

# ESSEX COURT CHAMBERS

BARRISTERS



## HUGH MERCER QC

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## PROFESSIONAL PRACTICE

Hugh Mercer QC has a wide-ranging practice in public law, judicial review and commercial law especially where cases involve specialist issues of conflict of laws, foreign law and EU law. He has extensive experience in trial and appellate advocacy, especially in the UK Supreme Court, and is equally at home in arbitral tribunals.

He covers the entire field of EU, public and international law providing advocacy and representation not only before the Court of Justice and General Court but also before a wide range of courts and arbitral tribunals both in the UK and, working with local counsel, in Belgium, France, Greece, Spain and Switzerland where his languages (French, German, Spanish and Italian) are very valuable.

A member of Treasury A Panel when a junior, his work since taking silk has included several recent cases involving sanctions/restrictive measures before the General Court, national courts and regulatory authorities, intervening in the General Court of the EU to support Microsoft's appeal against a periodic penalty payment of almost €1 billion, successfully appealing a Court of Appeal decision in the fisheries field to the UK Supreme Court on behalf of Defra, representing defendants in damages actions before UK courts in competition cases, representing claimants in *Francovich* damages claims, intervening before the European Court of Human Rights in a criminal case involving bail, challenging UK implementation and decisions in relation to the

Single Payment Scheme and Fruit and Vegetable Schemes, representing the UK regulator in relation to issues on retirement homes under the Unfair Contract Terms Directive, representing authorised persons in Financial Services Authority disciplinary proceedings, representing a water company in proceedings before the Competition Commission, representation in relation to litigation arising out of EU and UK climate change levies, challenging various levies, charges and duties, advising on blocking statutes in the field of sanctions, damages claims in the General Court arising from travel bans/asset freezing orders, challenging state aid decisions in the telecoms sector before the General Court, advising on bilateral investment treaty issues arising from competition law enforcement, advising on the application of competition law to property agreements, arguing issues of foreign law in the English courts, dealing with the references to Luxembourg in the fields of international environmental law, agriculture, customs/excise duties and copyright, advising NGOs in Srebrenica in relation to international human rights before the International Criminal Tribunal for the former Yugoslavia.

He is Chairman of the CCBE EU Lawyers Committee ([www.ccbe.eu](http://www.ccbe.eu)), a committee which handles cross border regulatory issues affecting all EU Bars, and is on the Legal Experts Advisory Panel of Fair Trials International. He also co-authors a major commentary on the Brussels Regulation on jurisdiction and judgments, *European Civil Practice*. He has particular experience working with economists on regulatory matters and for example, provided the EU law input for an economist's Wolfson prize entry concerning the crisis affecting the euro.

He has experience both as expert witness on English law and also as arbitrator, including as sole arbitrator.

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## AREAS OF EXPERTISE

- Arbitration & related court applications
- Banking & financial services
- Commercial dispute resolution
- Conflict of laws & private international law
- Energy & natural resources
- European law & competition
- Food, agriculture, fisheries & farming
- Foreign laws in English courts
- Health & medicine
- Human rights & civil liberties
- Media, art, entertainment
- Public & administrative law
- Public international law
- Regulatory law & investigations
- Revenue law (including VAT, IPT, duties & excise)
- Sanctions & restrictive measures
- Shipping & admiralty

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## WHAT OTHERS SAY

*“He’s first class and undoubtedly one of the top agriculture barristers in the country.” “A classy operator; he’s stunningly intellectual and a very experienced EU lawyer.”*

Chambers UK 2015

*Agriculture & Rural Affairs*

*“He’s so quick it’s terrifying.” “Excellent on his feet, he was really quite robust in a difficult case.”*

Chambers UK 2015

*European Law*

*“Excellent at getting what the client wants.”*

Legal 500 2014

*Administration and Public Law*

He is particularly noted as *“a fine litigation strategist”* who is *“marvellous for EU law questions”*.

Clients have described him in the legal guides as *“very erudite and, frankly, brilliant”*, *“phenomenally clever and very likeable”*, *“excellent in all aspects”* of his work, *“excellent and approachable”* and *“a super lawyer”*.

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## **EXAMPLES OF NOTABLE CASES**

*Cox v. Ergo* [2012] EWCA Civ 854, 1001 (Conflict of laws; fatal accident; jurisdiction in England and question is whether the action is to be brought only under English Fatal Accidents Act or according to German law as the applicable law) Successfully defended on appeal.

*Mangouras v. Spain* [2012] 54 EHRR 25 Application to the European Court of Human Rights on the grounds that immediate arrest and detention in custody or under hotel arrest for a matter of years breached the defendant’s right to liberty under Article 5 of the Convention.

*Microsoft v. Commission*, Case T-167/08 (Periodic penalty of €900 million for alleged failure to comply with decision ordering cessation of abuse of dominant position; Commission alleging failure to comply until 0% royalty proposed; acting for interveners supporting Microsoft’s right to remuneration for innovation).

*Bloomsbury v. Sea Fish Industry Authority and Defra* [2011] UKSC 25, [2011] 1 WLR 1546 (The Sea Fish Industry Authority's power under the Fisheries Act 1981 s.4(3) to impose a levy in respect of sea fish or parts of sea fish landed in the United Kingdom extended to imposing a levy in respect of imported sea fish. That levy was not a charge equivalent to a customs duty contrary to arts. 28 and art.30 TFEU.) Decision of principle on the approach to statutory construction. Instructed by Defra.

*Nordea v. Unicredit* [2011] EWHC (Comm) (conflict of laws, foreign proceedings between related parties in EU, discretion to stay)

*R (on application of Fruition) v. Defra* pending in European Court of Justice (true interpretation of the rules on fruit and vegetable producer organisations in agriculture; whether recognition lawfully withdrawn from the claimant's organisation)

*Vtesse Networks v. European Commission* T-362/10 pending before the General Court of the EU (whether the Commission decision not to investigate a state aid complaint without opening a detailed investigation is lawful)

*Vtesse Networks v. European Commission* T-54/07 [2011] ECR II-0000 (whether decision of European Commission in a state aid complaint unlawful; whether admitted differential in business rates applied to BT granted an advantage to BT which qualified as an unlawful state aid).

*R (on the application of TA Gwillim) v. Welsh Assembly Government* Court of Appeal. (2009) NPC 136 (EC Agricultural Law – Single payment scheme – whether the provision for hardship in farmers subject to agri-environmental commitments transferring to the scheme requires a dip in livestock production or not and whether, if hardship payment made, it would be contrary to state aid rule – Held that WAG's decision unlawful)

*Vtesse v. Bradford* [2010] EWCA Civ 16 (whether, in determining the rateable value of a hereditament consisting of fibre optic cable for use in telecoms market, VOA is obliged by the Telecoms Directives to take into account evidence derived from the rateable value of BT which incorporates 75% of UK optical fibre – Effect of state aid rules and whether definition of the relevant market is necessary for the legality of a tax based measure to be assessed)

*R (on the application of Partridge Farms) v. Secretary of State for Rural Affairs* CA, (2009) NPC 58 (EC law and compensation scheme for cattle culled under TB control measures – whether unlawful differential treatment through failing to differentiate in any way between high value and normal commercial stock – challenge upheld at first instance but CA found no differential treatment. Whether compensation scheme would in any event infringe the EU state aid rules)

*R (on the application of O'Connor) v. HM Coroner for Avon* [2009] 4 All ER 1020 (Coroners' directions regarding insanity when raised in an inquest – departing from position in criminal trial, once insanity is properly raised, it must be disproved to the criminal standard to sustain a verdict of unlawful killing)

*Mangouras v. Spain* ECHR (Human rights – whether breach of right to bail for ship's master accused of pollution offences to be asked for €3m and, even after providing this sum, being kept under hotel arrest with ban on leaving Spain)

*Região autónoma dos Açores v Council* Court of First Instance of EU (EU fisheries policy – serious risk to environment through permitting fishing in the Azores waters – whether European Commission interim regulation obviated need for interim relief – on appeal to ECJ)

*Répertoire Culinaire v. HMRC* ECJ (whether cooking wine is within the alcoholic beverage provisions of the Excise Duty Directive and/or whether it is entitled to exemption – whether ECJ bound by previous caselaw in respect of this issue)

*R (on the application of Mabanft) v. Secretary of State for Energy and Climate Change* [2009] EWCA Civ 224 (EC law – rules on stocks of petroleum products to be maintained by each Member State – to what degree equal treatment of affected businesses needs to be maintained)

*Sutton & East Surrey Water Interim Determination* (Competition Commission, 2009) (Water sector regulated prices – whether water undertaker entitled to modification of prices to deal with increased energy prices and reduced demand – whether lawful to refuse to increase prices)

*R (on the application of RSPCA) v. Secretary of State for the Environment, Food and Rural Affairs* [2009] ACD 2 (amendments to rules applicable to slaughter of birds in case of serious health outbreak – whether ultra vires Directive 93/119 or general EU law – Held – lawful). Acting for Defra

*R (on the application of Intertanko et al) v. Secretary of State for Transport* [2008] ECR I-4057 (ECJ) (whether Directive 2005/35 valid in the light of public international law – held UNCLOS is not a source of rights but Directive must be interpreted in accordance with EC law)

*Arbitration on effect of EC competition law on specialist shipping pool*, 2008 (whether standard form charterparties entered into by ship operator which shared profits with shipowners could be said to constitute a restriction on competition by object or effect)

*Olafsson v. Gissurarson* [2008] 1 WLR 2016 (CA) (whether order should be made dispensing with service in Lugano Convention case to ensure that otherwise potential domestic time bar would not defeat the claim – held that order should be made in truly exceptional case)

*Boake Allen v. HMRC* [2007] 1 WLR 1386 (HL) (limiting the availability of group income elections to subsidiaries of UK companies was not in breach of the non-discrimination articles of the relevant double taxation conventions.)

*Pirelli Cable Holding v. HMRC* [2008] STC 144 (if claimant had been able to make a group income election, non-resident parent companies would not have been entitled under the relevant double taxation agreements to tax credits on the subsequent payment by a UK subsidiary of mainstream corporation tax)

*Taylor v Lancs County Council* [2005] EWCA Civ 284 [2005] NPC 43, Times, March 31, 2005 (Human rights – property law – whether Case D of the Agricultural Holdings Act 1986 draws an unlawful distinction contrary to Article 14 ECHR between the procedures applicable to tenants who are required to do remedial works and those tenants required to remedy other types of breaches)

*Regina (Middleton) v West Somerset Coroner* [2004] 2 AC 182 (Human rights – deaths in prisons and the scope of the investigative duty under Article 2 ECHR – whether necessary or appropriate to extend scope of inquests to cover this Coroner's actions – scope of inquests extended.)

*Holleran v Severn Trent Water Plc* [2004] EWHC 2508 (Public procurement – whether claim was statute-barred under the Utilities Contracts Regulations 1996, Reg. 32(4), through failure to respect three month deadline – whether three month deadline Article 6 ECHR compliant – need for dealing with complaints quickly in the public interest)

*Re A (a child) v Ministry of Defence* [2005] QB 183 (CA) (Duty of care – non-delegable – negligent treatment of soldiers and dependants in hospitals in Germany – hospitals were part of a “health service” organised and administered by the Ministry which declined all responsibility in the event of claims – soldiers should sue in Germany under German law and in German language – CA hopes Ministry of Defence will help soldiers)

*Arkin v Borchard et al. (No. 3)* [2004] 1 Lloyd's Rep. 636 (Costs of Part 20 proceedings where defendant successfully defended claims by claimant but had been singled out of a group of jointly liable potential defendants and had joined others from same group as Part 20 defendants)

*Arkin v Borchard et al. (No. 2)* [2004] 1 Lloyd's Rep. 88 (Costs – insolvent claimant and professional funder – whether professional funder should be ordered to pay costs of successful defendants – whether grounds for order to pay part of costs)

*Leeds City Council v James Stuart Watkins and another* (2003) 14 EG 122 (CS) : Times, April 9, 2003 (Competition law and Market law – exercise by city council of exclusive rights under market

law for their own commercial purposes did not place city council in a de facto dominant position on the relevant market – refusal to accept that there was a relevant market – no restrictive agreements proved)

*Arkin v Borchard et al.* [2003] 2 Lloyd's Rep. 225 (EU competition law – claim for damages – shipping liner conferences – no abuse of a dominant position – conduct within the block exemption – no causation in any event) (Note – acted for successful defendants in the most substantial competition litigation ever in the UK courts)

*National Iranian Oil Corpn. v IRI International Corpn* [2002] EWCA Civ 1024 (CA) (Rome Convention – law applicable to a contractual obligation in the absence of choice – force of the presumption in Article 4(2) Rome Convention on the law applicable to contractual obligations – whether appropriate to apply Article 4(5))

*Henderson v Jaoen* (CA) [2002] 2 All ER 705 (CA) (Jurisdiction – whether jurisdiction in English courts following tort in France – Brussels Convention – jurisdiction in relation to torts)

*Castille v DTI* [2002] Eur. L.R. 209 (EU Customs law – whether DTI in breach of EU customs legislation in rejecting multiple applications for EU import quota)

*R v Minister of Agriculture, Fisheries and Food ex parte Fisher* [2000] ECR I-6751 (ECJ) (EU Agriculture – whether MAFF obliged to disclose information to current farmer of land in order for him to apply for EU subsidies in respect of that land – penalties may not be imposed if failure to disclose)

*Agnew v Lansforsakringsbolagens* [2001] 1 AC 223 (HL) (Jurisdiction – breach of pre-contractual duty of disclosure in insurance contract – whether a matter relating to a contract for the Brussels Convention)

*R v Swale BC ex parte Lidl (UK) GmbH* [2001] EWHC Admin 405 (State aid/sale at an undervalue contrary to s. 123 Local Govt Act 1972 – highest offer on the table is not necessarily the best offer)

*Arkin v Borchard et al* [2000] UKCLR 495 (Limitation period applicable to competition law – alleged abuse of a dominant position by a liner shipping conference – applicable limitation period – estoppel following proceedings before the European)

*Sutton & East Surrey Water v Ofwat*, Competition Commission Report, 2000 (appeal against regulator's decision – whether fixing of k factor for prices in the water industry granted SESW sufficient resources to carry out its statutory duties as a water undertaker – answer in negative)

*R v Secretary of State for Trade and Industry et al. ex parte the Isle of Wight Council* (2000)

COD 245 (EU Regional Policy – administration of policy by the DTI – Isle of Wight poor but aggregated with rich region – whether lawful not to include Isle of Wight as a potential recipient of regional selective assistance and/or structural funds from the EC)

*Leidig v Intervention Board for Agricultural Produce* [2000] Lloyds Rep PN 144 (CA) (Negligent advice by Board to a farmer on milk quota and whether cream sales were subject to levy – in consequence farmer believing that his enterprise was viable continued and invested in it – entitled to levy but to no damages on account of continuing in business or investing therein).

*R v S of S for Health ex parte Eastside Cheese, Duckett intervening* [1999] 3 CMLR 123 (implementation by UK of EU food law – whether ban proportionate)

*Norbain v Dedicated Micro* [1998] EuLR 266 (Competition – alleged abuse of a dominant position – whether injunction available to oblige a supplier to continue to supply pending trial)

*Stevenage Borough Football Club v The Football League* [1997] 9 Admin LR (competition law and restrictive rules for entry to a higher league – injunctive relief to force promotion)

*Flynn v Rizrani* The Times, 20 July 1995 (the effect of Article 8a of the EC Treaty on the free movement of persons)

*Kitechnology v Unicolor* [1994] ILPr. 560 (Jurisdiction – place where the harmful event occurred for the Brussels Convention on jurisdiction – intellectual property)

*European Commission v East Africa Conference Lines* *European Commission XXIIIrd Report on Competition Policy*, 1993, paras. 230-231 (Article 81 and Article 82 EC – whether lawful for a shipping liner conference to require 12 months' notice of leaving the liner conference).

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## **ARBITRATION & RELATED COURT APPLICATIONS**

Experienced litigator and regularly acts as counsel in arbitral tribunals, often where EU, competition or foreign law issues are raised including recently leading a team of Greek, Swiss and English counsel in an ICC arbitration in Geneva and arbitrating competition law issues. In appropriate circumstances will also litigate/arbitrate in French, German, Spanish and Italian.

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## **BANKING & FINANCIAL SERVICES**

Particularly experienced in the application of EU Directives to the financial industry (e.g. seeking to sanction failure of Government to apply the Insurance Directives) including claims for



*Francovich* damages but also covers the public/regulatory law aspects of financial services including hearings before the Regulatory Decisions Committee and the Upper Tribunal.

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## **COMMERCIAL DISPUTE RESOLUTION**

Has been involved in litigation involving multiple damages claims based on *Francovich* arising from the failure of Government to implement EU directives in the field of insurance, financial services, tax and also in both stand alone and follow-on actions for damages arising from cartels for example in the vitamins cartel and the air cargo cartel. Handles many cases with expert evidence of foreign law and where conflict of laws issues are uppermost.

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## **CONFLICT OF LAWS & PRIVATE INTERNATIONAL LAW**

Is a recognised authority on the Brussels I Regulation in the light of his commentary (Layton & Mercer, *European Civil Practice*) on the Regulation. Frequently handles the specialist conflict of laws issues such as applicable law and jurisdiction at the outset of a case. Particularly experienced in cases where foreign law becomes an issue.

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## **ENERGY & NATURAL RESOURCES**

With regard to natural resources, including food, he is a very experienced litigator on all public law issues affecting agriculture. Has worked with the NFU for many years dealing with a vast range of cases involving interpretation of the Common Agricultural Policy and now the Single Payment Regime. Also advises and represents French farming unions before the French courts and before the European Commission. He was instructed by the Azores in their judicial review of an EU Fisheries Regulation which adversely affected the marine environment of the Azores and had a striking success before the Supreme Court in overturning a Court of Appeal decision in the fisheries sector.

Frequently advises and represents in this area covering a range of issues from competition to regulatory work (including successfully overturning a sectoral regulator's pricing decision before the Competition Commission and making interim application for redetermination of regulated price); commercial agency and utilities procurement issues.

Covers a range of environmental issues arising in farming and fisheries contexts such as the application of the precautionary principle to the ecosystem of the mid-Atlantic ridge but is also involved in judicial review of EU directives in the field of the environment, in particular where

there is an interface with the farming community. Has had regular involvement with climate change issues, both under EU and UK law.

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## **EUROPEAN LAW & COMPETITION**

Broad range of competition and state aid law experience across a very wide range of industries from electronics and IT (including supporting Microsoft in the General Court of the EU) to vitamins; specialist chemicals and oil derivatives to materials for the construction industry; supermarkets to cigarettes & beer/alcoholic drinks. Also was the primary competition lawyer for the successful defendants in the *Arkin* shipping competition case in the English commercial court based on predatory pricing and has particular experience in transport related issues having successfully fought off challenges to shipping pools on competition grounds. See also Group actions, above.

Covers the full range of EU law areas with special expertise in agriculture, food and free movement of goods or services as well as free establishment of companies in the EU but extends across into EU law as it affects all areas from tachographs to extradition treaties and all aspects of EU sanctions on third countries. Handles arguments on implementation of EU law into English law in all fields.

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## **HUMAN RIGHTS & CIVIL LIBERTIES**

Has particular experience in the application of human rights within a diverse range of fields of civil law such as agriculture, environment, due process, competition and extending even to the impact of human rights on the conduct of inquests (acted as lead counsel for the coroner in the case of Middleton in the House of Lords). Represented the majority of the worldwide shipping industry in the case brought by Capt Mangouras against Spain on the breach of his right to bail and currently representing NGOs in Bosnia in relation to the conduct of the International Criminal Tribunal for the former Yugoslavia.

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## **MEDIA, ART, ENTERTAINMENT**

Deals with various competition, regulatory and state aid issues arising out of telecoms liberalisation policies, related regulatory issues and extending to competition issues arising from satellite broadcasting, licensing of programmes etc. Also has experience in the application of EU law to the football and boxing sectors.

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## **PUBLIC & ADMINISTRATIVE LAW**

Has been a regular litigant for and against Government entities for over ten years, generally in cases which raise EU issues but also in cases with Human Rights or regulatory law. Very experienced in the application of public law applied to agriculture, fisheries, food, environmental issues and also in relation to a diverse range of regulatory panels and procedures.

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## **PUBLIC INTERNATIONAL LAW**

Has regularly handled issues arising out of EU customs law from issues of community origin to export refunds and extending to issues arising from quotas for goods from non-EU states and applicability of excise duty regime including judicial reviews arising therefrom together with restitution and damages issues.

Frequently covers the public international law arguments arising in relation to EU law such as the Law of the Sea or sanctions but also extends to independent PIL issues in fields such as WTO and sovereign debt issues. Litigated the impact of international law on EC law in the context of shipping pollution and advised on the legal issues arising from the eurozone crisis.

Is involved in legal and regulatory challenges in several of the EU sanctions regimes, challenging the implementing regulation in the EU General court, claiming damages, bringing national court challenges, dealing with the impact of the EU blocking regulation against US sanctions (Reg 2271/96).

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## **REGULATORY LAW & INVESTIGATIONS**

Very experienced in the conduct of regulatory investigations in the utilities, food, agriculture and telecoms sectors both in the UK and the EU, in conjunction with any subsequent public law proceedings in the Administrative Court or the General Court of the EU.

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## **REVENUE LAW (INCLUDING VAT, IPT, DUTIES & EXCISE)**

Deals with tax issues arising in an EU context such as differential taxation of subsidiaries based in another EU country and extending into state aid arguments arising out of differential business rates taxation. Has challenged a wide range of levies, charges and duties in an EU context.

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## **SHIPPING & ADMIRALTY**

Extensive experience of competition issues both before UK competition authorities and the EU Commission in relation to transport including liner conferences; bulk and tramp shipping; shipping pools; reefer trades; specialist shipping; port and airport pricing and discrimination arguments; differential pricing by monopoly operators on shipping routes.

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## **CAREER**

2012 Bencher of Middle Temple

2010 Chairman of the CCBE Permanent Delegation to the Court of Justice and General Court of the European Union (liaison committee between all EU lawyers and the ECJ)

2008 Appointed Queen's Counsel

2005-8 Junior Counsel to the Crown (A Panel)

1988-9 Tutor, London School of Economics

1985 Called at Middle Temple

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## **EDUCATION**

1986 Licence spéciale en droit européen, Université Libre de Bruxelles

1984 MA, Downing College, University of Cambridge