

## Articles

IAN FORRESTER QC

### **“A Valediction, Forbidding Mourning” 343**

As the UK embarks on the uncertain adventure of Brexit, Judge Forrester reflects on Europe’s bloody history, its recent embracing of reconciliation, peace and prosperity, and argues that European law contributed motion in a time of stasis and that notwithstanding Brexit its beneficiaries will be reluctant to renounce that which free movement has achieved. He offers a few suggestions for the court’s working and notes a number of profound questions which cannot not be addressed by political leaders.

DR GORDON BLANKE

### **Some reflections on UK-seated competition arbitration after Brexit (Part 1) 347**

This two-part article takes a look at UK-seated competition arbitration after Brexit. This Part (1) deals in some detail with (i) the *acquis* of the arbitrability of domestic and EU competition law, including the proper construction and scope of an arbitration clause under English law, the doctrine of separability, the arbitrability of cartel agreements, follow-on damages actions, and the role of EU commitment arbitrations; and (ii) the arbitrator’s *ex officio* duty to raise competition law issues, including questions of liability (of both the arbitral tribunal and arbitration counsel).

ALEXANDRA MALINA & DEBA DAS

### **UK and EU competition regimes: where will we see divergence post-Brexit? 357**

This article explores the potential for post-Brexit divergence between the UK and EU competition regimes in light of the new s.60A of the Competition Act. It is suggested that current efforts to address perceived competition law concerns in digital markets—looking specifically at digital platforms, algorithms and vertical restraints in online distribution—may lead to a post-Brexit digital divide.

BEN HOLLES DE PEYER & MARIJA MOMIC

### **State aid law post-Brexit: subsidy control under the EU-UK Trade and Cooperation Agreement 365**

This article examines whether the subsidy control provisions of the EU–UK Trade and Cooperation Agreement (TCA) are capable of ensuring a level playing field between EU and UK-based companies. The authors contend that the TCA subsidy control system is a step in the right direction towards achieving this objective. However, it is the authors’ view that the extent to which the TCA will be able to ensure a level playing field going forward will ultimately depend on two factors: how the provisions of the TCA and the UK–EU Withdrawal Agreement are interpreted, as well as the specific policy choices that the UK makes in designing its future subsidy control system.

ALEX NOURRY, CHANDRALEKHA GHOSH & JORDAN BERNSTEIN

### **Merger control in a post-Brexit world: is the CMA up to the task? 371**

The UK’s Competition and Markets Authority (CMA) has been preparing itself for an increased merger control caseload in the wake of Brexit. In discussing the CMA’s recent practice and guidance on jurisdiction, procedure, substantive assessment and remedies, the authors highlight key points of change in approach, particularly with regards to multi-jurisdictional mergers and digital markets. The article considers the sustainability of the CMA’s approach and its potential impact on mergers.

DR VINCENT J.G. POWER SC

### **Competition and State aid law on the island of Ireland post-Brexit 383**

The UK and Ireland are the two States most affected by Brexit. It is therefore not surprising that the island of Ireland—shared in the north by the UK and in the south by Ireland—should be the cross-border region most affected by Brexit. This article examines the competition and State aid/subsidy regimes on the island post-Brexit.

This article explores the implications of Brexit for the Competition and Markets Authority (CMA). It argues that the most pressing issue is not the future design or evolution of UK competition policy, but the particular challenges faced by the CMA in scaling up their enforcement activities to replicate the work previously undertaken by the European Commission on the UK's behalf. The possibility of the CMA also being responsible for the UK's new subsidy control regime further heightens these pressures and risks a post-Brexit weakening of competition enforcement in the UK.

**Code** 400

What can antitrust practitioners learn from software developers? As the CMA gets to work on codes of conduct for digital platforms, it faces many of the same challenges that developers confront when writing computer code. This article examines 10 principles of software coding. It asks how those principles apply to coding legal rules for digital platforms. And it considers whether those principles are reflected in the proposals of the CMA's Digital Markets Taskforce.

**Wightman: a Marbury v Madison moment?** 407

*Wightman* is arguably one of the most significant CJEU judgments of the past decade. This article analyses the substance of that ruling, as well as its procedural and political context. In comparing the judgment to the seminal US Supreme Court decision in *Marbury v Madison*, it looks at the ruling in perspective and examines what it says about the EU legal order.

**Opinion**

**Brexit and Ireland: time for an all-island approach to competition enforcement?** 415

Brexit has heralded many changes but the immediate impact has been no more keenly felt than in Northern Ireland. This article considers the current crisis which the Protocol has created there and the growing need for co-ordination between the three authorities—the CMA, CCPC and European Commission—that now share responsibility for protecting and promoting competition on the Island of Ireland.

**The enduring currents of EU competition law: some personal reflections** 418

This comment explores the enduring legacy of EU competition law and practice on UK domestic competition law post-Brexit. It examines the extent to which that legacy may change and diminish over time and posits that despite its diminishing status, EU competition law will continue to leave an indelible mark on UK competition law for a long time into the future.

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