

Interview with Kevin Coates

Formerly head of a cartel unit at DG Comp, and one-time theatre technician, Kevin Coates has moved over into the private sector

Q: Why did you want to be a lawyer and then a competition lawyer?

A: Honestly I don't know. I've wanted to be a lawyer for as long as I can remember – even before I knew what a lawyer was or actually did day-to-day. I've always been interested in the law and what that meant in terms of society. So I went off and studied law, got interested in European law at university because I thought the relationship between European law and UK constitutional law, where parliaments are supposed to be sovereign, was interesting. So I went off to do a postgraduate degree in European law and that's when I got into competition law, which is completely different. But I found it was the first time I'd done any economics, so I really enjoyed working on an area of law where there was this interplay between law and economics. There was also the point that if you got to be a practising European lawyer back then, competition law was the main area where you ended up. Less so now, but certainly that was the case 20 years ago.

Q: What's been the best – and the hardest – part of being a competition lawyer at the European Commission?

A: The best bit, I mean the thing that I really loved doing, is that you get to see lots of different businesses and lots of different industries. You've then got to understand how they operate, why they're doing it and the competition implications of what's going on. So you get into the innards of lots of different sectors, which I find really interesting.

The hardest bit is to construct a set of workable legal rules out of an area that is based on economic analysis. It's rather a nerdy answer but that's what competition law really is about. It's all very well saying you need to do this detailed economic analysis in order to trigger what's going on. But if you're then trying to advise your marketing department on whether they can respond to a bid in a particular way this afternoon, it isn't really a good enough response to say, "Well, let's go away and do six months of economic analysis on this problem". So marrying economics and law together is just incredibly hard for everyone – the Commission and the external legal advisers – involved in these cases.

Q: Where's home to you?

A: Day-to-day life is lived in Brussels but home is still the UK. My family and my oldest friends are here, although of course I have friends in Brussels as well.

Most people (though not all) would still regard themselves as coming from and still having a home back in the country they originally came from, particularly now when we have the wonders of modern technology. I wake up to the Today programme every morning and listen to John Humphrys rabbiting on about something or other. So in some ways it's not like living abroad at all.

Q: Even less than most places, I imagine, as (at the professional level, at any rate) Brussels has now been invaded by just about every nationality imaginable?



A: Yes, and that causes problems with the Brussels economy because you get a whole load of well-paid civil servants, lawyers and economists coming in and distorting the house price market. It has all sorts of effects but it's still a fantastic place. I love living there. The international community is a great thing to be a part of but home is still here in the UK.

Q: You're now a partner here at Covingtons. What are the major differences between working in the Commission and in private practice? Do you find it a shock?

A: It's still a little early to say, I think. When I first moved over from private practice (when I was just as a trainee) into the Commission, I remember the big difference was that you didn't have to serve a particular client. In the Commission, you had to look at a competition problem and decide what the best answer was. That's a tremendous privilege. Your job is to do the right thing – and that's fantastic.

Moving into private practice, of course the perspective shifts. Your job is to serve the interests of the client. So that's one very big change. But of course the core of the work doesn't change that much. It's the same level of analysis, the same law and the same trying to understand what's going on. Of course, in a few months' time, I may have a different view.

Q: Is there any one achievement during your time at the Commission of which you're particularly proud?

A: By far and away the most interesting time I had at the Commission was when I was working for the DG Comp director generals, Philip Lowe and Alexander Italianer. It was communications rather than legal work but it meant that I got involved in discussions about everything important that was going on in the DG across all of the different areas, across policy, across cases. And working directly with the director general – and with the cabinet and the commissioner – was

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just tremendous in terms of the interestingness of the work and what you got to see.

I guess it will vary from year to year but I think the thing I'm most proud of at the moment is the statement of objections we put out in the electrolytic capacitors cartel at the end of last year, where we went from the start of the investigation to getting the statement of objections out the door in 18 months. This is for a multiparty cartel – and it was effectively 18 months from the end of the infringement to the sending out of the statement of objections. The team worked incredibly hard. We got all our ducks in a row very quickly and I think we can be very proud of having got out a strong message that the European Commission can work quickly and hit companies rapidly.

Q: Do you think the image of the Commission as a priesthood that's isolated from the world helps or hinders its work?

A: I've only ever worked in DG Competition, and the different parts of the Commission are different in terms of what they do and how they see themselves. Even though I'm now on the other side, I still hope – and I want to believe – that DG Comp is an open and engaged organisation that talks to the outside world. Virtually everybody has almost daily contact with companies, their advisers, ministries and the state aid area. I certainly didn't see myself as part of a priesthood when I was there and I think a lot of my colleagues wouldn't see themselves like that either. Maybe that has something to do with the nature of the work in competition law: you've got to get into the detail of the companies and how they're working. So you can't be too distant from the commercial world.

Q: How does competition law keep up with the pace of change and the technology / IP worlds?

A: I'm quite sceptical about things changing as quickly as some people say they do. Products change, yes. You get a new version of a piece of software or a new generation of a phone or something like that. But the technology that means that these things are important doesn't change nearly as quickly.

It's easy to get dazzled by the pace of product change in the tech world. But what underlies that change does alter significantly but it changes much more slowly and not many people would say that the Commission's treatment of tech cases is over-hasty, especially as they do probably last longer than even the Commission would want. But the point about getting tech cases right is that you establish the principles which can then be used in other cases as they go along. Sometimes it's not even about getting a timely answer to a particular case. It's about establishing a principle that can then be used in a subsequent case.

Q: How difficult is it to reconcile the different approaches of lawyers and economists so that you get the best out of both?

A: I'm not sure anybody has really worked that out yet – certainly nobody I've met. It's really a question of getting them to meet in the middle, I think. Economic analysis doesn't necessarily require working out a solution to a problem to three decimal places, with bags of formulae and masses of data. You can have economic analysis that tells a sensible story about what's happening, without going into the data.

At the same time, lawyers sometimes don't properly appreciate that fact and consequently get scared of doing economic analysis. And economists sometimes forget that in the end you've got to get away from the data. You can't take six months to analyse every problem if you're operating in a law firm. You just need to understand the story.

When lawyers get scared of economic analysis, that's when under article 101 they start to throw everything into the object box. "Oh yes, it's an object infringement so we don't need to do an effects analysis," they say. Whereas in fact, all they often need is a couple of paragraphs telling a sensible story. Some economists love their data so much that they get lost in it, forgetting to surface and tell a story so that we can all come up with a set of rules that can actually be applied on a day-to-day basis.

Q: Do competition lawyers – or does competition law – do any good? The economic evidence is ambivalent. What evidence is there (as opposed to political belief) that competition stimulates innovation?

A: I think what you're really asking about here isn't so much about competition enforcement but about competition itself. Most economists and lawyers would say, yes, competition spurs innovation. Competition encourages firms to lower their prices, to come up with better products and to be more responsive to customers. There are plenty of examples to show that when you don't have competition, then nothing much happens.

As to whether competition is a good thing, well, there are plenty of areas of life where competition isn't the best objective. For instance, most people wouldn't say that the police should allocate their resources according to the willingness of the victim to pay them. That's not the system we want and that's perfectly right. To a lesser extent possibly, most people would say the same about health and education. You don't want that allocated solely – or even at all – on the basis of an ability to pay. As a society, we want a National Health Service and we want a state education system – and that's absolutely fine. So I think that competition can deliver certain things but you've got to decide if these are the things that you want in any given area of activity. I would like the government to have advertising and safety regulations about toothpaste, for instance. But I don't then want the government to interfere any further as, by and large, I think I'm going to get cheaper and better toothpaste if companies are left to compete freely on the market. But that's toothpaste – it's not police, education, health or the army.

In the end, the debate is about what you want to achieve, and there are plainly some areas where a market approach doesn't seem the obvious way to solve the problem. I mean there is the consequence that if a government introduces a market in a particular area, then the competition rules will apply to that market, as the competition rules apply to all markets. But the initial choice is whether you want competition in a particular area. That can be a big political choice that carries risks. There's been some criticism, for example, about introducing competition into areas of the health service because one of the consequences of doing so is that you import potentially the application of the competition rules. So the first question is this: is this an area where you want competition or is it an area where you want a managed system?

Q: Why shouldn't a government prop up, say, a national postal service – on the grounds of political principle – even if other companies claim they could do the job more cheaply?

A: Again, it depends on what objectives you're trying to achieve. The classic thing you'd want to achieve with a postal service is universal service and the state aid rules, the competition rules in general, allow universal service support. The question is, do you need to provide support in order to get universal service?

I remember back when I used to do telecoms and there was a big debate about whether or not you have a national single telephone/communications model or not. This was the stage before we got into the postal discussion. The UK telecoms regulator analysed the costs and the benefits to BT of being obliged to offer a universal service and they found out that, on balance, because that means your network is bigger and everybody can call everybody, that brings net positive benefits. So BT didn't need to be funded anymore to provide the universal service.

Now maybe the postal system is different, I don't know, but again it goes back to what objectives you are trying to achieve and then how best do you achieve them. It isn't necessarily a question of market or not market. Certainly I don't think there's anything about the postal service that fundamentally means you couldn't have a market solution if that was viable. There's no other objective that you're trying to achieve, like some environmental benefit or whatever. It's just about getting letters and parcels delivered to and from people and I think there is an increasing consensus that you don't need a state monopoly to do that.

Q: Do you think that competition law has much of a jurisprudence (ie legal philosophy) underpinning it?

A: Well I think the moral ethical undercurrent is that businesses should compete and not collude on the market. There are, though, some very opaque areas of competition law where it's not clear whether somebody is competing or something else is going on. But if you take it back to the classic, simplest area of cartels, where companies aren't competing but colluding, then that should be prohibited and the participants should be punished, they should have to pay damages. I think that's as clear as old-fashioned contract. You can imagine an implied contract to the effect that if you want to operate on a market, you have to give an undertaking that you will compete. That's it. It then gets complicated in some areas because it's not clear whether what people are doing is competing or whether they're trying – by subterfuge or by monopolisation or whatever – to avoid competing. In those sorts of cases, it can get factually complicated but the core principle is as clear as other areas of law.

Q: What are the major competition law challenges for 2016 for lawyers working in your particular fields of practice? I gather you focus especially on electronics, technology, software and ecommerce issues.

A: Everybody is looking out for what the competition commissioner is going to do on the various state aid tax cases that are outstanding, because the Commission is applying state aid in a way that hasn't been done before and where historically there hasn't been a consensus that this is an area for state aid control at all.

Q: Are cartelists really getting smarter?

A: I remember a war story from a colleague back early on when I joined DG Comp about a dawn raid where they walked into somebody's office and saw a folder on the shelf marked "Cartel minutes". However, when I was in the Commission, we didn't find that kind of thing anymore. The nature of many cartels has changed. You rarely see old-fashioned smoke-filled rooms, let's go 10% up next Tuesday, type of cartels. You see far more discussions on the lines of "Well, I'm thinking about doing this with my prices next week. What are you thinking about doing with your prices next week?" There's nothing going as far as "So we're agreed then, it'll be 10%" but rather, "Well, I was thinking of 10%. Are you thinking of that? Ok".

So what you have now is what is termed information exchange, where I tell you what I'm going to do and you tell me what you're going to do. They tend to stop short of the classic collusion but it's still fairly clear what the intent is when you're looking at why these people are actually having this conversation. Why would these competitors be talking to each other about forward-looking prices? Well, that's probably because they intend to co-ordinate their forward-looking prices. So they've got smarter in that usually they realise that hardcore detailed discussions about what they're actually going to do on price is a bad thing.

However, proving a cartel can be much harder. So in that sense, yes, they've got smarter. But you can still prove it through, for instance, phone records showing that certain phone calls took place. That's already a start. So then you progress on to why the alleged cartelists were making this particular phone call.

I remember a few years ago on something that became the gas insulated switchgear cartel. I did the dawn raids in that case. A company (which I won't name) that was a member of the cartel had supplied all the participants in the cartel with an encrypted GSM phone: state-of-the-art encrypted phones, not the standard type. So you said to the suspected cartelist, "So you have an encrypted phone?". "Yes I do," the cartelist replied. "Who do you call on your encrypted phone? Is there anybody else in your company that has an encrypted phone?" "No, there isn't," came back the answer. "So who do you call on your encrypted phone?" By trying to cover it up, they actually made it a little bit easier to prove that something really dubious was going on.

Q: I'm assuming that the reason why you don't get hit-and-run cartelists – that is, cartelists who join to make a quick buck before shopping their fellow conspirators – is because it takes too long for a cartel to make any money? Is that right?

A: Yes, I would agree, the timescales don't work. And the risks are enormous. You can lose your money, your job and potentially your pension rights. In some jurisdictions, you can even go to jail. So the reward/risk ratio is just too unfavourable.

Q: If you couldn't be a lawyer, what would you be?

A: Probably, I'd do something in the theatre. I used to do a lot of tech work in theatre when I was younger. I got involved in a couple of theatre groups at home and at university and I really enjoyed it. And in my spare time, I go to the theatre as often as I can.