PART VIII: QUANTIFICATION OF DAMAGES

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Link: JustCompetition – Training Module – Part VIII

We`ve talked about effectiveness.

We`ve talked about the fact the evidence is asymmetrical.

People have different access to evidence.

And, we`ve talked about that.

There are principles of cooperation under article 4(3) of the basic treaty of the European Union, not even the Treaty on the Functioning of the European Union.

This cooperation is fundamental to how Europe operates.

Now, the first point is rather important.

As judges, frankly, we are never going to have the full picture.

What we are looking at always is going to be partial.

And so the way in which we deal with this is got to be proportionate.

And that is why courts have to be empowered to estimate.

There is never going to be an absolutely right arithmetical answer.

At the end of the day, the job of the judge is to decide.

And at the end of the day, the reason why it is 457.000 Euro is because the judge says so.

There is this rebuttable presumption of harm from cartels.

And when it comes to the abuse of a dominant position, the very fact that you have found an abuse suggests that there has been an abuse.

What that abuse is, of course, you have to decide.

The Commission provides guidance – we will come on to that – and the Directive provides for the court to get help from the national competition authority.

So, what are we looking at? What are we trying to quantify?

We are trying to quantify actual loss, loss of profit and interest.

And what is envisaged in the Commission's guidance is that there are going to be further developments – and we will come back to those in a moment.

What is not envisaged is what is allowed in English law, as Liam explained, which is exemplary damages.

If the behaviour was so bad that it ought to be punished, then the person who brings the case gets rewarded for doing that by being overcompensated.

And that is going to be illegal under the Directive.

And one of the things that Ireland and the United Kingdom have to decide is how we deal with that when it is a matter of national law.

These basic principles run right away through what we are doing.

So what happens must not be practically impossible or excessively difficult.

The claimant must have the possibility of getting those damages estimated.

We`ve talked about limitation.

So, causation. There has to be a connection between the infringement and the loss.

Now that may seem, absolutely obvious but is rather important.

And fortunately courts are very used to having to look at causation.

And there is no great difference between causation in this case and causation in other cases.

So, I`m not going to say very much about causation except that in assessing it, again, the task must not be made impossible for the claimant.

So, keep those basic principles going round and round.

Proof is got to be not impossible.

That is helped by having a rebuttable presumption that cartels cause harm.

And there were some who thought that there should have been a percentage in there.

As one of my economist friends says:

"It`s really not worth founding a cartel for 10%, the minimum that we really ought to have for a cartel is 20%".

You know, if we were to get together to reach an agreement on court fees, for example, we would want to make sure that they are pretty unreasonable, in the sense we get a decent margin.

They decided not to put a percentage in.

So, the statement is qualitative, that harm happens.

And that is going to leave room for lots of economists to argue about what the appropriate percentage should be.

And, again, one can get help from a national competition authority.

Now, the Commission have provided a communication.

And, one of the interesting things as we talk about this subject is the status of soft law.

As you go through my slides, you will find that I am referring to recitals as well as to articles, and to the Commission's communication on quantification, and to the practical document that accompanied the communication.

Now, recitals and the Commission`s communication and the practical guide are all soft law.

They do not bind a court.

And one of the questions the people are asking is as we start taking decisions which reflect the recitals and reflect the soft law in the Commission`s guidance will case law harden some of those bits of soft law into harden law because they have been embodied in case law?

And I have to tell you that some judges are worried about this.

The Commission itself has tried to say that their guidance is not the end of the story.

But inevitably as this subject develops so lawyers will be trying to persuade us that previous cases should be applied as hard law and not simply as soft law.

And that is going to be one of the issues that arises as we go along.

And some of these things will be the subject of preliminary questions to Luxembourg and we shall begin to get guidance from Luxembourg as to how to treat these matters.

Now, the fundamental question is

"Where would a party have been if the infringement had not taken place?"

In other words, how do we put the party into the position they would have been had the infringement not happened?

And this is an estimated scenario and inevitably there is a limit to the certainty and the precision with which one can do that estimation.

So the judges are put in a position…

It`s not guess work. It`s educated guess work.

But that is what we are doing.

We are making an estimated scenario and we are doing so proportionally on the basis of economic insights and, in some cases, particular methods and techniques.

Now, many years ago now, I charred on behalf of the European Commission a group of authorities from the Member States to try to convince them that you can make into arithmetic a number of algebra models in the field of telecommunications.

And this was to derive the regulated prices for telecommunications.

Now, I have to tell you that I thought then we got it slightly wrong and I think we haven`t got it quite right yet.

And what that tells you is that some of these methods are in themselves questionable and when you have lots of economists in court, they will be telling you that their method is right and that the other people`s method is wrong.

Now in one of my recent cases I asked each of the witnesses in turn:

"Did you engaged in quantitative modelling of your own pricing?"

Only one witness amongst our leading supermarkets were actually engaged in quantitative modelling of their own prices.

So, you`ve got on the one hand a collection of economists doing these quantitative models and on the other hand industries not doing quantitative models.

So, you have to ask yourself: "What? How is this behaviour being conditioned? And what techniques are appropriate?"

And the fact that an economist suggests a technique to you should not necessarily convince you that that technique is applicable.

And what the Commission's communication talks about is evolving economic insights based on three things: theoretical and empirical research, they are different, and judicial practice.

Now, that acknowledgement of judicial practice is actually very interesting, because what it is suggesting is that as we go forward the judges will themselves gain experience in how to do these estimations and that we should be ready to listen to judicial experience.

So, accompanying the Commission document, which is very short, comes a heavy practical guide

And the practical guide contains a number of ways forward.

The first is comparator based methods and I am going to come back to that in a moment.

The second is regression analyses.

Now, I probably ought to stop and say what is a variable of interest.

It`s not interest in the sense of what you have to pay for your mortgage or what you are getting from your bank, which is probably now nothing. It may be prices.

So, one of the variables in a regression analysis is the price of the good or the service we are looking at.

Now there may be other variables of interest, such as the season or the price of oil or the tax rate.

And what you are trying to do in a regression analysis is to understand the influence of the variable of interest, in my example "price", in determining what happens.

Example. What is the elasticity of demand for a bus service?

Jean Louis runs a bus service and he charges 1 Euro for his bus service.

Enter Mirela, who starts a rival bus service and she is going to charge 50 cents.

What is the elasticity of demand between Jean Louis`s buses and Mirela`s busses?

Will I, for 50 pence, get on the first bus that comes along or wait and see whose bus it is?

Now, you can model that in theory.

You can do empirical studies on that.

You could stand at a bus stop and see how many people get on the first bus that arrives and how many people wait for the cheaper bus.

At the same time, you can analyse the costs.

You can see whether Mirela`s bus service is actually engaged in predatory pricing by examining her costs against her price.

Now, these are mathematical exercises.

You can have discussions about which costs should be included when determining predatory pricing or you may be examining whether Jean Louis is extorting money out of the passengers… that actually 50 cents is the proper price and a whole Euro is an extortion price and he is misusing his dominant position despite the fact there is a competitive offering.

And all of those are matters that could be discussed and you can do analyses on those.

You can do modelling. You can do simulations of what would happen if both busses were at 50 cents, or both busses were at a Euro.

What would happen to the behaviour of the passengers?

Now there are various particular points here which have to do with what happens when you have a chain of people so that…

For example, if the price of petrol is – let us say – 1 Euro a litre and now moves up to 1,5 Euro per litre, what is the effect of that downstream?

Lots of people are affected by that change.

Prices in the supermarket may go up, because it applies to everybody.

So, if you got a supermarket who are claiming that the petrol companies have all got together and raised the price of petrol by 50 cents a litre, the question is: did they suffered that loss or did they passed the whole loss through to their customers?

That`s passing-on.

Now, at the moment, I am not going to go into the details of this case, but we have a supermarket before us in a seven-week trial suing MasterCard.

And one of the question is: what are the effects?

Now, the supermarket can argue that even though they passed on the costs of the rising petrol prices the fact that all those prices went up had a volume effect on their total sales.

Now that then depends upon the elasticity.

The defendants may say that people are so wholly dependent on food from the supermarkets that actually demand on the supermarkets did not fall down at all.

What happened was people went out to the theatres less, they didn`t redecorate their homes and actually there was no effect.

But you have to consider what is the volume effect.

They also, in the practical guide, deal with what happens when there is exclusion.

Now, exclusion can happen in a variety of ways.

We had a case which had to do with a crematorium in a small town.

There were two family firms of funeral directors who used the crematorium.

One family owned the crematorium.

In a Romeo and Juliette type situation the families fell out.

And the family who owned a crematorium refused to burn the bodies of the customers of the other family.

And they complained to the National Competition Authority, who didn't do anything about it.

So they came to us, first in public law and then in private law.

And we held abuse of a dominant position, in public law, and then there was a private action to follow.

And there you had exclusionary behaviour.

We said that the fact that there are other crematoria in Britain did not matter because you would have to drive the body a long way to the next crematorium.

So, there you had an instance of exclusionary behaviour and the practical guide helps you to understand the impact on competitors and on customers.

So, back to comparators… How do we look for comparators?

Well, you can look at what happens over time in the same market.

Let me give you an example which is about to be current in the United Kingdom.

London has a variety of airports.

It only has one airport close to the centre of town – London City Airport.

The owners of London City Airport wish to sell it for a lot of money.

If they sell it for a lot of money the debt associated with the airport is likely to increase significantly and the worry the British Airways have – this time British Airways is the complainant not the defendant – is that the price of landing and taking off from the airport will increase significantly on the basis that the costs have gone up due to the take-over raising the costs of debt.

So that`s going to raise questions about… Is this airport in a dominant position?

Or does the fact that we have Heathrow, Gatwick, Luton and Stansted, not to mention Schiphol and Charles de Gaulle in easy reach…

You know… What`s going on here?

So… But you can look at what happens to those prices in the same market over time and ask yourself:

"Is this behaviour anticompetitive?".

Then you can have data from other geographic markets.

You can ask yourself the question: "How do the landing costs at London City Airport compare to other airports, other geographic markets?".

You can also use data from other product markets.

So if you take an example from the dairy industry – you have cheese, butter, ordinary milk, yogurts –

and if when you look at the price of cheese something very different is happening to the price of cheese to what is happening to the price of milk then something funny is going on.

Actually - geographic market - we had an example in the UK, where the price of milk in Scotland was significantly higher than the price of milk in England.

And it turned out that what had happen was that Robert Wiseman big milk company in Scotland had divided Scotland into two zones and – I think - Express Dairies had one part of Scotland and Robert Wiseman had the other part of Scotland.

So they divided the geographic market.

But you can tell that something funny was going on because the price of Milk in Scotland was peculiarly high.

And why wasn't this being even out if there was a truly competitive market?

So, other product markets, geographic markets, time…

You can also look of course at a combination of time and across markets.

So, taking the Milk example again, if the price of milk was going up like that (showing a medium increase) in England, but like that (showing a high increase) in Scotland, then that suggests to you that something untoward is happening.

And is not difficult then to ask the question: "Is this…? Is there a good reason for this? Or is the reason for this the anticompetitive behaviour?".

Now, you do have to ask yourself that question because sometimes there would be a good reason for it.

We had a head of our national competition authority who was told by our government to investigate why the price of petrol in the United Kingdom was higher than anywhere else in Europe.

And the government wanted the answer "because of the wicked large companies selling petrol".

Instead he came back and said: "I can tell you the answer, it`s very simple, the taxes in the United Kingdom are higher than anywhere else in Europe. That is the answer."

The government`s reaction to that was to allow him to spend more time with his family. This is not a good solution.

So, you do, as a court, have to ask yourself the question: "Is there another reason why your comparator is turning out the way it`s turning out?".

So comparators can be good and comparators can be bad.

Counterfactuals. If you can`t find a useful comparator, then you have to fall back on what would have happened if there had been no infringement.

And can you work out what would have happened?

In the bus case we had one bus company which decided that in order to compete it would run buses free.

Its idea being that it would drive the incumbent carrier out of business and they took various other steps.

So, you have to ask yourself: "What`s the counterfactual?".

Now, we had a bus case and the defendant argued that this company was so badly run – the claimant company – that they would have become insolvent anyway.

And that's quite difficult. You`ve got to work out what`s really going on here.

Now, one of the problems about competition law can be insolvency. Some of you – I know – deal with insolvency.

And if you are a clever defendant group, one of your tactics can be to render the defendant company insolvent.

But sometimes, it`s the claimant company that`s insolvent.

On a number of occasions, we have had an insolvent claimant company in front of us saying that it was because of the behaviour of the infringer that they have gone out of business.

Now, in a situation like that, you`ve got to ask yourself what scenario techniques do you use and what are your plausibility tests.

Now, let`s talk for a moment about scenarios.

In the real world, life is horrendously complicated.

In building a scenario you generally limit the number of variables you are going to change.

I will give you an example. Jacob Marschak was an economist who was asked by the U.S. Navy, who haven't got any nuclear weapons at the time, to investigate the scenarios of nuclear war.

And Marschak had a two by two matrix. On one side he has "there isn`t a nuclear war" and "there is a nuclear war".

And on the other side he had "we built shelters" and "we didn't build shelters".

This is in the United States. And into the boxes he put the results: "all dead", "all still alive", "rich" and "poor".

And that was because Marschak reckoned to build shelters for the whole population of the United States was going to costs the United States a great deal of money.

Switzerland was doing so, but… rather different situation.

And so you a had the very simple situation in the Marschak matrix with just those four boxes.

Now, our scenario analysis becomes slightly more complicated and what is likely to happen if you are in a contested procedure is that each side will have a rival scenario.

And, in the case that I`m thinking about, the defendants are likely to say "whatever happens this claimant company would have become insolvent".

The claimant company is going to say "we would have been thriving in one scenario but in fact we were insolvent".

And so you have to ask yourself: “What are the underlying variables that you are going to put into the mix, in terms of your scenario?”.

Now, scenarios are stories and each of us in this room have been judging the plausibility of stories since we were quite small children.

Phycologists tell us that from a quite early age you were able to tell whether the story that mommy or daddy were telling you was plausible or not.

And that’s the judgement that as a judge you`ve got to exercise. Is the story that I`m being told by this party a plausible story or an implausible story?

Because, there is no proof of a counterfactual. It is necessarily hypothetical.

Now, you may be able to use actual comparators.

There may be other examples that enable you to tell whether this is a plausible story or not.

But, that is in essence the task.

So… the passing on defence.

In many of the cases with which we deal, there is a chain of people from suppliers down through wholesalers, retailers and then the ultimate customer.

I was myself part of the class action against British Airways in California in relation to the fuel surcharge for passengers.

It`s not the one I talked about this morning.

Now, when I claimed my damages I was told I couldn`t because they had already been claimed by my travel agent.

Now, my travel agent – I have to tell you – had passed on the entire fuel surcharge to me and, in terms of a passing-on defence, they had no loss on a price basis.

They could have a loss on a quantitative basis.

They could argue that they would have had more business had there not been a fuel surcharge.

You will be glad to know that I recovered my loss from the travel agent.

I imagine they made a great deal of money from people who failed to recover their money from the travel agent.

So, you’ve got this question of who has what burdens in the passing-on defence.

So, if it`s a direct purchaser it is the defendant who must prove that the passing-on took place.

So in my example, British Airways would have to prove that the travel agent passed on the charge. Now, if you go back to evidence.

What evidence they need? Answer… sometimes that's very straight forward – they get the papers out of the travel agent and they can see "fuel surcharge" on the paperwork.

So if you`re a travel agent, remember, don`t separately list the fuel surcharge otherwise you will be in big trouble when there is disclosure of your documentation.

Life becomes a little bit more complicated if you were the indirect purchaser.

And you will have to consider what happens and… I`m not going to go into all the details.

What you need to do is: when there is a passing-on defence an alarm bell should ring in your mind and you got to remind yourself where in the Directive has the burden got to.

The basic burden for proving an infringement is with the claimant, but here we`ve got two instances so far where the burden shifts.

First, with the cartel there is a presumption of harm, it`s rebuttable.

And, secondly, where you`ve got passing-on then the burden has switched to the defendant.

Again, estimation applies.

And so, if the travel agent is able to say "well, I felt I will lose all my business if I pass-on the whole fuel surcharge so I only passed-on half of it", then you, as a judge, are going to have to work out what actually happened and make an estimate.

So, here you have multilevel claims.

Now, this is where life begins to become complicated.

Courts have got to work out what is going on in what is likely to be a series of actions which may well be taking place before more than one court.

The Americans are very used to these anti-trust cases starting in several courts and they have procedures for consolidating cases.

But we have already seen today that you can have multiple claimants.

Claimants can be direct purchasers, intermediary purchasers, consumers, and later we will talk about consumers and collective actions.

You`ve got multiple defendants and amongst multiple defendants, in an undertaking, you can have parent companies, subsidiaries and, of course, siblings.

And courts have got to try to ensure that judgements are consistent and consistent not only within private actions but also within public enforcement.

One aspect of this is understanding what has the public authority done.

Now, in some cases, a public authority, as part of a settlement, may agree a compensation programme.

And, again courts need to be aware just in case the answer has already been decided by a competition authority somewhere or by another court.

Now, again you`ve got the problem of knowing when is it the same infringement and when is it a related infringement.

In my carbon case, you had infringement of American law being litigated in America, but the same cartel giving rise to an infringement of European law being litigated, in our case, in the United Kingdom.

So these multilevel claims require quite a lot of attention and parties and indeed you need to get some idea of who has what money where.

So… estimation. Courts have to be empowered to estimate. And this is where you need a mixture, frankly, of competence and confidence.

As a judge, you or your group of judges are going to have to take a punt, you`re going to have to say it is 457.000 Euro.

I would advise against 47… 457 263 and 4 cents, because that suggests that you are cleverer than you are.

So, I would advise round numbers which acknowledge that you're having to do an estimation.

We`re beginning to work out estimated damage, but who is going to pay?

Now, you`ve already heard today that there`s joint and several liability, but joint and several liability is subject to some restrictions.

As you`ve heard an SME has restrictions unless they are the lead player in a cartel. Now, in some countries you may have – as we have in the UK – a special procedure.

We have a fast track procedure for SMEs and that has a number of special provisions. It comes out to a very strange number in… well the numbers for turn-over and capitalisation are very odd in Sterling because they are expressed in Euro and the European recommendation has to be translated.

Relative responsibly is a matter of national law, it`s a matter of subsidiarity.

And a national court should be used to working out amongst defendants, who should be paying what.

Now, one of the things that the Damages Directive does recognize is that along the way some of the parties may become insolvent and that may change the way in which the liabilities land.

So a leniency immunity company may become liable because everybody else has run out of money.

And that`s why it`s important to know where the money is.

And… I`m not sure whether I should say more about that but there is a problem in groups of companies in that they may move the money around to try to ensure that at the end of the day the defendant companies are insolvent.

Now, that then leads you on to whether that is a lawful way of handling legal personality or whether is fraudulent.

And there may be cases where you have to refer to your fraud authority rather than trying to deal with it yourself, because some people do engage in fraudulent conduct.

That doesn`t help the plaintiff? Reporting it?

It doesn't help the plaintiff. No, it doesn`t help the plaintiff. No, alas, it doesn`t help the plaintiff.

There may be circumstances in which it could help the plaintiff, but it doesn`t normally.

Is there any way you can get the directors, the officers…?

In public law, in the UK, we have Directors disqualification provision in our competition law, not often used.

I mean, I believe this is a real problem. It has only occasionally arisen.

We had a case in which one of the problem was companies change their names quite often when their doing this sort of thing.

One of its names was…

This was a company that knew that a decision was about to emanate from the Competition Authority that would render them liable and what they did…

It was quite clever this.

The company employed the children of the chairman and they sold the business, not the legal entity, the sold the business out of the legal entity to a listed company who omitted to inform the stock exchange or the Competition Authority of the transaction.

So, the decision arrived addressed to a company which was by then such a shell that its finance director in a witness box was unable to explain to me where the money was.

The chairman of the company whose children had been sold as it where with the company, with the business, appeared in court – but not in a witness box - and he was always placed so that it was lawyer hiding his face from me.

And, in the end, I was rather firm in court with him about one or two of the facts of this case.

I mean, he had been in the room when the infringing activities took place - they drove a competitor out of business amongst other things.

And we deed the holding company, but… How did you…?

Fortunately, they were an addressee to. Ok. That was direct liability.

I mean they tried to argue that it wasn`t.

Where Ackzo Nobel took over a British company and they ran full page advertisements in the Wall Street Journal explaining what a wonderfully integrated synergistic group this now was and then they find themselves arguing in Court that the whole group was so dysfunctional the holding company could not be held responsible for the actions of a subsidiary company and they pulled all the advertising quickly.

The European Commission is actually quite worried about this whole business of liability, because most of our legal systems have not really grappled with the realities of how a business works today and that`s problematic.

When you are thinking about relative responsibility under national law you`ve got to respect effectiveness and equivalence.

One of the provisions that we have in our law is that we can order a payment on account.

Before any finding? Before any finding.

And, we have done this on one occasion and it did result in a rapid settlement.

When the parties realised that we were concerned about this…

This is very much a matter of what is available in your national law in terms of whether you can make an interim order either in relation to an injunctive remedy or in a relation to some payment.

And we also have the concept of payment in.

So, if Liam and I are litigating, Liam can pay two million in which the court doesn`t know about.

Now, if I recover less than two million then I`m responsible for the costs and if I recover more than two million then he is responsible for the costs.

This is very much a matter of national law – what you`re able to do. And it`s the same with costs.

We have a system of security per costs, where if one party is concerned that the other party is what we call a person of straw or maybe about to shell out the company - in other words, to remove all the money – then we can ask for security per cost to be put in place.

So, this is very much a matter of the remedies that are available through your national system.

Now, what`s important here is my fourth point – respecting effectiveness and equivalence. In other words, you must use your national law.

That`s the equivalence part. But what you do must be effective and there are… special consideration for immunity recipients, when it comes to contribution.

Contribution is this business of sorting out between the parties what happens.

Now, what may happen is that the claimants decide to go against one of the members of the cartel and to leave that member of the cartel to bring in third parties who are the other members of the cartel.

They may also choose to leave them out and then the other parties may have to decide whether they want to intervene in the proceedings to protect their own position.

Again, this will be a matter in your national law for how do you deal with parties who are not defendants, at the first level.

As I was explaining, the case I`ve talked about… We got third parties and fourth parties and non-parties.

So, these are all things that you have to think about in the contribution part of an action.

Interest. The Directive is very straight forward; it just says interest is recoverable, basically.

That`s what is says. It doesn`t tell you the rate of interest. This is down to national law again.

You are going to have to work out what is the proper rate of interest bearing in mind full compensation. And that may depend on the party.

If it`s a long case, interest can be a very large component.

If interest rates go up again, interest can make an enormous difference to the overall total of the damages.

So, again it`s a question of national law and that principle of effectiveness that we are trying to give the parties a full compensation.

That brings us to a slide which says consensual resolution. So, you worked out what you are going to do and you made a judgement.

You then get to enforcement. Now, enforcement is going to take you into… If it`s a multinational case, it`s going to take you into the Brussels regulation.

You may have to pursue people overseas and you`ve got to follow that through. You`ve also got to remember to inform the Commission.

This is under Regulation 1/2003. The Damages Directive doesn`t have to tell you that. You need to inform the Commission.

Now, there is a point here that we need to go back to and we, really, haven`t worked this out yet.

As a court under Regulation 1/2003 there`s a responsibility to apply article 101 and 102 where an infringement has an effect on trade between Member States.

And this raises the issue… What happens if the parties have brought the case before you on the basis of national competition law and it is apparent to you that there is an effect on trade between Member States?

Now, I don`t know, in Ireland if you have a case like that – so, it`s been brought under national law, there`s a clear effect on trade between Member States - what is the responsibility of the court?

The court must consider the direct application of 101 and 102. It must move up its own motion to enforce it.

This is again… It`s about the alarm bells ringing. You`ve got a case in front of you. You look at it. You say: "Clear effect on trade between Member States," or "is there an effect on trade between the Member States?"

"What do I do about it?" Answer: "I`ve got to apply the law, European law."

Now, one of the reasons why in some Member States you will see very few cases on the Commission list is because quite often people do not bring either public law or private law actions under European law.

They bring it under national law. And part of what is meant to be happening is that courts need to ask themselves the question:

"Has this been properly framed? Is this the appropriate law under which to bring the action?"

Now, you`ve got some interesting interactions here, because the law, for example, on limitation may be different depending on whether the action is brought under European law or national law and so the task of the judge may be more complicated than it looks at first instance.

But we are hoping that the Commission website is going to be well populated.

Now, the Commission is asking itself the question of how to deal with this database.

Because the current arrangements are probably inadequate for the increase in cases that the Commission is hopping is going to occur once the Damages Directive is enforced.

Then the question of costs. Now, here we are in an area where national law is very important.

You will have your own background in how costs are awarded and how costs are assessed, but there is the question of proportionality and part of what we`re talking about is how a case is managed in a way in which it is proportional.

And one way of doing that is at a fairly early stage to try to appreciate how is this case going to be run proportionally.

We have had damages actions in which the costs have been an order of magnitude larger than the damages. Now, that is disproportionate.

Now, you will have in your own procedural law how do you deal with that. In some systems, in our High Court, we now have the possibility of a cost budget, of getting the parties to produce a budget of what they think should be spent.

We can do cost capping. We can say that whatever Liam spends he can only recover 25.000. So, he can employ enormously expensive lawyers, but if he wins he can only recover 25.000 or whatever it is.

But to think about the costs on the last day is not the answer, we need to be thinking about the costs of each case much earlier on, if we are to keep them proportional.

Here we are with effectiveness and equivalence.

And part of the implications of the Damages Directive is in substantive law and part of it is the changes of the national rules of procedure that will be necessary to make it effective and equivalent and to ensure that it is not difficult or practical impossible.

I don't know how far you as judges are being involved by your government and legislature in the transposition.

I know the amount of effort it has taking us to change our rules and our guide to procedure to develop as far as we have in relation to private actions and we put a lot of work into this.

And that`s because we want a guide that actually helps lawyers and litigants in person to understand how we do this. We will come on to collective in a moment.

There`s also sincere cooperation and part of this is between public and private enforcement.

Again, bells have got to ring in your mind. Do I going to have a procedure which automatically copies each claim to the national competition authority? Copies it to them for two reasons…

First, are they engaged already in public enforcement or do they want to investigate?

In which case, do they want you to stay proceedings while they do so? And, secondly, do you want their help?

So, at both EU and national levels, we need to be aware of what is going on in each other's proceedings.

We may also need to be aware of what is going on in parallel proceedings in other Member States and you may have a claim brought in Member State 1 with investigations taking place in Member State 2.

You may well have claims brought in Member States 1, 2 and 3, with investigations taking place in Member States 4, 5 and 6.

And how we work out some of this is going to be one of life`s interesting questions and we are worried so we are talking with Eddy De Smijter.

Eddy De Smijter is now both handling private enforcement in DG Comp and also the ECN.

So, he is looking both at relations between the Commission and the national competition authorities and the relations between the Commission and the courts.

And my advice is that the courts need to talk to the national competition authority because national competition authorities, as well as courts, need to be geared up ready to know how to deal with this

Now, those discussions are maybe difficult where you are also the court that does appeals from the national competition authorities and we are wondering whether we have to make those discussions on the record, make transcripts of everything it said so that it is clear to people we are not talking behind anybody`s back and that we are open about what we are doing.

So, we do see some difficulties.

Disclosure and its limits. You have already learned that the national competition authority will have to work with you in understanding the rules and the practicalities of disclosure and, as I said, deciding whether you should stay your proceedings while public enforcement takes place.

So, getting and being given help…

How can we help each other? Well, as I say, we can identify questions of practical importance, mareas where we are not quite sure what we are going to do and where we think some discussion on guidance may be necessary.

We can begin to develop best practices and I think we will learn from each other as time goes by and I`m trying to enable discussions between the judiciary and the Commission to help us do that. We need to identify what are the hazards, what are the tripwires, what are the things that are going to go wrong as we try and do all this, many of which we won`t know until we start trying. And, as I say, informing the Commission of areas were guidance could be improved.