

Competition Law Litigation in the UK

Bill Batchelor

Partner
32.2.639.0312 / Brussels
44.20.7519.7312 / London
bill.batchelor@skadden.com

Frederic Depoortere

Partner / Brussels
32.2.639.0334
frederic.depoortere@skadden.com

Giorgio Motta

Partner / Brussels
32.2.639.0314
giorgio.motta@skadden.com

Ingrid Vandenborre

Partner / Brussels
32.2.639.0336
ingrid.vandenborre@skadden.com

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One Manhattan West
New York, NY 10001
212.735.3000

523 avenue Louise
1050 Brussels, Belgium
32.2.639.0300

On December 4, 2019, Skadden hosted a discussion¹ with Sir Marcus Smith QC, a Justice of the High Court and a chair of the Competition Appeal Tribunal (Tribunal). Sir Marcus has presided over leading cases in the U.K. on antitrust damages claims — *Sainsbury's v. MasterCard* and *Britned v. ABB* — and chairs the Tribunal panel hearing the *Forex* group action. The speakers debated some of the most prevalent issues in antitrust litigation in the U.K. today. Additionally, Sir Marcus shared his views on issues such as collective actions, burden of proof, judicial review and Brexit. Brussels antitrust/competition partners **Bill Batchelor** and **Ingrid Vandenborre** participated in the discussion.

Collective Proceedings: Should the Gateway Involve Merits Assessment?

In discussing *Merricks v. MasterCard*, differing views were expressed by the Tribunal and the Court of Appeal (CoA) on the appropriate threshold to certify an action for collective proceedings. The Tribunal considered certification requires a degree of merits assessment of the group's economic model and distribution methodology. The CoA held that demonstrating a realistic prospect of success ought to be sufficient. The U.K. Supreme Court will hear arguments on the correct standard later this year.

Sir Marcus acknowledged the substantial pressure defendants face to settle, occasioned by a collective proceedings certification, and discussed whether a claimant group should face a higher bar than showing only a realistic prospect of success. Another question due to come before the Tribunal will be the treatment of competing applications to be certified as the opt-out group for a claim, given there can be only one opt-out group certified. This may require a relative qualitative assessment of the proposed collective actions, potentially involving a range of factors such as class definition, funding and distribution proposals.

Quantification: Importance of Economic Analysis Grounded in Facts

BritNed Development Ltd v. ABB AB (the Tribunal's first fully litigated cartel damages claim) is a detailed judgment, involving a curious fact pattern in which price negotiations were conducted by individuals without knowledge of the cartel. In a highly detailed judgment, the case highlights the challenges faced by the court as fact finder when considering competing economic analyses.

¹ The discussion can be found [here](#).

Key Takeaways

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Sir Marcus explained that the facts in *Britned* were exceptional. The case permitted a detailed analysis of the individual underlying facts as it involved a single, very large, project allegedly allocated between ABB and other cartelists. But this level of detailed review may not be practical where thousands or potentially millions of transactions are allegedly cartelized, and there is little practical ability to test in a granular manner how a specific price agreement was implemented. Rather an economic model may need to be applied.

Sir Marcus stressed the importance of a rigorous understanding of the underlying facts and that any economic model must be consistent with the known facts and theory of harm. A court is likely to be skeptical of grand economic theories presented in the abstract, particularly if it is contradicted by evidence of actual conduct.

Third-Party Discovery in Support of Damages Claims

The CoA in *Britned* remarked that damages quantification was challenging without economic data from third parties (which might indicate a competitive price benchmark). But the courts generally are reluctant to order third-party disclosure, which may be a feature of future damages claims.

In *Britned* the claimants were limited to a dataset of projects provided by a participant in the alleged cartel, without being able to benchmark these against third-party non-cartelized projects. Sir Marcus observed that there was a high bar to ordering third-party disclosure in civil cases. While there may well be a case for disclosure in exceptional circumstances, it seems unlikely that this will gain general acceptance in the courts.

Pass-On Not Yet Successfully Upheld as a Defense

There is yet to be a successful pass-on defense. In *Sainsbury's* the rather generic claim, that in a thin margin business cost increases must inevitably osmose into prices, was unsuccessful. However,

it is possible defendants may succeed in surcharge-cartel-type fact patterns (fuel, insurance or raw material price spikes — or currency fluctuations — being surcharged to downstream customers).

Sir Marcus observed that economists and lawyers had different views on this point. Economists consider that pass-on is a fact of economic life — an enterprise must pass on its costs to survive — whereas the legal understanding of pass-on overcharge (as demonstrated in *Sainsbury's*) is far narrower and more difficult to establish. But all agreed that a clear nexus must be shown between the overcharge claimed and the downstream price if the defense is to be successful.

Reform Proposals for Judicial Review in Competition Cases

The discussion turned to the implications of the February 21, 2019, letter from Lord Andrew Tyrie (chair of the Competition and Markets Authority) to the U.K. secretary for business, energy and industrial strategy, suggesting a change to the Tribunal's full merits review in antitrust cases. Sir Marcus was asked for his thoughts on the importance of a judicial appeals process as a quality control for antitrust decisions. He stated that in this respect it was considered questionable whether a judicial review standard was necessarily quicker or cheaper, which does not necessarily reflect the experience to date.

UK and EU Divergence Post-Brexit

Turning to the possibility of the potential for divergence between U.K. and European Union competition law post-Brexit, Sir Marcus noted that — even if the competition laws of both jurisdictions remained the same — there would be divergence, if only because the U.K. courts would follow competition judgments of the U.K. Supreme Court (and other appellate courts in the U.K.), whereas member states would be bound by the decisions of the EU Court of Justice.