21st Century Government: Friend or Foe?
How to work with it and around it
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Plan

• Status of implementation of the Damages Directive

• Status of the Guidelines to be issued by the Commission
Implementation

• Deadline expired on 27 December 2016
  • Only 7 Member States met deadline
• 23 Member States have currently communicated full transposition
  • Malta has notified partial transposition
• 7 Reasoned Opinions were sent out in July
  • 5 Member States have yet to comply with the requirement to inform the Commission of implementation
Commission’s current activities

• Completeness and conformity check
  • Every implementing measure is checked and, if not complete and conform, Commission may decide to bring infringement proceedings for incorrect implementation

• Complete
  • every rule in each provision must be transposed into national law (see exhaustive table provision by provision)

• Conform
  • national provisions must have the same effect in practice as the Directive
Issues

• 28 different legal systems and traditions
• Problematic provisions include:
  • Disclosure
    • Confidential information and effective protection measures (Article 5(4))
      • Divergence between Member States on how this is transposed and what measures are provided for
    • Black list (Article 6(6))
  • Limitation periods
    • “at least five years” (Article 10(3))
      • many Member States have shorter periods
  • Passing-on of overcharges (Chapter IV)
    • Technical, complex, economic aspects that call for experts
Guidelines and Guidance

• Passing-on Guidelines

• Guidance on Confidentiality
Passing-on Guidelines

• Article 16
  • the Commission will “issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser”

• The Commission will be assisted by the Study on the Passing-on of overcharges

• Economic theory and quantitative methods
Guidance on Confidentiality

• Article 5(4)
  • Member States to have effective measures for protecting the confidential information in disclosed evidence

• Recital 18
  • Non-exhaustive list of measures which the guidance will further elaborate on
  • Practical framework for using such measures in practice
    • Definition of measures
    • Explanation and examples of use in practice
  • Based on existing practice in Member States
    • Example of confidentiality rings in the UK
    • Issues – Ref to Alstom v Commission case (T-164/12 R)

• Framework for national judges to use in practice
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