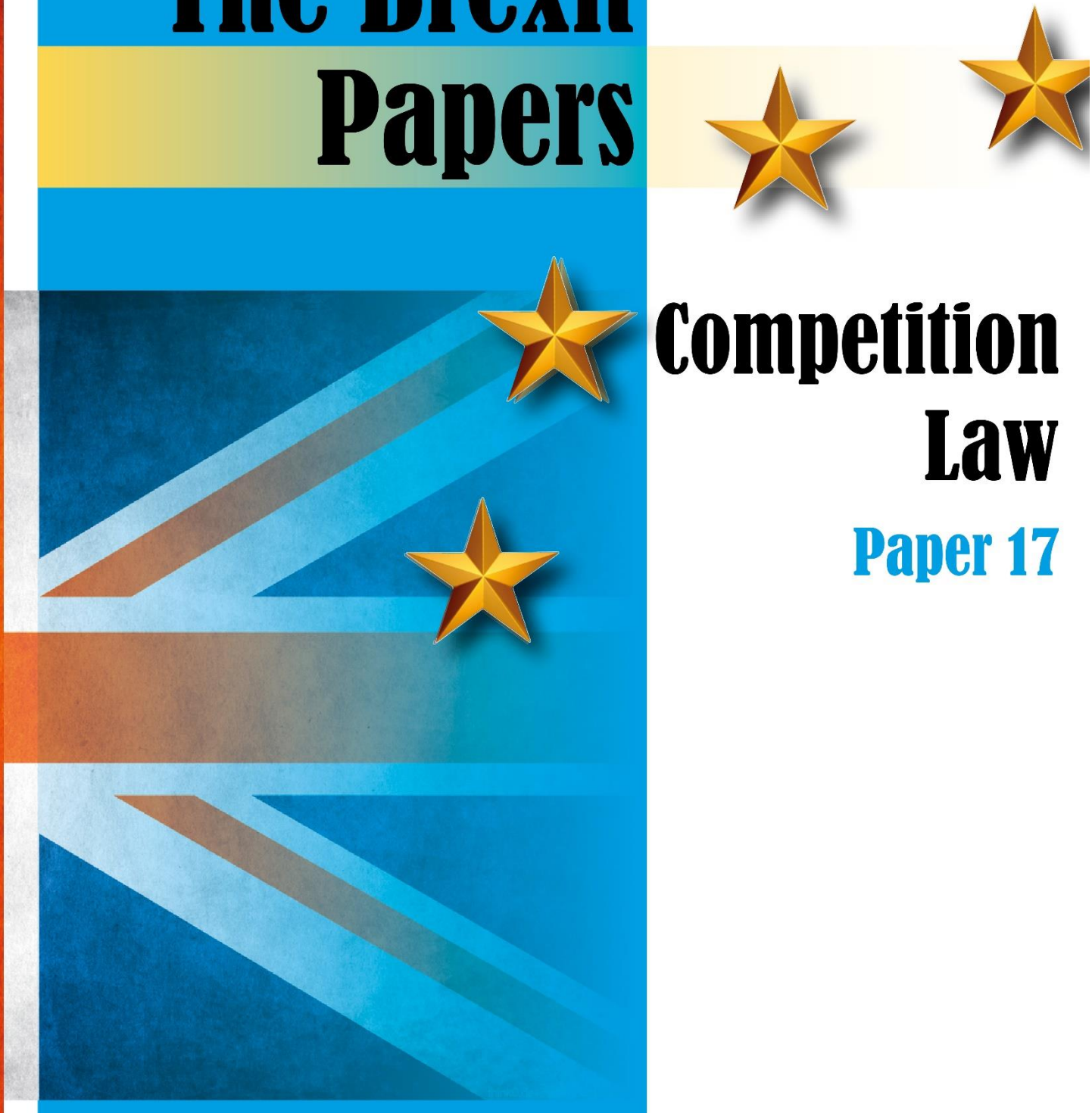
The Brexit Papers



Competition Law

Paper 17

Bar Council Brexit
Working Group
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THIRD EDITION

Brexit Paper 17: Competition Law

Summary

Competition enforcement and current levels of consumer protection will be severely weakened unless post-Brexit arrangements allow UK consumers to rely on decisions of the European Commission.

Preserving the powers under the Competition Act 1998 to enable UK courts and consumers to continue to enforce the decisions of the European Commission will be very important.

There is also is a powerful public interest in ensuring that the European Commission can continue to include the UK in its EEA-wide investigations into competition distortions.

A key driver of competition enforcement in both the UK and EU is the use of leniency arrangements, under which participants in cartels may obtain immunity or reduction in fines in exchange for cooperation. At present an application in the UK is sufficient to trigger leniency across the EU and in respect of the Commission. If that "one stop" approach were lost, there would diminished incentive to apply for leniency.

Following Brexit, coordinating measures would be highly desirable.

- We therefore urge Government to preserve the powers contained in the Competition Act 1998 to render Commission infringement decisions binding and enable UK consumers and businesses to seek injunctive relief on that basis.
- We also urge Government to preserve the immunity protection for leniency applicants and ensure mutual recognition and protection for immunity statements from disclosure.

The Impact of Brexit on Competition Law

1. Competition law is an important driver of the UK's economy, estimated by the CMA to produce annual average direct consumer benefits of £745 million between 2012-13 and 2014-15.[1]

2. Over the last 20 years, successive Governments have implemented a series of reforms which have strengthened that regime and the remedies which it offers. As the Government said in 2013, launching its most recent reforms:[2]

> "Competition creates growth and is one of the pillars of a vibrant economy. A strong competition regime ensures the most efficient and innovative businesses can thrive, allowing the best to grow and enter new markets, and gives confidence to businesses wanting to set up in the UK. It drives investment in new and better products and pushes prices down and quality up. This is good for growth and good for consumers."

3. At present, businesses and consumers in the UK enjoy the protection of two parallel, and closely linked regimes. The principal provisions of UK competition law are contained in the Competition Act 1998 (CA 98). It contains prohibitions on cartels and other forms of collusive agreements, as well as abuse of dominant position.[3] Its provisions are closely mirrored on the requirements of EU law.[4]

The present position

4. Enforcement of competition law takes place in two ways, 'public' or 'private'. Public enforcement is by the competition authorities: the CMA in the UK and other sectoral regulators[5] and the European Commission at EU level. Decisions of those authorities are binding on the English Courts and give rise to substantial penalties.

5. Decisions of the UK authorities are confined to anti-competitive conduct within the UK; the European Commission considers distortions of competition in cases with an effect on trade within the EU.

6. The European Commission, which tends to focus its enforcement activity on large international cartels, levied fines between 2012 and 2016 in the sum of €8.6bn.[6] By contrast, the

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[1] National Audit Office Report, February 2016.

[2] Private actions in competition law: a consultation on options for reform, Government Response, BIS January 2013 p 5.

[3] Chapters I and II of the Competition Act 1998.

[4] Treaty on the Functioning of the European Union, Articles 101 and 102. S. 60 of the CA98 ensures consistency of approach with the EU by requiring that questions arising under the Act in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law in relation to competition within the European Union.

[5] Covering communications and post, water, road and rail, gas and electricity, air traffic and airport operations, financial and payment services and healthcare.

[6] http://ec.europa.eu/competition/cartels/statistics/statistics.pdf

UK competition authorities issued £65 million of competition enforcement fines between 2012 and 2014. The Commission's enforcement activity extends to cartels which distort competition in the United Kingdom and worldwide and in practice serves to expand the reach of enforcement action within the UK, beyond that of the CMA, and enhance greatly the protection which consumers and businesses receive even within the UK.

7. Private enforcement consists of claims for injunctive relief and damages brought by companies or individuals (acting alone, or as part of a class action under reforms introduced in 2015). It is at least as important as public enforcement in practice. It enables those harmed by infringements of competition law to obtain direct redress, and provides an important constraint on anti-competitive behaviour. As the Government has said:[7]

> "Private actions are a very important limb of an effective competition regime. Where behaviour is illegal under competition laws, parties who are harmed should be able to bring action against the perpetrators – getting the compensation they deserve."

8. Under the CA 98, a decision of either a UK regulator or the European Commission that there has been a breach of competition law is binding upon national courts for the purpose of a competition damages action.[8]

9. This is a hugely beneficial regime for consumers: claimants do not need to prove a breach of competition law – just the damages they have suffered as a result. They can instead take advantage of the enforcement activity of both national regulators and the Commission. In practice, most competition law damages actions at least partly rely upon such decisions. There are huge impediments to claimants seeking to prove the existence of cartel arrangements for themselves, not least the secret and frequently international nature of such cartels with consequent asymmetry of information and difficulties in obtaining evidence.

10. The London courts have become a leading international centre for private competition litigation of this kind, and in recent years have seen claims for damages brought in respect of international infringements concerning LCD screens, air cargo, credit card fees, vitamins, rubber and many others. By way of example a class action against MasterCard was recently launched on behalf of consumers, seeking £14bn in damages. The English Courts, have seen the highest proportion of follow-on damages between 2006-2012 within the EU.[9] This is a reflection upon the confidence placed in our system of courts and tribunals the efficacy of the remedies provided by English law and the calibre of legal services.

The implications of Brexit

[7] A World Class Competition Regime White Paper 2001

[8] s58A (read with s47A) of the Competition Act 1998

[9] http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf

11. Whilst Brexit will not affect the ability of UK authorities to enforce UK competition law in the UK, those authorities in fact take very few competition enforcement decisions.[10] In practice, the system of competition law protection in the UK would be substantially weakened, constrained by the far more limited resources and territorial reach of the national regulators.

12. If our current system of efficacious remedies and consumer protection is to remain in place it is critical that consumers in the UK are able to rely upon decisions of the European Commission. Otherwise, competition enforcement (both public and private) will be severely weakened.

13. The starting point is that the CA98 gives effect both to our domestic competition law and also permits decisions of the European Commission to be relied upon in order to found follow on actions. The formal position is that those provisions would not be affected by repeal of the European Communities Act 1972 as they are contained in primary legislation.[11]

14. It is likely that preserving those powers would therefore enable UK courts and consumers to continue to enforce the decisions of the European Commission.[12] The Commission will however continue to make decisions which impact upon UK business which trade in the EU. At present, its investigations encompass distortions of competition within the whole EEA, including the UK. Depending on the terms of Brexit, that may well come to an end, unless steps are taken to ensure that UK markets and consumers stay within its remit for competition law purposes. There is a powerful public interest in arrangements which enable it to continue to do so.

15. One model of such arrangements is provided by the EEA Agreement. Its competition provisions are materially identical to the EU regime.[13] As a consequence, competition enforcement decisions of the Commission expressly apply the provisions of the EEA Agreement and frequently consider cartel activity throughout the EEA, so as to encompass markets in Iceland, Norway and Liechtenstein as well as the EU. If the UK entered into comparable arrangements, then there would be no detrimental impact to the efficacy of the competition regime arising from Brexit.[14]

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[10] The CMA took three enforcement decisions in 2015/16: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539987/cma-annual-report-and-accounts-2015-16-web-accessible-version.pdf

[11] See ss 47A and 58A of the CA 98.

[12] We understand there is some difference of opinion as to whether these provisions of the CA98 would be sufficient, on the basis that this would amount to the application of foreign rules of public policy.

[13] See Arts 53 and 54 of the EEA Agreement and Protocol Z1 and Annex XIV to the EEA Agreement.

[14] Consequential changes would be required to the Competition Act 1998, but not in respect of matters of substance.

16. There are two further more technical matters of practical significance.

17. First, a key driver of competition enforcement in both the UK and EU is the use of leniency arrangements, under which participants in cartels may obtain immunity or reduction in fines in exchange for cooperation. At present an application in the UK is sufficient to trigger leniency across the EU and in respect of the Commission. Use and disclosure of that material is carefully controlled. If that "one stop" approach were lost, there would diminished incentive to apply for leniency, and a need for multiple filings. Thus, following Brexit, coordinating measures would be highly desirable.

18. Secondly, there would be a need for protection for UK enterprises from the risk of double jeopardy in the form of fines for the same conduct in the UK and by the Commission or other regulatory authorities in the EEA.

Recommendations

Any post-Brexit arrangement with the EU should:

- Preserve the powers contained in the Competition Act 1998 which render Commission infringement decisions binding and enable UK consumers and business to seek damages and injunctive relief on the basis of those decisions.
- Preserve the immunity protection for leniency applicants and ensure mutual recognition and protection for immunity statements from disclosure in administrative or judicial proceedings;
- Protect against double jeopardy of competition fines in respect of the same conduct.
- There is in addition a powerful public interest in arrangements which would extend future infringement decisions by the Commission to UK markets.

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