Part I: Admissibility and Standing Requirements

Dr. Ander Maglica – Speech

Good afternoon,

Thank you very much for the introduction. It is a real pleasure and an honour to have the chance to collaborate on this project and to moderate today the panel on admissibility and standing with such distinguished Judges.

As anticipated, they are President Silvia Giani and Sir Peter Roth.
Silvia Giani is the President of the Specialised Section in Entreprise Matters of the Tribunal of Milan, working especially in IP, competition law and now also competent for class and representative actions.

Whereas Sir Peter Roth, on the other hand, was an English High Court judge and served as president of the UK Competition Appeal Tribunal (the CAT) between 2013 and 2021, and then as the acting president for a further 9 months last year. He has recently retired as a full-time judge but continues to sit as a chair in the CAT.

Without further ado, given time constraints, I have flagged three points, related to different Fiches of the Practical Guide that we have been drafting, which I believe could be of interest and stimulate the overall discussion.
I will briefly mention them and then leave the floor to our Esteemed Judges.

1) First, in the Introductory fiche on Admissibility we have tried to contextualise the admissibility phase.

The RAD, in this regard, remains quite general. It merely states, under Article 7(3), that "*The courts or administrative authorities shall assess the admissibility of a specific representative action in accordance with this Directive and national law*". It, therefore, leaves wide room, under the principle

of procedural autonomy, to Member States to lay down the specific rules on how to structure this preliminary filter.

In other words, the admissibility phase is the very initial stage of the proceedings, where the courts evaluate whether the case is fit to be subsequently heard on the merits as a representative action. It follows that this phase does not require, and actually must not encompass a full assessment on the merits.

Premised this, hence, a first question to ask ourselves is, **what type of assessment does this admissibility phase encompass?** And, well, the answer, evidently, is "It depends". It depends on the specific Member State. What we have done, to this regard, while drafting the fiches, therefore is a concrete evaluation of the implementation by all the Member States; this has also been supported by other ongoing projects on EC-REACT. From there, we have extracted for our fiches a series of common issues, which I will address now.

2) One of these issues is the following – which constitutes my second point for today: **and that is: does admissibility differ between injunctive actions and redress actions?**

In the second fiche on Admissibility we have argued that it does – and that actions for redress measures have higher standards.

This occurs not due to the fact that the latter actions entail an adhesion phase – through opt-in or opt-out –, but rather because redress inevitably points to a final liquidation and to the, connected, quantification phase. As a result, it is necessary for national legislators to make sure that such phases are viable. In other words, if the subjective rights enforced through a representative action for redress measures cannot be liquidated through this form of collective proceedings, the action must be stopped at the admissibility phase right away. This is in line with the objective of efficiency overarching the Directive, e.g. in Recitals 7, 9, 13, 19 and 47 – efficiency which is also the one principle informing such a liquidation and quantification phase, which as a result should not be completely individualised, but rather somehow standardised.

This is where we often see a distinctive admissibility filter for redress: that which is called "homogeneity", "commonality", or "similarity". Certain jurisdictions also add another requisite, which is that of "numerosity", thereby setting numerical thresholds, from five (Latvia) to fifty (Germany) consumers affected by the infringement.

To this regard, a connected question I have for our Esteemed Judges is the following: **do you agree with this view? That is, do you agree with the fact that there is differentiation also in the admissibility phase between injunctive and redress actions? And, if so, how do you interpret the so-called "homogeneity" (for Italy for instance), or "commonality" or "similarity" requirement? Furthermore, in your experience, is it to be conceived and applied in the same way for representative actions seeking pecuniary and non-pecuniary damage?**

3) Last, my third point for today relates to our third and fourth fiches on admissibility: **beyond homogeneity, what are the "general" admissibility conditions for both types of relief?**
In our work for the fiches, we have found that two conditions recur across systems, although they are applied very differently. They are the following:

First, not being manifestly unfounded. This is a classic gatekeeping standard, but it can easily expand into a merits assessment. The third fiche on Admissibility is dedicated to this issue.
A related issue is: does this entail a full assessment on the merits or only to a certain degree? Should a court dismiss a case at admissibility if it has doubts on the merits, even if the other filters are satisfied? And should courts take evidence at this stage, or is that already too far?

Two, representativity (also known as adequacy of representation) and lack of conflicts of interests, especially where there is third-party funding. The fourth fiche on Admissibility is dedicated to this issue. Since we have time constraints and a separate panel dedicated to this, I will just mention that judges under the RAD are also called to scrutinise the relationship between Qualified entities and third-party funders during the admissibility phase.
A related question, therefore, but perhaps it is more an issue to keep in mind for the next panel, is **how do judges concretely assess in a realistic way this type of funding arrangements during the admissibility phase – especially if they are not disclosed by the parties?**

I will stop here.
Those were the issues I wanted to put on the table to structure the discussion.
In particular, I would kindly ask President Giani to focus on the first two – that is, in general, on the function and the limits of the admissibility phase and, more specifically, on the difference between injunctive and redress actions and the requirement of homogeneity.

To Sir Roth I would kindly ask to what extent do you have a collective action regime in the UK, and how does it operate and which problems do you face at the admissibility stage?

I know time is very limited, but if possible, I would invite both of you to address these points also through the lens of the case-law currently available – and, in particular, to reflect on whether the concepts and rationales that emerge from that case-law are, in your experience, transferable across different types of cases and across EU jurisdictions, or whether they remain inherently context-specific. It would also be extremely valuable to hear how an analysis of such case law can contribute to a more coherent and predictable application of the RAD across the Union, and – very concretely – how the legal fiches we prepared can assist you, as Judges, in daily practice, for example by showing where the same or closely related concepts have been applied in a convergent way, and where, instead, they have led to divergent outcomes. Any feedback is highly appreciated.

Thank you for the attention. We are looking forward to your views and to the overall discussion.