

FBLS and UofG's Joint Symposium on Competition Law after Brexit

By Abbie Stirrat, Honours student at the School of Law

In February 2023, the Glasgow University School of Law joined forces with the Franco-British Lawyers Society (FBLS) and held a joint symposium entitled '*Competition Law After Brexit: Divergence for Differentiation or Parallelism for Consensus*'. The symposium was organised by Professor Maria Fletcher and Dr Magali Eben within the School of Law. The spearheads within FBLS were Ian Forrester KC, Lord Ericht and David Guild. As lecturer in competition law, Magali hosted the event. The University of Glasgow School of Law and the Franco-British Lawyers Society have a well-established connection with one another and during this joint symposium, the two came together in order to focus on change within competition law. The collaboration of the two parties enabled a range of experts from different jurisdictions and professional areas related to competition law to discuss and consider potential solutions and challenges in competition law, particularly post-Brexit.

The day consisted of several interactive panel sessions which involved discussions from many esteemed scholars, judges and lawyers engaging in thought-provoking discussions related to the future of competition law in Scotland, Europe and further afield, such as the United States.

To kick off the discussions, Lord Ericht set the scene: Lord Ericht referred to recent major political upheaval and the convergences and discrepancies between superpowers on the world stage, namely the United Kingdom and the European Union in reference to Brexit. His introduction was followed by a captivating speech by Sir Marcus Smith, President of the UK Competition Appeal Tribunal. He expressed that competition law in a post-Brexit environment is a topical concern for the CAT particularly because the CAT's jurisprudence is rooted in European jurisprudence. He also highlighted the importance of the CAT maintaining an international outlook, even when divergence from EU law in the UK could be on the table. However, according to Sir Marcus Smith, extreme divergence from EU competition law in the UK is unlikely. This notion is supported by the fact that Article 101 and 102 of the Treaty on the Functioning of the European Union very much lives on within Chapter I and II prohibitions in the UK Competition Act. In summary, he expressed his hopes for the future of UK competition law in terms of consensus and differentiation: the CAT should never turn away from internationalist traditions and law, and the UK must now develop on its own with a clear sense that competition law is international at heart.

The first discussion panel was chaired by Carol Xueref, Board Director of the Franco-British Lawyers Society. It addressed the topic of '*the views of competition law across borders: Scotland and the world*' and provided a platform for the speakers, experts in the field of competition law, to refer to what they see in day-to-day practice. These discussions raised the question whether the UK, EU and further afield are really on diverging paths and if consensus really is the 'soup of the day'. Professor Bill Kovacic from the George Washington University provided a US insight into the area. He acknowledged that the developments within competition law and policy present today in the US possess similarities with the developments taking place in the EU. For example, some lawyers in the US have made repeated references to the EU's Digital Markets Act, using it as a source of guidance. This would suggest some sort of global consensus. Nonetheless Professor Kovacic cautioned that trans-Atlantic consensus may emerge in terms of substance, but not in terms of the tools adopted. While the EU may focus on regulation, the US would instead continue to focus on competition litigation, via the numerous appeals and litigation in relation to 'Big Tech' monopolization or merger control cases. He did state that the US have many of these cases in its portfolio. Therefore, time will tell if consensus or divergence will prevail. Kate Kelliher, an Associate at White and Case, discussed state aid and foreign subsidy control in an UK and EU context. She highlighted potential divergences: while the UK leans towards a more

procedural route towards these matters, the EU takes a more orthodox, traditional competition law route. Professor Jacques Steenbergen, former President of the Belgian Competition Authority and professor at the Katholieke Universiteit Leuven, also provided valuable insight from the Competition Authority perspective during this panel. He highlighted the potential obstacles to the ability of authorities from different jurisdictions to exchange information with one another. Alec Burnside, a Partner of Dechert LLP in Brussels and London, discussed the hot topic of sustainability within the scope of competition law. He introduced some pressing questions such as to what extent the law in this area should extend interests to unborn generations, overseas workers and consumers. He also suggested that the EU Commission's guidance in this area has a major failing within it: it does not provide guidance for public companies that are working towards international sustainability and netzero goals. This is a problem, because the achievement of these goals may arise from collaboration between companies, which may produce anti-competitive effects. The question is how we should strike the balance between competition and sustainability.? Professor Steenbergen also provided insight in this area, stating that a genuine pro-sustainability agreement may indeed have anti-competitive effects.

The second discussion panel focused on *'the future and funding of private litigation of competition law'* and was chaired by Ian Forrester, KC and former Judge at the General Court of the EU. Professor Barry Rodgers from the University of Strathclyde kicked off the panel by providing an up-to-date overview of competition related litigation. He exemplified some recurring themes within this litigation right now, such as active case management by the CAT and also a general reluctance of the CAT to permit appeals. He also proposed that there is a move away from business-focused actions towards more consumer-focused actions in this area. He also questioned whether claimants would still bring claims within the UK for EU wide claims now that the UK is no longer a member state. The UK has considerable expertise and experience but it is now more difficult to enforce damages. Commission decisions are no longer binding in the UK, raising the question whether this will encourage claimants to bring multi-jurisdictional actions in the UK, or to take these actions elsewhere. Susan Dunn, Head of Litigation Funding at Harbour, discussed the process of funding litigation and what such funding is intended to cover. She highlighted the huge expenses that are involved in bringing competition litigation cases and emphasised that none of the major cases, such as Merricks, for example, would be possible without funding. Thus, the CAT would likely be empty without funding mechanisms such as Harbour. Funding is typically viewed as insurance, but this is not the case as instead funding covers all the costs of litigation along the way. Due to the risk element of litigation funding, a funder must consider who the defendant is and if they can pay, how much the claim is worth and the cost of the action. In relation to competition law litigation, she highlighted that the question of litigation costs dominate the CAT as it is such an expensive place to bring cases. She also discussed the fact that the funding business is finding that many people are trying to bring cases in the CAT due to the forum's advantageous 'opt out option'. Viktoria Tsvetanova, Associate at Dentons LLP, focused upon how lawyers and authorities can work together in practice now that Scotland has its first ever competition law case: the 'Trucks' case. She explored the practicalities of bringing competition law cases in the UK when the UK itself is made up of different jurisdictions. For example, litigants may be in favour of bringing cases in Scotland due to the cost of litigation generally being less in Scotland. She also considered that the competition litigation system within Scotland is novel due to the Scottish courts rarely witnessing major competition law related litigation. This means that there is opportunity within the Scottish system to build its own procedure, depending on what the CAT sees fit.

The final panel addressed *'Big uncertainties and open questions'* and was chaired by Magali Eben. Professor Sir David Edward, former Judge of the Court of Justice of the EU, built upon the main themes of Viktoria Tsvetanova's contribution and considered the fact that the Scottish profession is not yet

fully plugged into competition law. He proposed two reasons for this: firstly, due to the fact that Scots lawyers see so little competition law cases and secondly, due to the fact Scots lawyers may be unsure when a case falls in the realm of competition law due to a lack of experience in the area. He felt that this issue will worsen now that the UK has left the EU. Dr Cansin Karga, Associate at Dentons, discussed questions related to the new subsidy control regime, referring to the UK Subsidy Control Act that came into force in January 2022. She highlighted that this is not retained EU law, pointing towards some elements of divergence. Dr David Reader, Senior Lecturer in competition law at the University of Glasgow, also provided insight and discussed the possibility of parallel merger regimes for big data markets. He also questioned whether or not the UK will now diverge from a strict competition law approach post-Brexit and touched upon the UK's public interest approach to merger control. However, he did also note that since Brexit, the only public interest policy introduced in relation to merger control was in relation to the pandemic.

Overall, the day provided for a range of insightful and valuable perspectives to be shared amongst those passionate about competition law. Furthermore, the insights provided may go further and guide those in the field of competition law as to what the next steps might be in competition law and policy in a post-Brexit, sustainability-conscious, technology-driven environment. Time will tell whether divergence for differentiation or consensus of parallelism will be favourable for the UK and the rest of the world in today's rapidly developing day and age.

Thank you to all involved.