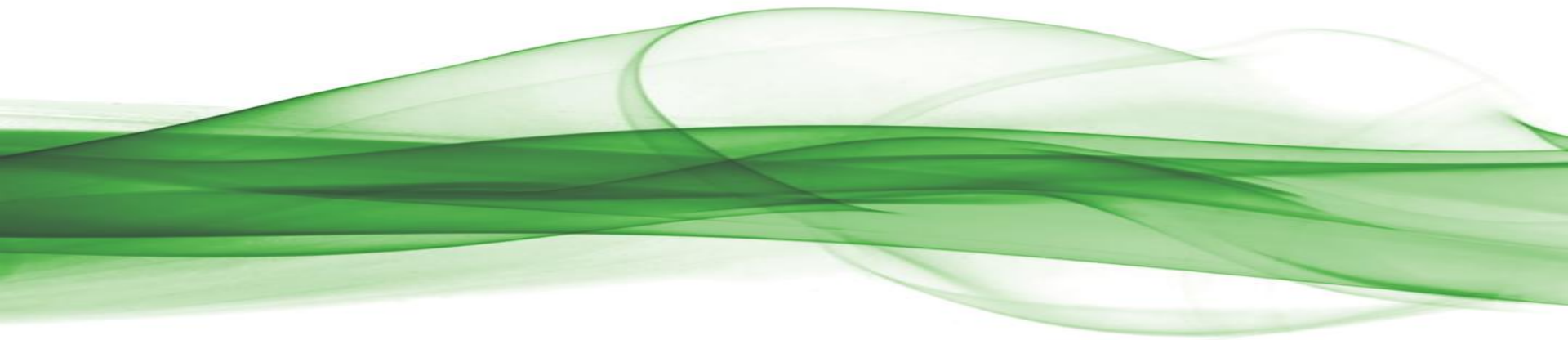




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# Competition Section Seminar: Brexit Part 2: litigation and enforcement

Tuesday 11 October 2016





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## What is the Competition Section?

The Competition Section is a Law Society subscription based membership group which provides the support you need to be prepared for market change in competition law and practice, helping you to understand the implications for both you, your business and consumers.

We deliver expert analysis and practical guidance through our face-to-face networking events, topical webinars and archived podcasts, providing practical guidance with insight from competition law experts, both solicitors and representatives of related institutions.

For more information about the Competition Section or to join - [www.lawsociety.org.uk/competition](http://www.lawsociety.org.uk/competition)



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# Competition Section calendar

- **13 May: (webinar) Competition at the FCA: An update for lawyers**
  - Speaker - Deb Jones, director of Competition, FCA (Financial Conduct Authority)
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# Peter Freeman CBE QC (Hon)

chairman, Competition Appeal Tribunal

# Private competition cases - leaving the EU

- A spectrum of possible outcomes depending on terms
- Substantive law issues
  - EEA-like arrangement or other?
- Procedural issues
  - Jurisdiction and choice of law
  - Parallel cases, recognition and enforcement

# Possible outcomes

- EEA or equivalent
- Bespoke UK/EU arrangement
- Other arrangement

# Substantive law

- EEA or equivalent
  - The EEA competition regime
  - No direct effect
  - Tendency to follow EU law
- Bespoke arrangement
  - Strong incentive not to diverge too far
- Other arrangement
  - Anybody's guess

# Issues arising - Substantive law

- Status of CMA and other competition authority decisions
- Interpretation and enforcement practice
- Converge or diverge - whither s60?



# Procedure

- Forum and Jurisdiction
  - (Recast) Brussels Regulation, the Lugano Convention
- Recognition and Enforcement
  - (Recast) Brussels Regulation, the Lugano Convention
- Choice of law
  - Rome II and implementing regulations (EW & S)

# Issues arising - Procedure

- Principle of private enforcement remains but new uncertainties
- Level of enforcement activity
- Attractiveness of UK as forum

# Conclusion

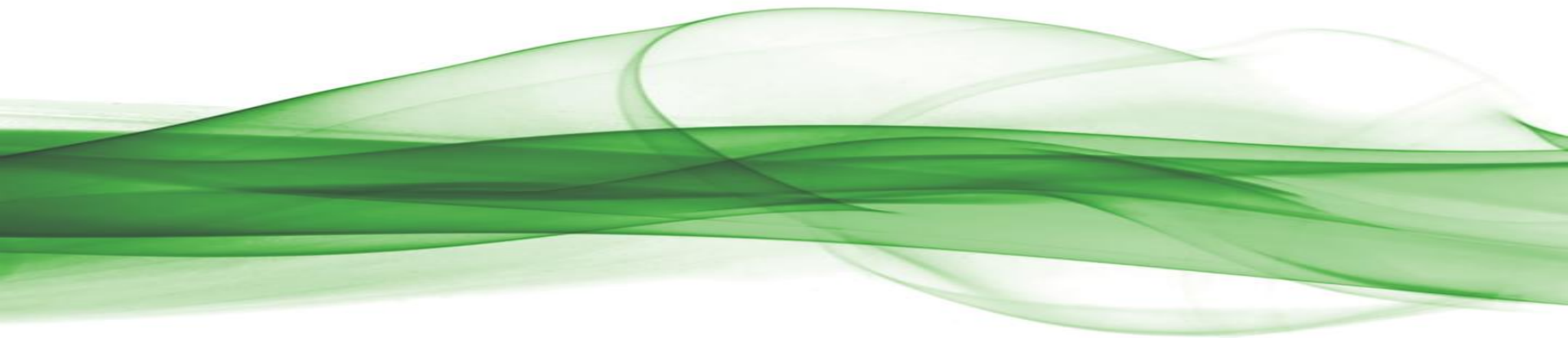
- Change there will surely be
- Still too early to predict outcome



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# Kate Vernon

partner, Quinn Emanuel Urquhart & Sullivan UK LLP



# Current Statutory Framework

- S.47A CA98 and Breach of Statutory Duty Claims:
  - Follow on/Standalone/Hybrid claims in CAT and EWHC
  - Infringement Decisions of CMA, Sectoral UK regulators, European Commission can be relied upon for liability findings under CA98 and/or TFEU
- S.58A CA98 (post October 2015) Infringement Decisions of (as upheld on final appeal) CMA Sectoral UK regulators and European Commission binding on CAT and UK Courts:
  - S.60 CA98 Interpretation consistent with EU law
  - Regulation 1/2003 Duty of sincere co-operation
  - Damages Directive due to be implemented by 27 December 2016
  - Jurisdiction of E&W Courts subject to Recast Brussels Regulation
  - Governing law subject to Rome II Regulation

# Post Brexit Assumptions

- Out means out: and not EEA/Switzerland model
- Great Repeal Bill- question as to what EU law will be transposed into UK law and what UK law will subsequently be amended/repealed to give effect to Brexit
- S.47A, S.58A and S.60- likely to be amended/partly repealed to remove binding nature of Commission decisions and to reflect PM's statement that UK will not be subject to the jurisdiction of the CJEU post Brexit
- CMA/Sectoral Regulators will no longer enforce Article 101/102 TFEU although UK companies remain subject to enforcement by Commission
- Recast Brussels Regulation/Rome II Regulation- new UK legislation to implement the provisions of these into UK law?
- Damages Directive to be implemented by amendment to existing UK legislation- likely to remain (as mostly based on English law/legal system)
  - Possibility some of it will be repealed/amended as going further than current English law e.g. carve outs on joint and several liability

# Follow on Claims post Brexit

- S.47A will still apply in relation to CMA/Sectoral Regulator infringement decisions
- Companies infringing CA98 still at risk of follow on actions in CAT/EWHC
- Assumption that there are no following on claims in relation to Commission infringement decisions made post March 2019 and that all claims involving Commission Decisions will be commenced in other member states to take advantage of single claim
- Potential for parallel proceedings and divergence with EU wide cartels litigated outside UK and UK cartels litigated in UK
- Transitional arrangements will be needed
- Any scope for claims based on Commission infringement findings?

# More standalone/hybrid claims

- Specialist judges, lawyers, experts and funders in the UK- unlikely that it is anyone's interests post Brexit that the experience and expertise is lost or that UK businesses should be forced to claim or defend themselves in other EU member states
- Standalone cause of action based on alleged infringement of Article 101/102 and/or such an infringement finding?
  - Application of “foreign” competition laws possible under Private International Law (Miscellaneous Provisions) Act 1995- as long as not foreign law relating to public policy
- Jurisdiction of UK Courts if cause of action based on alleged infringement of Article 101/102 and/or such an infringement finding?
  - Either Recast Brussels Regulation remains or if UK signs up to Lugano Convention and/or reverts to Brussels Convention or Hague Convention- can still sue UK anchor defendant and the other cartelists
- OR- carve out for current competition regime from PM's statement that UK will not be bound by CJEU post Brexit





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## Kate Vernon

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# Biography

Kate Vernon is a partner in Quinn Emanuel's London Office. She has vast experience in EU and UK competition law and was previously head of the UK Competition Team at DLA Piper.

Ms. Vernon has represented clients in both follow-on and standalone competition claims in the English High Court and the Competition Appeal Tribunal. She also has conducted appeals from and judicial reviews of decisions of competition and regulatory authorities in London and Luxembourg. She also has significant experience in advising and representing clients in competition investigations, both infringement and market and sector inquiries, and providing strategic and general competition counselling advice. Ms Vernon has particular expertise in the application of competition law to the sports, media, retail, pharmaceutical and IP sectors.

Ms. Vernon has been honoured by multiple legal publications including *Chambers & Partners* and *Legal 500*. In the 2015 edition of *Chambers*, the publication stated, "*The 'very impressive' Kate Vernon heads up the competition practice and has particular experience of contentious competition law*". Whilst *Legal 500 2015* described Ms. Vernon as, "*a 'strong pillar of the practice' at DLA Piper, where highlights include advising the Premier League on Ofcom's investigation into how the Premier League sells its broadcasting rights.*"

## REPRESENTATIVE CLIENTS

- Premier League
- British Horseracing Authority
- Merck KGaA
- Debenhams Plc
- Aga Rangemaster
- easyJet
- Cathay Pacific
- Automotive and Insurance Solutions Plc



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# Biography (continued)

## NOTABLE REPRESENTATIONS

- Acted for Debenhams Plc in the CMA's RPM investigation into sports bras which was closed with no grounds for action.
- Acted for Merck KGaA in the CMA's pay for delay patent settlement investigation.
- Acted for Automotive and Insurance Solutions Plc in the CMA's Private Motor Insurance market investigation.
- Acted for the Premier League on a wide range of litigation including copyright and competition law claims and defences in the High Court, Court of Appeal and the CJEU.
- Acted for the Premier League in Ofcom's Pay TV investigation and subsequent appeals to the CAT and Court of Appeal.
- Acted for the Premier League in Ofcom's CA98 investigation into the sale of its broadcasting rights.
- Acted for Cathay Pacific Airways Ltd on the European Commission's air cargo cartel investigation, subsequent appeal to the General Court and the related damages claim by Emerald against British Airways & Ors in the High Court.
- Acted for Shop Direct Group in the CMA's PPI market investigation and subsequent judicial review in the CAT.
- Acted for a number of UK construction companies in the OFT's bid rigging investigations in the construction industry and the subsequent appeals to the CAT.
- Acted for JJB Sports Plc and Littlewoods Ltd on the OFT's price fixing cartel investigations in relation to replica football kits and toys and games. Acting on the subsequent appeals to the CAT, Court of Appeal and leave for appeal applications to the Supreme Court.
- Acted for Oxley Threads in its appeal to the General Court against the European Commission's industrial thread cartel decision.
- Acted for a number of companies on competition law claims and defences in confidential arbitrations.

## EDUCATION

- University of Essex (LLB (2:1), 2000)
- Nottingham Law School (Legal Practice Course (Merit), 2001)
- Kings College (Diploma in EU Competition Law, 2004)

## PRIOR ASSOCIATIONS

- DLA Piper:
  - Head of EU & Competition London, 2013-2016
  - Partner, 2011-2016
  - Associate 2003-2011
  - Trainee Solicitor 2001-2003

## PROFESSIONAL ACTIVITIES

- Editorial Board Member, LexisNexis PSL Competition
- Co-Author of CLA's Response to BIS' consultation on private damages reforms in UK
- Co-Author of a chapter on injunctions and interim measures in Restrictive Covenants under Common and Competition Law 5<sup>th</sup> Edition Sweet & Maxwell
- Author of various articles and a chapter on UK leniency procedure in PLC competition manual
- Member of CLA, BIICL, LSEG, Competition Litigation Association, Brussels Bar

## ADMISSIONS

- Solicitor, England and Wales



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# Tim Ward QC

Monckton Chambers

# Transitional Arrangements

What is the legal basis for competition damages actions?

- Competition Act 2008, s 47A and UK case law.
- Articles 101/102 TFEU (via EC Act 1972) and EU and UK case law.
- Damages Directive, due to be implemented by 27 December 2016.
  - Sets out rules “coordinating the enforcement” of Arts 101 and 102 TFEU in private damages claims.

# How will the Directive be implemented?

Pre-Brexit BIS consultation of March 2016:

- Implementation through changes to existing legislation: CA98, CPR, CAT Rules.
- Proposed one set of procedures to apply to EU and UK claims.
- No proposed change to existing limitation periods.

# The Great Repeal Bill

- Repeal of the ECA 1972 - but presumably only on the day Brexit becomes effective.
- Arguably unnecessary even then: no obligations under EU law to give effect to.
- Would put an end to the direct application of EU law.
- But leaves unaffected any primary legislation such as the CA 1998.

# The Great EU Law Preservation Bill

- There are approx. 11,000 Regulations and 1,800 Directives.
- The GRB will preserve all enactments previously in force in the UK - at least for now.
- That presumably includes the implementation of the Damages Directive, even if achieved by amendment to subordinate legislation under the 1972 Act.



# The future?

- The Competition Act is domestic legislation, formally unaffected by repeal of the EC Act. But query:
  - Section 47A(2)(b) and (c) which allow damages claims for breach of Arts 101 and 102.
  - Section 58A: infringement decisions (inc Commission) are binding before the High Court and CAT.
  - Section 60 which requires consistent treatment with EU law.
- Any amendments introduced to give effect to the Damages Directive can be repealed following Brexit.

# What transitional arrangements will be needed?

- Eg:
  - A UK business has suffered harm in 2014 as a result of a cartel an EU wide cartel.
  - Can it still bring a claim after we leave the EU based on TFEU?
  - Can it bring a follow on claim from a relevant Commission decision?
  - If it has already brought a claim based on EU law, will it be extinguished by Brexit?

# Interpretation Act 1978, s16(1)(c)

Unless the contrary intention appears, a repeal does not affect any right, privilege, obligation or liability accrued or incurred under the enactment repealed.

Such a right can be “inchoate or contingent”, but it is not enough if there is to be “an investigation to decide whether some right should or should not be given”: *Free Lanka Insurance v Ranasinghe* [196] AC 541.

# Transitional provisions following Brexit?

- The Competition Act will allow follow on actions, unless/until amended.
- The GRB will preserve the effect of the Damages Directive, at least initially.
- Transitional provisions could eliminate any doubt, but could also cut down the protection afforded by the Interpretation Act.
- A more general transitional regime following Brexit?

# An alternative approach

Sue in foreign law in the case of a claim which goes beyond the UK:

- Choice of law for non-contractual claims currently governed by the Rome II Regulation.
- Would revert to the Private Int Law (Misc Prov) Act 1995.
- Law governed by the place where the significant elements of the tort occurred; ie place where goods purchased.



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# Emeritus Professor Richard Whish QC (Hon)

Kings College, London



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# Competition Section calendar

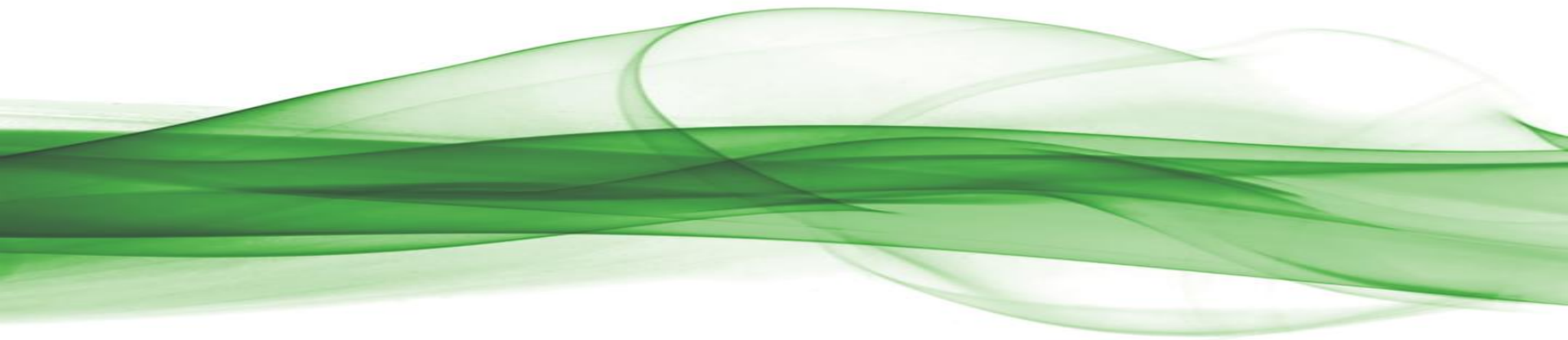
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# How to get tonight's slides

1. Open email from 'events@lawsociety.org.uk' - subject line 'Competition Section survey.....'
2. Click on the survey link
3. Provide your feedback on the event
4. At the end of the survey follow the link to download the seminars slides.



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