

# Agenda

Advancing economics in business

## It's not that complicated really: truisms about economists

At the recent book launch of *Economics for Competition Lawyers*, Nicholas Green QC of Brick Court Chambers was asked to share his views and experiences of working with economists as court experts. This resulted in 'Green's five truisms about economics and economists', which are shared here with the *Agenda* readership, along with his reaction to the book

Economics is, in any view, integral to competition law. Decisions about competition law, however, represent the culmination of a legal process, and the challenge for practitioners is therefore to mould economics into this process. Decision-makers are a mixed bunch. They range from regulators such as the UK Office of Fair Trading (OFT), or Ofcom and other sectoral decision-makers, through the Competition Appeal Tribunal (CAT) and the High Court, and all the way to the General Court and the European Court of Justice.

To put it mildly, there is a highly variable level of understanding, competence and even willingness on the part of judges and decision-makers to grapple with complex economic issues. When they lack confidence, they tend to resort (often at a sprint) to legal rules that have the effect of limiting their responsibility for addressing the correctness of economic decisions taken by decision-makers. The evolution, at the European Court level, of the doctrine of the margin of discretion in complex economic cases is a classic example of courts finding a (semi-)respectable way of ducking economics and allowing the European Commission to get it all wrong with impunity. I do not wish to sound too craven, but the CAT has made less of a dog's dinner of economics than any other tribunal I have appeared before to date.

The critical art and task of the economist is, in my view, twofold. First, it is to identify the economic issues that are relevant to the legal issues in a case. Second, it is to both provide and articulate the economic answer in the clearest, simplest and shortest manner possible.

The most effective economists are those who can perform their discipline while remaining conscious of the legal framework and its obvious limitations.

This textbook, *Economics for Competition Lawyers*, is a delight. It is comprehensive and comprehensible. When I was asked to talk at the book's launch, an opportunity arose that I grabbed with alacrity: I demanded a gratis copy of the book from the publisher. As you would expect, I have read it from cover to cover—well, to be more accurate, I have read the front and back covers. I particularly liked the response from one commentator on the back cover, which said, 'This book reads like a novel.' Well, that might be pushing it a wee bit, but you will get the essential message.

Even a quick skim through the substantive text, however, makes it clear that the work starts with the assumption that its readers are economically and numerically illiterate, and proceeds to explain basic concepts in their legal framework. It has chapters that are broken down and delineated in an accessible manner. One such chapter appeared to be tailor-made for me: chapter 11 contains a section under the heading 'Smokescreens and Mud Slingers'. I am confident that this text will help to demystify economics for lawyers, decision-makers, courts and tribunals.

### The truisms

And now for the serious bit. In my exhaustive reading of this tome I discovered some omissions. These are truisms about economics and economists that have not, regrettably, found their way into the text.

I feel that I should plug that gap with 'Green's five truisms about economics and economists', as given in the boxes below.

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Niels, G., Jenkins, H. and Kavanagh, J. (2011), *Economics for Competition Lawyers*, Oxford University Press, March.

**Truism 1: 'An economist is a person who, when they find that something works in practice, then has to make it work in theory.'**

This expression of deep scepticism reminds me of Mr Justice Jacobs (as he then was) in a case in 2000 concerning the relationship between patents and abuse of dominance in a High Court action. At a case management conference, when the question of experts came up, he replied as follows: 'The only thing to do with experts is to put them both in a darkened room at the start of the trial, turn the lights off, and then not let them out until it's all over.'

**Truism 2: 'The first law of economics is that for every economist there is an equal and opposite economist. The second law is that they are both wrong.'**

This reminds me of doing a trial in Hong Kong about seven years ago with Dr Helen Jenkins of Oxera as my expert. Our collective task was to explain long-run average incremental cost to three judges, none of whom was evidently finding it easy. Our opposing expert was Professor John Kay. It was a telecoms case set down for five days, but after five days we had barely got into the cross-examination of the witnesses of fact. Dr Jenkins therefore sat for five days smiling, in a very knowing way. The sight of Dr Jenkins smiling constantly at Professor Kay over five days was enough to force the other side to cave in—and they did. At least that was our theory. The case settled and we did not have to go back to finish it.

**Truism 3: 'Q. What do you get when you cross the Godfather with an economist?  
A. An offer you cannot understand.'**

This reminds me of my cross-examination of an economic expert in the High Court in *Courage v. Crehan*. In the course of that exchange, the expert had answered (so I thought) somewhat sneakily to a question that I had posed, so I said (intending to be withering): 'Dr [expert], you're ingenious.' However, the transcript of the exchange produced later that day said: 'Dr [expert], you're a genius.'

In the same case, there was a demonstration that judges can sometimes be economically very savvy. A well-known economics professor was discussing, while in the witness box, the concept of rent ratios. This was an idea that he had successfully advanced over many years in front of the OFT, the Monopolies and Mergers Commission (now the UK Competition Commission) and the European Commission in relation to the nexus between rents and beer prices in cases involving brewery tied houses. Mr Justice Park took ten minutes

of intensive debate with the professor to come to the conclusion that it was unsustainable—and he was right.

**Truism 4: 'The use of mathematics has brought rigour to economics; unfortunately, it has also brought mortis.'**

This reminds me of the hearing in 1999 in front of the Restrictive Practices Court, when the OFT was challenging the exclusive television deal for football between Sky and the Premier League. The Bench, comprising Mr Justice Ferris and two lay members, had been listening to statistical and econometric evidence for the best part of two days. This was designed to address the shockingly complex notion that televising more football might reduce gate attendances (one of the OFT's theories). Towards the end of the second day the judge suddenly said 'stop'. He paused and then said, 'I want you to imagine that whenever my hand is up I have not understood a word that has been said by the experts.' He then paused again (clearly for dramatic effect) and added, 'Now please imagine that my hand has been up for the last two days.'

**Truism 5: 'It's not that complicated really.'**

In a case involving the relationship between copyright and competition law presided over by the late, but still lamented, Mr Justice Laddie, the copyright holder (Ordnance Survey) was seeking summary judgment and a strike-out in relation to a spurious Euro-defence (ie, where the other party relied on the European Competition rules to get out of an arrangement). To avoid this outcome, counsel for the infringer submitted that the relationship between competition law and copyright was highly complex and 'riven through' with economic complications, to which Mr Justice Laddie, with characteristic modesty, replied: 'That is a political broadcast on behalf of the terminally confused party. I am not confused; my wife would not be confused, and not even my mother-in-law would be confused.'

## Concluding remarks

Notwithstanding the omission of these fundamental truths, I can heartily recommend this book. I do this partly because I have not had to pay for my own personal copy, but mainly I say this because the authors really have done something quite novel—they have set out to explain economics in terms that will be accessible to lawyers and the legal process. In that, they have succeeded. It is a splendid addition to the antitrust library and I, for one, will be making reference to it regularly.

## Nicholas Green QC

If you have any questions regarding the issues raised in this article, please contact the editor, Dr Gunnar Niels: tel +44 (0) 1865 253 000 or email [g\\_niels@oxera.com](mailto:g_niels@oxera.com)

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