Opening address at Frontier Economics competition litigation discussion event: 20 May 2026

"The use (and misuse) of economics in UK competition cases"

Introduction

Good evening, everyone, and thank you for inviting me to open today's discussion. It is a real pleasure to be here.

The title for today is "The use (and misuse) of economics in UK competition cases". Anyone who has been involved in a modern competition case will know exactly why that matters. And this is particularly important in the Competition Appeal Tribunal, where economic evidence is almost always central to the final substantive decision.

Private enforcement of competition law could not function without the assistance of expert economists on the analysis of both liability and quantum; and the Tribunal is a sophisticated user of economic evidence, with its expertise stemming from its economist members and the familiarity of many of the chairs and other ordinary members with litigation involving economic evidence.

That puts the Tribunal in a particularly good position to comment on what works well, what we think can be improved, and what the Tribunal is doing to encourage economic evidence that is as useful as possible for the decisions that we are taking.

I want to address three issues in particular. First, the Tribunal's recent Experts Practice Direction, and why it is focused on independence and proportionality. Secondly, the need to be clearer about what the economic experts are actually being asked to do in the litigation, and what should instead be left to factual evidence and legal submissions. Thirdly, some case-management points about making the expert process work better.

My preamble is a comment by Lord Justice Green, a few years ago. He said that "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." To be fair to everyone in this room, he might have added that they are usually both right on some points too!

The practical difficulty is identifying which is which – and doing so on a principled basis, rather than by a process of elimination. Good expert evidence enables us to do that – to see clearly where there is genuine agreement, where there is genuine disagreement, and why. The question is how to achieve that.

1. Why a reset is needed

The observed problems: independence and volume of evidence

Let me start with the Experts Practice Direction and why we produced that. The process of drafting that Practice Direction began within the Tribunal's own group of economist members, who are well placed to identify recurring difficulties in the way economic expert evidence is being prepared and used in cases brought before the Tribunal.

In that regard, we have become increasingly concerned about two trends. The first is a blurring of the lines between expert evidence and advocacy. The principles set out in the CPR on the instruction of expert witnesses and the content of the evidence of experts are well known, and they have long been applied in the Tribunal. But they are not always being complied with.

Judgments of the Tribunal have repeatedly criticised the partiality of the expert evidence. *Trucks* in 2023, *Stellantis* and *Kent* in 2025, and most recently the *Stasi v Microsoft* certification judgment last month are all examples. Nor is this a new issue: similar concerns were expressed about the expert evidence in the Tribunal's very first Competition Act judgment, in the *Napp* case.

Advocate economists are simply not helpful to the Tribunal – or to their clients for that matter. As the Tribunal said in *Stasi*, it does not help if each expert treats the other as completely wrong about almost everything of relevance to the case. Nor is it helpful for an expert to ignore obvious analytical points that are adverse to their client, and only to address them when raised by the other side.

Approaching the evidence in that way makes it far more difficult for the Tribunal to identify and deal with the real disputes between the parties. And it is also self-defeating, in terms of the credibility of the expert. If the Tribunal gets the sense that an expert is slipping into advocacy for their client, it inevitably becomes harder to trust the rest of that expert's evidence.

Our second concern is the volume of the expert evidence filed. Economist reports have become, habitually, so long that they make it extremely difficult for the Tribunal to understand and grapple with the real issues in the case, meaning that everyone is less likely to be able to use the hearing time effectively. Elephantine expert reports increase the burden on the parties' legal teams, in developing submissions based on that evidence, and the burden on the Tribunal, in dealing with all the evidence in its judgments. And of course they drive up costs on all sides.

Aims of the Experts Practice Direction

Those points show why we think that a reset is needed. The Experts Practice Direction makes clear the Tribunal's absolute expectation that expert evidence must be objective and unbiased. That must start with appropriate scrutiny of the basis on which the expert has been instructed.

Many experts will have been instructed in the preparatory stages of the litigation, and may also have worked for parties across multiple related proceedings. Neither of those things are, in themselves, improper. But the Tribunal is likely to be interested in the expert's prior role, including situations where the expert has been involved in instigating the litigation, and will consider carefully whether that is likely to compromise that expert's objectivity and impartiality.

The point is not to introduce unnecessary obstacles to the instruction of experts, but to ensure transparency, and to deal with issues early in the proceedings rather than at the trial, when it is too late for an alternative expert to be instructed.

Moving to the substance of expert reports, to try and ensure greater objectivity, the Practice Direction makes clear that the parties' lawyers must not seek to influence the content of the reports, including joint reports. Joint expert statements, done well, can be immensely helpful in identifying the true points of agreement and difference – in the same way that concurrent evidence, or hot tubbing, is now used to very good effect in competition cases. But too many joint statements simply become a restatement of all the points on which each expert disagrees with the other.

One option for joint reports might be to require some or all of the discussions between the experts, and the drafting of the joint statement, to take place without any contact with the legal teams: what Australian practitioners refer to as a "conclave". The Tribunal has not yet ever done that, but it is something that could be considered in future. The ultimate aim is simple: to ensure that what emerges reflects the experts' unvarnished views.

The Practice Direction also emphasises the necessity for expert reports to be concise and focused. One practical measure to achieve that is the page limits for expert reports at the certification stage, which are now set out in a separate Practice Direction. We are aware that this marks a radical shift from what experts have become accustomed to producing for certification, but early experience suggests that it is entirely feasible for experts to provide much shorter initial reports. Indeed the last four CPO applications that have been filed have all complied with the new page limits.

The reason why those page limits should generally be sufficient is that at the CPO certification stage we are of course not expecting full evidence. Rather, what is necessary is for sufficient information to be provided that the Tribunal can make an assessment of the appropriateness of certification. The emphasis needs to be on quality over quantity. As an example, the Tribunal in *Evans* noted that it did have detailed reports before it. But what was lacking was a properly pleaded case on causation, loss and damage. The answer is therefore not longer and more detailed reports, but a focus on what needs to be established by each side.

That point also applies for trial reports. Shorter reports are almost always more useful, more relevant, and ultimately more persuasive. Unfortunately, our sense is that a lot of expert evidence is taken up with minutiae that are just an argument with the other party's expert, and do not really make any material difference to the result. We routinely tell advocates to focus on the important issues, and the same discipline should apply for experts.

One of the suggestions in the Experts Practice Direction is to have single final trial expert reports, which supersede their previous reports. Rather like skeleton arguments, this would enable everyone at the trial to work from a single expert report on each side, which is focused on the most important and relevant issues in the case, omitting points that are no longer in dispute following the earlier reports and joint expert discussions.

That would, hopefully, avoid the spectre of the Tribunal being confronted at trial with a huge volume of expert material, much of which has been superseded, but with some key points buried, like Roman treasure, in footnote 227 towards the end of report number nine.

2. Clarifying the scope of expert evidence: what are experts being asked to do?

That brings me to the second issue I wanted to address, namely the scope of the evidence given by the economists. Experts are very often asked to address issues that are really questions of either fact or legal submission. The result can be a great deal of expensive analysis that does not actually help the Tribunal decide what it needs to decide.

You see this most clearly in some abuse cases. Economists will, of course, be instructed on market definition, dominance and quantification. But it is also not uncommon to see experts asked, in broad terms, whether conduct is "abusive", whether it falls "outside competition on the merits", and whether it is "objectively justified". Those are mixed questions of fact and law. If an expert is going to be asked to address them, the prior question should be: what exactly is the economic analysis, and is it likely to add anything material, over and above the factual material and the legal submissions?

A key step is therefore early scrutiny of what issues the experts will cover, defined with specificity rather than simply listing some broad headings. Disciplined instructions matter, and this ties back to my points about independence and proportionality. Vague instructions invite expansive reports with irrelevant material; expansive reports invite advocacy; and confidence in the evidence is then undermined.

The benefit of focusing the scope of the evidence is that it enables the Tribunal to pay more attention to the substance of the important issues in dispute between the opposing economists. And that is something that the Tribunal is well-equipped to do. We recognise that a lot of economic evidence is informed estimation, rather than a precise science. We recognise that economists will need to use assumptions and informed judgments about what analysis and which models to use. We are able to understand concepts such as statistical significance; and we understand that it is proper, in building an economic model, to explore alternatives.

That is why we would like an honest "warts and all" discussion of the economic modelling, recognising the inherent limitations of the analysis, rather than being presented with a Disneyfied version that is attractive on its face but ultimately not a compelling picture of reality. I believe that the Tribunal does have the expertise to deal properly with a "messy reality" and indeed is much more likely to be persuaded by that, than by an overly sanitised set of modelling results.

Case management

My third and final theme is case management, and this underpins the practical implementation of all of the points that I have made so far. A persistent problem is that issues with the expert evidence emerge too late in the proceedings to be addressed properly. Objections based on an expert's prior involvement with the client should really not arise for the first time at the trial. Nor should the Tribunal, at the trial, be faced with a deluge of expert evidence that cannot sensibly be addressed in the time available.

The Tribunal also often sees reports from opposing experts who have worked on the basis of different assumptions, and sometimes even addressed different questions, such that their evidence doesn't really meet. The Tribunal is then faced not with a structured debate on a common footing, but with ships passing in the night.

Those problems can, we hope, be avoided by earlier engagement, including by making more use of the economist panel members assigned to cases, to align the experts as closely as possible on the issues they are addressing and the data needed to address those issues. In collective proceedings, that discussion should normally start soon after certification. That should also help to address the proportionality point, by ensuring that clear guidance from the Tribunal is given from the outset as to the issues that the expert evidence should and should not be addressing.

Some Tribunal panels have explored a more expert-led approach to identifying what disclosure is actually needed for the key economic analyses. Involving the experts can potentially avoid the production of vast amounts of material that is time-consuming and expensive to trawl, but only marginally relevant.

But this approach will not be right for every case; and where it is used, it needs judicial control, because experts may have very different views from the lawyers and indeed the Tribunal about what is necessary to enable a decision on the issues in the case. The Tribunal is also very mindful of not setting up a process that is intended to reduce costs, but which ultimately ends up adding more complexity and cost to the decision-making process.

The main point to emphasise about case management is that you can expect the Tribunal to be more directive about length and focus in future cases. The purpose is not to make life difficult for experts. Rather, it is to direct evidence to address what really matters, and to encourage a form of presentation that the Tribunal can actually use.

Concluding observations

To conclude, the Experts Practice Direction, and the Tribunal's broader work on costs control and case management over the past year, signals a heightening of the Tribunal's expectations about expert evidence. The principles and standards we apply have not changed; but we are paying more attention to what those principles require in practice.

That is likely to mean increased scrutiny of the independence and objectivity of the expert evidence before the Tribunal, and tighter control over the volume and scope of that evidence.

That may take a little time to become embedded in practice. But given the centrality of economics to competition law, it is worth the effort that I know everyone is making to ensure that economists are able to assist the Tribunal as effectively as possible.

Independent, focused and properly aligned expert evidence is easier for the Tribunal to use, and it is more likely to produce fair, proportionate and timely outcomes. I hope that today's discussion will help all of us to think clearly about how to make this process work best, and I am very grateful to Frontier Economics for organising it. Thank you very much.