please, make reference to the communication from the Commission and also the practical guide on quantification.

Both of these documents are easy to read. They're set out in different levels of broad principle, but also detail, and they're extremely helpful in giving you a handle on how to approach it.

This slide, slide number 23, is also talking about who the claimant might be, and I have been concentrating essentially on direct purchases now, but evidently indirect purchases are also included.

The second bullet point there identifies perhaps a separate category of persons who have suffered harm by reason of the umbrella effect.

Just a quick word on that.

I think there should be an attachment to these slides which if any of you might be interested about the umbrella effect, would be informative to read, but essentially what it is that there's a Cartel in operation, the cartel has manipulated conditions on the market to forge its own names.

A third party, who is not a member of the cartel, decides to take advantage of those conditions to raise its prices and thus, cause loss to others.

This is an absolute over-simplification and I don't even want to look at Adam Scott when I'm giving you that over-simplification because he was there "Aaaaaargh".

In simple terms it is something like: those individuals who suffered loss, as a result of that kind of activity, can also claim.

Article 15 is an interesting Article because it talks about different claims being brought by individuals at different levels on the supply chain.

In effect, a quote is entitled to take into account those claims brought at different levels of the supply chain relating to the same infringement which may impact in the court's assessment of the passing-on defense and also in dealing with indirect purchases.

I have mentioned in this slide, this is slide number 24, passing on over charges.

It really is not the essence of this presentation to give you any substantive detail about the passing-on defense or when it is available or how it operates or where the burden of proof is or when does the onus shift etc.

However, it is a very significant Article in terms of at least clarifying, at the level of principle, what should happen when the passing of defense is being raised or has been raised.

It deals with presumptions which are in the main rebuttable, it deals with who has the obligation to raise it, how far that individual has to go before it can be responded to.

And again that last point there is going back to Article 15 in that context, but the passing-on defense, the passing-on rules and regulations are really worthy of a certain consideration themselves.

"Collective redress mechanisms".

I remember, at one of our conferences, asking the then Director General why collective redress was not itself incorporated as an essential part of the Directive.

His answer was entirely understandable and entirely satisfactory.

There are many other sectors of European Law where this question of collective redress would benefit the ultimate consumer, indeed would benefit many people, and some come to mind: environmental protection, personal data protection, financial services legislation and investor protection.

It was felt really that it could not be justified to simply isolate competition cases from those other mass harm situations because they undoubtedly can give rights to losses coming within that category as competition cases have.

Hence, the suggestions made, hence the recommendations made, hence the communication by the Commission on collective redress.

There is little doubt but that, even if you have an effective system of legal aid operating in one's country, that, if subject to the imposition of certain safeguards there was in place a collective mechanism then that surely would be more satisfactory from a consumer's point of view, that surely would be a better way of ensuring not only that infringers have been found wrongful at a liability aspect, not only that they were obliged to pay compensation but that compensation, in turn, found its way into the pockets of those who truly suffered loss.

It is driven at a level of principle, by a fundamental value of the European Union, which is to create an area of freedom and social justice via access to justice, and that, in turn, involves a high protection which the law should afford and which the law should ensure applies to consumers.

I pointed out in the second line there that mass harm is defined in the Directive and of course given the diversity and complexity of a modern economy there are several situations, not difficult to think of, which may give rise to that.

In any event, it hasn't been possible to do so but we have the Commission recommendation in 2013 and just a quick word about a distinction in the terms collective redress mechanism and representative actions.

Collective redress mechanisms really mean a facility whereby two or more individuals with a common

interest and a common infringement, even though variables are in there, can get together and pursue an action seeking to establish an infringement and if harm has been suffered, seeking compensation for that.

Representative actions are a different breed but can operate, in one way, in parallel with or as complementary to Collective Redress.

Representative actions, it is envisaged, will be carried out by nominated bodies who would be sanctioned and at official level to take on such actions.

The Recommendation sets out strict conditions by which such bodies could operate and if they want to breach any of those conditions then their authorization to continue to act as a representative agent of groups could be withdrawn.

I have just mentioned one or two: they must be non-profit making and, secondly, the main objectives of their establishment, of their existence, of their purpose and functioning must coincide with the particular rights which are identified in the cause of action which the claimants wish to pursue.

A great deal of work has been done on collective redress to include representative actions.

I am a member of ELI, which is the European Law Institute, and a Sub-Body of ELI, to which I am attached, has been working on this particular issue for 2-3 years now and has produced several drafts and the latest draft wrote 200 pages. Can you imagine?

Of course, if that were to find its way into a legal measure from the Union it would have to be condensed and a good deal trimmed.

But it's, on the one hand, a discursive document, but on the other hand it's a document which is pretty much now ready to firm up and make recommendations in this regard.

I should say the purpose of ELI and this particular Sub-Committee is simply to carry out the research, is simply to have volunteers – judges, academics, lawyers and so forth – come together, give their collective wisdom, produce a document and then pass it over to Brussels.

The dangers that everybody knows of and are worried about are providing some mechanism, whereby a group of people can come together to sue collectively are set out in that last indent.

The overall experience is very much jaundiced by what we read, from time to time, about certain states in America.

Now, not all states in America follow each other rigidly on what provisions they make for collective redress. But many do.

And many lawyers have agreements with their clients beforehand that if successful they will, as part of their fees, take an X percent or Y percent or a multiple of X and Y of the award in question.

Many such agreements, in fact, also give the lawyers almost the final decision as to whether or not to take it.

That evidently is a serious incentive, on the one hand, to take actions undoubtedly, on the other hand to pursue them in favor of the client to extremity.

But on the other hand to, in fact, run with money in their hands so to speak, in case of an adverse outcome.

I just come back to the "no punitive damages" point here and that is an inhibiting effect, it is hoped that that will have an inhibiting effect on avoiding abusing litigation in the future.

It is proposed that it will be opt-in rather than opt-out, which means that individuals have to actively decide to gather the grouping.

I am going to wrap up here.

I have just mentioned who a defendant or respondent might be – addresses of public law decisions in a hybrid or a stand-alone action, non-addressees also.

I talk about carteliars within groups and liability for joint and several – which I've just touched on this morning.

"Identity of the Forum" – this is a major issue in European law in itself. We have had regulations on this for quite some time, and rules.

We now have Brussels Recast from 2012 which sets out in detailed form the location upon which one may take an action.

Evidently it has a principal rule which is that you sue a person, where he or she is domiciled – equivalent provision applies to undertakings and public bodies.

There are special jurisdiction rules which are an abdication of that and you will see that are dealt with in Article 6 of the Regulation.

And again, I'm sorry I'm not going into them. Article 7 – they deal with contract, they deal with tort – and there is no reason whatsoever that this Regulation ought not to apply to compensation claims under the Articles 101 and 102 as they do to other claims.

I should've mentioned in passing – don't forget that you may have to consult the Rome Convention if, per chance, there should conceivably be an issue in the competition case before you arising out of contract.

And you can just have a look on that, "when can a claim be brought", and I`ve set out so.

And, about the Regulation 1 of 2003: as you know, under Article 3, when a case is before a Domestic Court and if that case has an effect on inter-state trade then the national judge is obliged to apply the provisions of 101 and 102.

In that situation, the Directive evidently will apply to the 101, 102 claim, but they will also apply to the domestic claim.

The Commission saw no justification whatsoever in, in fact, having two separate rules or provisions dealing essentially with the same facts, essentially with the same circumstances and in the same action.