

# SUMMARIES

## **Predicting the past: Constructing the counterfactual in antitrust damages claims**

*Dame Vivien Rose DBE*

This article considers some of the issues that arise when the court must construct a counterfactual as a means of determining causation and quantum in follow-on damages claims. The article illustrates the issues by focusing on three damages claims based on abuse of dominant position infringements and, by analogy, a claim in the High Court for *Francovich* damages. The issues considered include how the court should strip out the illegal conduct when assessing what would have happened in the ‘but for’ world and how the conduct of third parties whose willingness or unwillingness to contract with the claimant may affect the calculation of loss. Finally, the article considers alternatives to counterfactuals such as presumptions of cartel overcharges.

## **Fine tailoring or a simple change of wardrobe: Assessing the CMA’s future against some notable peers**

*Ravi S Mehta*

This article seeks to answer the key question facing the CMA as the new overarching competition regulator in the UK: will it be an effective regulator and have lessons been learned from the UK’s regulatory experience? It briefly examines regulatory experiences in Germany and France, debates about the efficacy of their regulators and comparisons with the UK’s own institutions. It concludes that the proposed changes in the UK are positive, although the proof will be in the pudding – will the CMA use the considerable powers and resources put at its disposal effectively?

## **Concurrency past, present, and future: Too many cooks?**

*Colm O’Grady and Liam Maclean*

The purpose of the article is to assess the operation of concurrency in the UK thus far, examine the recent reforms made to the regime, and consider the future operation of concurrency. In particular, the article aims to critically assess the use (or lack thereof) of concurrent competition powers by various sectoral regulators, before going on to describe the

reforms made to the concurrency regime by the Enterprise and Regulatory Reform Act. It goes on to argue that these reforms have the potential to have a significant impact on the landscape of UK competition enforcement.

## **Jurisdictional issues in UK cartel damages claims**

*Paul Stuart*

To found an action for damages in the UK based on a cartel infringement that spans a number of EU Member States, a claimant must identify an appropriate jurisdictional basis for proceeding in the courts of England and Wales. This article explores the principal strategies that claimants have adopted to secure the English courts' jurisdiction and concludes that the rules have been given an unduly expansive interpretation, especially where claimants have instigated proceedings against UK-domiciled companies merely as a tactic to secure jurisdiction in England over non-domiciled defendants that ought otherwise to be sued elsewhere.

## **The application of the jurisprudence of the ECJ in intellectual property cases to issues of jurisdiction in antitrust litigation**

*David Ashton*

Competition-based litigation will often feature a single infringement whose effects cut across national boundaries. The international nature of the underlying infringement is at odds with the national remedial and procedural rules governing the adjudication of disputes arising out of such infringements. Intellectual property litigation shares this basic pattern. This article looks at the specific issue of how recent jurisprudence of the ECJ in intellectual property litigation on consolidation of claims can be applied to competition-based litigation. This provides guidance as to how such issues might be decided in competition-based claims in future.

## **Fast track injunctions in private competition disputes**

*David George*

The UK government wishes to strengthen private enforcement of competition law in the UK. Reforms are underfoot to transform the Competition Appeal Tribunal (CAT) into a 'major venue' for competition claims. The CAT will be empowered to hear stand-alone actions and to grant injunctions. Significantly, the CAT will also develop a new 'fast track' primarily for use by smaller companies seeking injunctive relief. This article analyses the fast track proposals,

drawing lessons from topical competition disputes and recent reforms in IP litigation. The fast track may deliver a step-change in the private enforcement of competition law in the UK.

## **The structure and funding of competition claims post-Jackson – ‘all change’ or ‘status quo’?**

*Tom Bolster*

The overhaul of the rules on civil litigation introduced last year following Jackson LJ’s Review of Civil Litigation Costs, has drastically changed the landscape in which competition damages claims are run. The reforms to the costs regime are some of the most significant yet least well understood of the lot. The changes to conditional fee arrangements (CFAs) and ‘after the event’ (ATE) insurance in particular will close the door on many types of previously viable claims. This article seeks to critically assess those reforms and the introduction of damages based agreements (DBAs) and consider to what extent they will help realise Jackson LJ’s twin objectives of managing costs and increasing access to justice.

## **Mainstream merger control in the NHS: Help or hindrance?**

*Fod Barnes*

Mergers between National Health Service (NHS) Foundation Trusts have recently been brought fully into the competition assessment process that applies to the mainstream economy. Lying behind this move in the UK is a, largely implicit, assumption that the economic dynamics in the UK health sector are sufficiently close to the rest of the economy that the same (or at least very similar) merger control will deliver patient benefits in the same way that merger control delivers customer benefits in the rest of the economy. But the outcomes from the first major cases have been contentious. This could be because actually putting the new process into practice has exposed significant differences between the dynamics of service provision in the NHS and how the rest of the economy behaves, or it may only be highlighting that health service stakeholders and competition authorities have yet to find how to communicate in a common language and once they do, clear benefits to patients will follow.