

BRICK COURT
CHAMBERS
BARRISTERS



Legal issues for professional and trade associations

12 May 2015

Programme

12.30: Buffet lunch.

13.00: Seminar (chaired by Ian Moyler, Joint Senior Clerk):

- Richard Gordon QC –
“The status of professional and trade associations in public law.”
- Jemima Stratford QC –
“EU law – when and how?”
- Robert O’Donoghue –
“Competition law – the top 10 tips.”
- Gerard Rothschild –
“Recent developments in the law on consultation.”
- Zahra Al-Rikabi –
“The human right to pursue a trade or profession.”
- Questions / discussion.



Robert O'Donoghue

specialises in competition law, EU law, utilities regulation, and related aspects of public and commercial law. He has appeared as an advocate before the High Court, Competition Appeal Tribunal, Court of Appeal, Supreme Court and the EU Courts in Luxembourg, as well as before the Irish High Court and Supreme Court. He is standing junior counsel to the Irish telecoms regulator (ComReg) and one of three members of the junior counsel panel for the Hong Kong Competition Commission. He teaches competition law at King's College London, the Brussels School of Competition and Free University of Berlin, and has published extensively on competition law issues. Prior to returning to the Bar in 2007 he spent a decade practising in Brussels (with Brick Court Chambers, then DG Competition and finally with Cleary Gottlieb LLP). He has acted for and advised professional and trade associations on various aspects of EU and competition law. Most recently he was counsel to the Bar Standards Board, Solicitors Regulation Authority, Architects Registration Board, and Farriers Registration Council in the Supreme Court in *Westminster City Council v. Hemming* in relation to the lawfulness of regulatory enforcement regimes under the EU Services Directive.



Gerard Rothschild

practises in the areas of commercial law, competition law and public law. He was a Lecturer in Constitutional Law at Magdalen College, Oxford for five years. His public law work over the past year has included matters as diverse as: the judicial review challenge by Stuart Wheeler to the Government's opt-in to European Arrest Warrant scheme; acting for interested parties concerned with Ofgem's regulation of the electricity industry, both before the Administrative Court and the Competition and Markets Authority; and the pending judicial review of the Government's reforms to the selection of expert witnesses in personal injury claims.

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About us

Here are some extracts from the independent legal directory **Chambers & Partners 2015**:

Administrative & Public Law: *"The excellent reputation of Brick Court Chambers is founded in part on its deep expertise in public law matters in the context of EU and competition law. Its members appear with equal acuity on behalf of both claimants and defendants, and attract particularly strong praise for their advocacy in commercial public law proceedings. They are especially accomplished in challenges to the imposition of economic sanctions and in regulatory matters."*

Commercial Dispute Resolution: *"Brick Court has long been regarded as a heavyweight chambers in commercial litigation work and remains a firm favourite with instructing solicitors. The instructions it receives are wide-ranging in nature, and include natural resources, banking, property and company disputes, as well as disputes originating in Russia and the CIS. The set is well stocked with leading silks and highly regarded juniors, and its members are consistently praised for their robust and intelligent advocacy. Sources say: "The barristers exhibit strong technical expertise and commercial awareness, and will always go the extra mile for the client."*

Competition Law: *"Brick Court houses a plethora of top-quality barristers with deep experience, who can offer assistance in all areas of competition law. Offering a uniformity of quality at both silk and junior level, it is able to tackle the majority of the leading cases of the field, however complex or challenging. As commentators note: "There is a benefit to the way that the practitioners work there. The set is a competition litigation hothouse, and members are able to bounce ideas off each other." Acting for a wide array of clients, including the government and the EC, the set has handled a number of recent interesting cases, including the BMI Healthcare litigation, Sainsbury's v MasterCard, and the Lafarge cement case."*

European Law: *"Brick Court's reputation in the market is undisputed. It boasts some of the top law firms as regular clients, many of which name the set as their first chambers of choice. It consistently receives praise for its barristers and its clerks, who offer a seamless service on a wide variety of EU matters."*

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Notes

Football supporters sue UEFA over spending restrictions

Friday, 8 May 2015 (3 days ago)

Henry Vane



(Credit: PSGMAG.NET, Wikimedia Commons)

A group of fans has brought a case against UEFA, European football's governing body, claiming that a clause in its "financial fair play" rules designed to make clubs financially sustainable in fact prevents new entrants from challenging established teams.

UEFA introduced financial fair play in 2010 and applied its "break even" rule in 2014 for the first time. The rule stops clubs from spending more money than they earn – through TV broadcasting rights, ticket sales, sponsorship, merchandising, and prize money – on new players. In essence this stops clubs from borrowing or using shareholder money to buy players.

Fans of French team Paris Saint-Germain (PSG) argue this stops clubs with smaller revenues from buying the players necessary to compete with the traditionally successful teams such as Real Madrid, Barcelona, Bayern Munich, Manchester United and Chelsea.

Professional & Trade Associations & Competition Law: Dos And Don'ts

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Why care?

- Trade/professional associations often held responsible for infringements alongside their members
- Can lead to stiff fines:
 - *French Beef* (2003): six trade associations fined €16.7 million for involvement in price-fixing agreement
 - *Construction Recruitment Forum* made up of six recruitment agencies fined £39m by Office of Fair Trading (2009)
 - *Estate agents* (2015)

Do I need to care?

- Competition law only applies to “undertakings,” which normally requires an “economic activity.”
 - Even if association not itself engaged in economic activity, regulators may “pierce the veil” and say that its members are (*Wouters* (Dutch Bar and MDP ban))
 - Organisational/regulatory role may be combined with commercial aspects e.g., sponsorship, advertising (see *FIFA, International Olympic Council*)
- Competition law can apply to:
 - “Agreements” and/or “decisions” of “association(s) of undertakings”
 - Absent agreement/decisions, association could have unilateral market power: regulatory power over a market/sector may give rise to dominance (see *FIFA*)

Dos and don'ts

- Develop a competition law Compliance Programme (if you don't have one already) & ensure a culture of compliance in practice
- Industry lobbying and promotion initiatives, inc. for protectionist legislation, are usually fine
- So too are general market information discussions and initiatives, e.g., health and safety, employment/training issues

Dos and don'ts

- Problems usually arise where association gathers and disseminates sensitive information on (current) price, capacity, terms and conditions or other parameters of competition:
 - Fact that something anticompetitive is done under auspices of trade association not a defence
- Have a clear protocol for conduct of potentially sensitive meetings:
 - Agenda
 - Minutes
 - Trouble-shooting

Dos and don'ts

- The rules of membership of an association may themselves raise issues where they exclude competition
- Equally the adoption or promotion of particular standards can have an exclusionary effect (*Sel-Imperial, IACS*)
- Association recommendations can be treated as “*decisions*” under competition law: recommendations as to collective (industrial) action can be an unlawful boycott (*Uber, IMO*), even if not binding

Dos and don'ts

- Non-separation of regulatory and commercial roles can
give rise to conflicts of interest (*Formula 1*)