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David Bailey, Laura Elizabeth John

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Edited By: David Bailey, Laura Elizabeth John

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3. EU Competition Law: Institutions

(a) The EU institutions

The institutions of the EU.

1.026 Article 13(1) TEU states that the Union's institutions shall be: (a) the European Parliament; (b) the European Council; (c) the Council; (d) the European Commission; (e) the Court of Justice of the European Union; (f) the European Central Bank and (g) the Court of Auditors.⁷⁶ The activities of the Union are financed from the Union budget, which, in turn, is financed by a variety of sources including a percentage of the VAT collected by Member States. Fines paid for infringements of the competition rules also contribute to the Union budget.

The official languages of the EU.

1.027 When the European Economic Community (as it was then known) came into being in 1958, there were four official languages and 15 (p. 13) staff interpreters employed. As at 2 October 2017, there were 24 official languages⁷⁷ and the EU institutions employ around 800 permanent interpreters and 4,300 freelance interpreters.⁷⁸ A meeting conducted in 24 official languages requires 72 interpreters to achieve 'total symmetry', that is translation into and out of each language. The translation of written material is carried out by a permanent staff of some 1,800 linguists based in Brussels and Luxembourg.⁷⁹ Provisions of EU law are not binding on the citizens of a Member State until they have been published in that State's official language in the Official Journal, even if versions in that language were available earlier on the internet.⁸⁰

The European Parliament.

1.028 The Members of the European Parliament ('MEPs') are directly elected in elections held throughout the Union every five years.⁸¹ There are currently 751 MEPs,⁸² who sit in party political groups and not as national delegations. Seats in the European Parliament are meant to be allocated between the Member States in accordance with the principle of 'degressive proportionality', by which is meant MEPs from larger Member States should represent more citizens than those from smaller ones.⁸³ Each Member State must have at least six and no more than 96 MEPs. The Parliament sits in three cities: its official seat is in Strasbourg; the Secretariat of the Parliament is located in Luxembourg and its committee meetings take place in Brussels. The importance of the European Parliament has been considerably enhanced by successive amendments to the Treaties. In particular, through the so-called 'co-decision' procedure, the Parliament has a substantive role alongside the Council of Ministers in adoption of legislation in certain areas. The relevant provisions of the TFEU are complex and beyond the scope of this work, but the areas of co-decision include the internal market and consumer affairs.⁸⁴ The European Parliament is also empowered to appoint an Ombudsman, who is able to investigate suspected maladministration in the activities of the EU institutions.⁸⁵ The nomination for appointment as the President of the Commission and of the Commissioners as a body must be approved by vote of the Parliament⁸⁶ and the Commissioners as a body must resign if the Parliament passes a vote of censure by a two-thirds majority.⁸⁷ The Council and (p. 14) the Commission have a duty to give oral or written answers to questions put by MEPs.⁸⁸ Parliamentary Committees (principally the Committee on Economic and Monetary Affairs and the Committee on Legal Affairs) examine draft European legislative acts proposals, as do national Parliaments.⁸⁹ National Parliaments have a role for reviewing the compatibility of draft legislative acts with the principles of subsidiarity and proportionality, as laid down in Article 5 TEU.⁹⁰

The European Council.

1.029 The European Council comprises the Heads of State or Government of the Member States, its President and the President of the Commission. Article 15(1) TEU states that the European Council shall define ‘the general political directions and priorities’ of the Union. The European Council meetings (sometimes referred to as ‘Summits’), take place twice every six months, convened and chaired by its President. On 27 June 2014, the European Council agreed on five priority areas to guide the EU’s work from 2014 to 2019: (i) to foster a Union of jobs, growth and competitiveness; (ii) to promote a Union that empowers and protects all citizens; (iii) to move towards an EU with a forward-looking climate policy; (iv) to create a Union of freedom, security and justice; and (v) to establish the EU as a strong global actor.⁹¹ The permanent office of the President of the European Council was created by the Treaty of Lisbon. The President is required to ‘drive forward’ the work of the European Council, which generally takes decisions by consensus. The President is also responsible for the external representation of the Union on issues concerning its common foreign and security policy.⁹² The European Council, acting by a qualified majority, with the agreement of the President of the Commission, appoints the High Representative of the Union for Foreign Affairs and Security Policy.⁹³ The High Representative is responsible for conducting the Union’s common foreign and security policy.⁹⁴

The Council of the EU.

1.030 The Council of the European Union (‘the Council’), more commonly known as the Council of Ministers, consists of one representative of each Member State at ministerial level.⁹⁵ The Presidency of the Council can carry considerable political influence, in particular since the President sets the agenda of Council meetings. The (p. 15) Presidency rotates every six months among the Member States in alphabetical order.⁹⁶ The Council is variously ‘configured’ depending on the subjects under discussion and may at any one time consist of, for example, foreign, agricultural or finance ministers.

Functions of the Council.

1.031 The Council is part of the legislature of the EU. It negotiates laws, coordinates EU policies and seeks to develop the EU’s Common Foreign and Security Policy, as laid down in the Treaties. The Council has a duty to exercise, jointly with the European Parliament, legislative and budgetary functions.⁹⁷ The Council typically acts on a proposal from the European Commission and in association with the European Parliament, either through the consultation procedure (as in the areas of agriculture, judicial and police cooperation, and taxation) or through co-decision (as in relation to the internal market). The Council acts either unanimously or by a qualified majority, depending on the Treaty provision in question.⁹⁸ Under Article 103 TFEU,⁹⁹ the Council is charged with the duty to adopt appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 TFEU; the Council must act by a qualified majority on a proposal from the Commission, and after consulting the European Parliament.

Procedure for adopting EU legislation.

1.032 The Commission, the Council and the European Parliament play an important role in the formulation, negotiation and enactment of secondary legislation giving effect to Articles 101 and 102 TFEU. The process required for adopting a given piece of legislation will depend on the nature of what is being proposed and the field of EU law. It can, however, be usefully illustrated by considering the steps that culminated in the adoption of Council Regulation 1/2003.¹⁰⁰ The process began informally with the publication by the Commission, on 28 April 1999 of a White Paper on modernisation of the rules implementing Articles 101 and 102.¹⁰¹ The Commission’s proposals in that White Paper included the abolition of the system of notification of agreements for exemption and an enhanced role for national competition authorities and courts in the enforcement of EU competition law. The Commission received responses from companies, trade associations, law firms, academics, and from the institutions of the EU and of the Member States. The Commission sought the views of the European Parliament¹⁰² and the European Economic and Social Committee,¹⁰³

which published opinions supporting the Commission's proposals. The Commission then prepared a Proposal for a Council Regulation to replace Regulation 17, published in September 2000.¹⁰⁴ The legal base for the proposed regulation was Article 83 EC (now Article 103 TFEU). This provides that (p. 16) regulations shall be laid down by the Council on a proposal from the Commission and after consulting the Parliament.¹⁰⁵ The Council then referred the matter to the European Parliament and the European Parliament in turn sought reports from three standing committees of the Parliament. The Parliament debated the reports of those committees and adopted a text setting out various proposed amendments to the Commission's draft.¹⁰⁶ The European Economic and Social Committee also published a further report on the draft regulation.¹⁰⁷ The Council debated the proposals on a number of occasions.¹⁰⁸ Finally, on 16 December 2002 the Council of Ministers adopted Regulation 1/2003. The Regulation entered into force on 1 May 2004.

The European Commission.

1.033 The Commission is the executive of the EU. The Commission consists of a College of 28 Commissioners (one Commissioner per Member State).¹⁰⁹ The Commission is led by its President, who is proposed by the European Council and elected by the European Parliament. The remaining Commissioners are chosen by the Council, by common accord with the President of the Commission, and then the Commission, as a body, is subject to a 'vote of consent' by the European Parliament.¹¹⁰ The Commission, as a body, is responsible to the European Parliament.¹¹¹ In carrying out its responsibilities, the Commission shall be completely independent and the members of the Commission shall neither seek nor take instructions from any Government.¹¹²

The functions of the Commission.

1.034 The Commission is responsible for promoting the general interest of the Union and taking appropriate initiatives to that end.¹¹³ The Commission's legislative functions include making proposals for measures to be enacted by the Council and by the European Parliament and exercising the powers conferred on it by the Council to implement Council regulations.¹¹⁴ It must be consulted on the admission of new Member States to the EU.¹¹⁵ Article 17(1) TEU provides that the Commission is charged with ensuring the application of the TEU and TFEU and of measures adopted by the Union institutions pursuant to them. That duty applies in the field of competition as in other fields, as is made clear by Article 105 TFEU.¹¹⁶ The Commission oversees the application of Union law, in particular by taking its own decisions under Articles 101, (p. 17) 102 and 106 TFEU, subject to review by the Court of Justice of the European Union. The taking of decisions by the Commission is governed by its own Rules of Procedure.¹¹⁷ The Commission acts 'as a college' when taking decisions. The Commission generally acts by a majority of its members.¹¹⁸ All members of the Commission bear collective responsibility at the political level for all decisions and actions taken. That principle of collegiality must be reconciled with the Commission's duty to ensure that its work is carried out in a timely manner. Given the large number of decisions that the Commission must consider, the power to adopt binding administrative acts in the name of the Commission may be delegated to a Commissioner.¹¹⁹ The Commission is of central importance to the enforcement of EU competition law and the Directorate-General of Competition, its services responsible for competition policy, is discussed further below.

The services of the Commission.

1.035 The Commission is supported by a permanent staff of approximately 32,500.¹²⁰ The Commission has a Secretariat-General consisting of 33 departments (known as 'Directorates-General') and 11 special departments (services). The Legal Service advises the Commission, checks on the legality of its decisions and represents the Commission before the Court of Justice of the European Union. The work of the Commission is carried out by Directorates-General and specialised services, for each of which a Commissioner has

responsibility. At the time of writing, the Commissioner responsible for Competition is Margrethe Vestager.

(b) Directorate-General for Competition

(i) Generally

Directorate-General for Competition ('DG Competition').

1.036 The 'mission' of DG Competition is to 'enable the Commission to make markets deliver more benefits to consumers, businesses and the society as a whole, by protecting competition on the market and fostering a competition culture'.¹²¹ DG Competition's work includes enforcement of Articles 101 and 102 TFEU; control of State aids; applying the Merger Regulation; the formulation of EU competition policy, and international cooperation. In 2015, DG Competition estimated the customer benefits resulting from cartel decisions was between €0.99 and €1.49 billion; the customer benefits resulting from horizontal merger control in the same year were in the range of €2 and €5.1 billion.¹²² Such indicators of enforcement activity do not take into account the non-price and deterrence effects of anti-cartel enforcement and merger control. In 2016, DG Competition published 'EU competition policy in (p. 18) action: COMP in Action', outlining its enforcement activities, advocacy efforts and policy initiatives in the previous year.¹²³

(ii) Structure

DG Competition.

1.037 DG Competition is headed by a Director-General and three Deputy Directors-General (for antitrust, mergers and State aids). DG Competition's day-to-day operational activities are carried out by nine directorates, each headed by a Director:

- Directorate R: Horizontal Management (including Registry, Finance and IT)
- Directorate A: Policy and strategy (including Antitrust case support and policy, the European Competition Network, Private Enforcement and International Relations)
- Directorate B: Market and cases I: Energy and Environment
- Directorate C: Market and cases II: Information, Communication and Media
- Directorate D: Market and cases III: Financial Services (including the Financial Crisis Task Force)
- Directorate E: Markets and cases IV: Basic Industries, Manufacturing and Agriculture (including pharmaceuticals and health services)
- Directorate F: Markets and cases V: Transport, Post and other services
- Directorate G: Cartels ¹²⁴
- Directorate H: State aid Policy and Case Support: including Infrastructure and Regional aid, Access to finance, R&D&I and Environment, Fiscal aid, Enforcement and Monitoring and Tax Planning Practices

Directorate A is the unit that deals with competition policy and strategy generally. Sectoral directorates B to F are responsible for the handling of antitrust, State aid and merger cases. Their sector-specific organisation is intended to apply sectoral knowledge of markets across instruments and to ensure effective use of DG Competition's resources. Directorate H is dedicated to non-sector specific State aid enforcement.¹²⁵

The Chief Competition Economist.

1.038 The Chief Competition Economist reports directly to the Director-General of DG Competition.¹²⁶ The role of the Chief Economist is to provide guidance on methodological issues of economics and econometrics in the application of EU competition rules and assist in the development of general policy instruments with an economic context. The opinions of the Chief Economist are not made public because they form part of DG Competition's internal deliberations. The Chief Economist is supported by a team of 20 specialised economists. The team provides general guidance in individual competition cases from their early stages and on occasion more detailed guidance in the most important competition cases involving complex economic issues. In more complex cases, a member of the Chief Economist team may be seconded to work on the DG Competition case team although the Chief Economist team member retains his or her independent status and reports directly to the Chief Competition Economist. The Chief Competition Economist is also responsible for maintaining contact with the academic world and organises and chairs meetings of the Economic Advisory Group for Competition Policy.

(p. 19) The Economic Advisory Group for Competition Policy ('EAGCP').

1.039 The EAGCP is a group of leading academics from different fields of research and academic centres in Europe all of whom specialise in industrial organisation. The Group is a forum for the discussion of competition policy matters, its main purpose being to support DG Competition by improving the quality of economic reasoning in competition policy. Within the framework of the EAGCP, three sub-groups have been set up to work on issues related to antitrust, mergers and State aid. On request by the Commissioner for Competition or the Director-General of DG Competition, members may also be asked on an *ad hoc* basis to provide economic advice on issues of relevance.¹²⁷

Consumer Liaison Officer.

1.040 The Consumer Liaison Officer was created in December 2003¹²⁸ to enable a dialogue with European consumers who are intended to be the beneficiaries of the Union's competition policy. The Officer provides a focus for contact between DG Competition and other Directorates-General within the Commission, for example that for Health and Consumer Protection. The Consumer Liaison Officer acts as primary contact point for consumer organisations and for individual consumers, and alerts consumer groups to competition cases when their input might be useful, advising them on the way they can provide input and express their views. The Officer also maintains contacts with NCAs regarding consumer protection matters.

The Hearing Officers.

1.041 The Commission created the function of Hearing Officer in 1982 to provide a 'check and balance' in the Commission's decision-making process and to ensure that the rights of the defence are protected.¹²⁹ The two Hearing Officers are members of the Commission's staff who report directly to the Commissioner for Competition. The role of the Hearing Officer was strengthened by the adoption of new mandates in 2001¹³⁰ and again in 2011.¹³¹ The general mission of the Hearing Officer is to 'safeguard the effective exercise of procedural rights throughout competition proceedings before the Commission',¹³² including the conduct of the oral hearing. The Hearing Officer has no function in State aid proceedings.

(iii) Enforcement through investigation and decision

Regulation 17.

1.042 Regulation 17¹³³ was the first Council regulation implementing the EU competition rules and came into force in the then Member States on 13 March 1962. Article 1 of that Regulation provided that the prohibitions of what are now Articles 101(1) and 102 take effect without any prior decision being required. However, the application of Article 101(3) was reserved exclusively for the Commission.¹³⁴ Individual (p. 20) decisions of the Commission applying Article 101(3) under that regime were commonly referred to as

'individual exemptions', although these words do not appear in the Treaty itself. Regulation 17 established a centralised procedure whereby parties could notify an agreement to the Commission with a request for a declaration that it did not fall within the scope of Article 101 (known as a 'negative clearance') or for an 'individual exemption' under Article 101(3). Regulation 17 also dealt with the making of complaints by aggrieved parties; and with the Commission's powers of enforcement, which include powers to require information, to order the termination of infringements, and to impose fines. The notification procedure gave rise to substantial delays in determining the legality of agreements and led to the creation of the 'comfort letter', an informal indication from the Commission to the parties of its views on the agreement. The legal status of these letters was somewhat unclear,¹³⁵ and the inability of national courts, before which Article 101 disputes were increasingly litigated, to apply Article 101(3) further stultified the extent of private enforcement at the time.¹³⁶

Regulation 1/2003.

1.043 Regulation 1/2003¹³⁷ entered into force on 1 May 2004 and modernised the procedures for the enforcement of the competition rules. It abolished the centralised system of notification under Regulation 17 and created a decentralised system based on the direct application of Articles 101 and 102 TFEU. The Commission, national competition authorities ('NCAs') and national courts have the power to apply Articles 101 and 102 in full. The term 'individual exemption' is therefore no longer apposite for the application of Article 101(3) under Regulation 1/2003. Undertakings are expected to carry out a self-assessment to ensure that their conduct complies with the Treaty requirements. In April 2009 the Commission published a Communication entitled 'Report on the functioning of Regulation 1/2003', which concluded that 'the change from a system of notification and administrative authorisation to one of direct application has been remarkably smooth in practice'.¹³⁸ The Regulation also deals with, among other matters, the burden of proof,¹³⁹ the relationship between national competition law and Articles 101 and 102 TFEU,¹⁴⁰ cooperation between the Commission and national competition authorities and the Commission's powers and procedures. In July 2014 the Commission reported that the 'EU competition rules have to a large extent become the "law of the land" through-out the EU.' The Commission also found a substantial level of convergence in the application of the competition rules by the Commission and the Member States had been achieved under Regulation 1/2003.¹⁴¹ It also noted, however, that some differences in the institutional position of NCAs, national procedures and sanctions subsist. To reduce those differences, (p. 21) in March 2017 the Commission proposed the ECN+ Directive to empower the NCAs to be more effective enforcers by in particular equipping them with effective powers of investigation and enforcement.¹⁴² In February 2018 the European Parliament Committee on Economic and Monetary Affairs endorsed the proposed ECN+ Directive.

Enforcement by the Commission.

1.044 Chapter III of Regulation 1/2003 empowers the Commission to adopt decisions concerning the finding and termination of an infringement of Articles 101 and 102, interim measures, commitments and a finding that Articles 101 and 102 are not applicable to certain conduct.¹⁴³ The Commission has adopted numerous infringement decisions under Article 7 of the Regulation: 48 per cent of infringement decisions of the Commission were in cartel cases between May 2004 and December 2013.¹⁴⁴ The Commission has also made extensive use of the power conferred by Article 9 of the Regulation to adopt decisions making 'commitments', proposed by the parties and considered appropriate by the Commission, legally-binding to address the Commission's competition concerns under Articles 101 and 102 TFEU.¹⁴⁵ As at 2 October 2017 the Commission has not exercised its power to make a finding of inapplicability under Article 10 of the Regulation.¹⁴⁶ Chapter V of the Regulation sets out the Commission's wide-ranging powers of enforcement.¹⁴⁷ These include powers to require information, to carry out unannounced inspections in business

premises and, subject to obtaining a court order, non-business premises, and to impose penalties and periodic penalty payments. All these aspects of Regulation 1/2003, except for fines, are discussed in more detail in Chapter 13, below; fines are discussed in Chapter 14, below.

Sector inquiries.

1.045 Under Article 17 of Regulation 1/2003, the Commission may initiate general inquiries into those sectors of the economy where it believes competition might be restricted or distorted. The aim of this provision is to enable the Commission to learn about business models, strategies and practices in a sector or part of the economy, and identify possible infringements of the competition rules.¹⁴⁸ Following the sectoral inquiries into energy,¹⁴⁹ pharmaceuticals,¹⁵⁰ and e-commerce¹⁵¹ the Commission opened a number of investigations in those sectors.¹⁵² Some of these investigations culminated in the adoption (p. 22) of decisions accepting commitments, including structural remedies in some cases, under Article 9 of Regulation 1/2003.¹⁵³

(iv) Legislative powers

The Commission's legislative powers.

1.046 The Commission is empowered to adopt legislation by a number of Council Regulations. Council Regulations 19/65 (as amended by 1215/1999), 2821/71 and 1534/91 empower the Commission to exempt en bloc under Article 101(3) certain categories of agreements, such as agreements relating to industrial property rights, 'vertical' agreements between undertakings at different levels of the distribution chain, certain categories of standardisation, research and development and specialisation agreements. The Commission has over time adopted a series of block exemption regulations covering various sectors and kinds of agreement. These regulations are discussed in Chapter 3, below.¹⁵⁴

(v) Notices and guidelines

Purpose of Commission notices and guidelines.

1.047 The Commission has published notices and guidelines on a wide range of matters relating to the application of the EU competition rules.¹⁵⁵ Notices and guidelines perform one (or more) of three functions. The first is to provide non-binding guidance to undertakings, NCAs, and national courts on how the Commission intends to apply Articles 101 and 102 in individual cases. To this end, the Commission often sets out an analytical framework for the application of the competition rules.¹⁵⁶ The Commission may also explain its policy on issues that have not been dealt with in the case law, or that are subject to interpretation.¹⁵⁷ The second function of notices and guidelines is to use the Commission's experience to establish 'safe harbours' and limit the exercise of its prosecutorial discretion. For example, the Commission's *De Minimis* Notice provides that it will not institute proceedings in respect of agreements that it does not consider are likely to have the appreciable effect of preventing, restricting or distorting competition.¹⁵⁸ Safe harbours are intended to confine detailed analysis to cases that are likely to present serious competition concerns.¹⁵⁹ The third function of Notices and guidelines is to provide practical guidance on administrative processes; the Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU is an example of this function.¹⁶⁰

Procedure for adopting Commission notices and guidelines.

1.048 When the Commission proposes to promulgate new guidelines or revise an existing notice, it normally invites (p. 23) comments from interested persons. DG Competition may prepare an initial draft version of a notice and guideline which is circulated for discussion with the members of the ECN and the Advisory Committee for Restrictive Agreements and Dominant Position.¹⁶¹ Thereafter there is usually a formal consultation following publication of drafts on the DG Competition website. For example, the Commission published draft revised guidelines on vertical restraints, together with a draft block exemption regulation,

on its website on 28 July 2009, and asked for comments to be lodged within two months.¹⁶² Non-confidential versions of the comments submitted to the Commission were published on DG Competition's website. The Commission subsequently adopted block exemption Regulation 330/2010 on 20 April 2010. The Vertical Restraints Guidelines were finalised on 10 May 2010 and were published in the Official Journal on 19 May 2010.¹⁶³ Public consultations on draft notices and guidelines provide a valuable opportunity for practitioners to comment on the functioning of existing guidance in light of practical experience or to influence the content and scope of future guidance.

Legal status of Commission notices and guidelines.

1.049 Notices and guidelines set out the Commission's view on the interpretation and application of the competition rules. They are not binding on the NCAs or the national courts.¹⁶⁴ For example, the Court of Justice has held that the Commission's leniency programme is not binding on the Member States.¹⁶⁵ Commission Notices are also not binding on the EU Courts; indeed the Commission acknowledges in its Notices that the guidance is without prejudice to the case law of the Court of Justice and the General Court. So far as the Commission itself is concerned, the Commission may not depart from rules which it has imposed on itself.¹⁶⁶ To the extent that a Notice prescribes the method by which the Commission will analyse an issue, the Commission must generally adhere to the provisions of the notice. This is particularly true of the Commission's guidelines on the method of setting fines imposed for infringements of Articles 101 and 102. The Court of Justice has held that:

'In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be excluded that, on certain (p. 24) conditions and depending on their conduct, such rules of conduct, which are of general application, may produce legal effects.'¹⁶⁷

Where, however, the Commission expresses itself in a notice in terms which allow it to choose a range of approaches, it retains 'great freedom of action' to choose the most appropriate approach in the circumstances of a given case.¹⁶⁸ In such cases the Commission enjoys a discretion enabling it to take account, or not to take account, of factors mentioned in its guidelines. The discretion enjoyed by the Commission and any limits that it has imposed in that regard do not in any event prejudice the exercise by the EU Courts of their jurisdiction.¹⁶⁹

Guidance on the Commission's enforcement priorities under Article 102.

1.050 In some areas the Commission has published guidance on how it intends to decide which cases will be a priority for the exercise of its powers of investigation and enforcement. An example is the Commission's Guidance on its enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings.¹⁷⁰ This document explains that it is not a statement of the law but is 'intended to provide greater clarity and predictability as regards the general framework of analysis' used by the Commission to justify its intervention under Article 102. A further example of guidance on the Commission's enforcement activities is the *De Minimis* Notice.¹⁷¹ The Commission will not institute proceedings either upon application or on its own initiative in relation to agreements covered by the *De Minimis* Notice.¹⁷² Where undertakings assume in good faith

that an agreement is covered by the *De Minimis* Notice, the Commission will not impose fines if it does nonetheless find an infringement.

Notice on guidance letters.

1.051 The Commission has published a Notice explaining when it will provide parties with informal guidance relating to a novel question concerning Articles 101 and 102, on which neither the Commission nor the EU Courts have taken a position.¹⁷³ Guidance letters are reserved for individual cases which involve novel or unresolved questions that give rise to genuine uncertainty. The Commission will only provide informal guidance to undertakings insofar as this is compatible with its enforcement priorities. The conditions for obtaining a guidance letter are described in Chapter 13, below.

Other pronouncements by the Commission.

1.052 Guidance as to the Commission's views on matters of competition law, practice or policy can be obtained from a number of other official and semi-official pronouncements. Most important are the Commission's Reports on Competition Policy, published annually in conjunction with its General Report on the (p. 25) Activities of the Union.¹⁷⁴ The Reports on Competition Policy review the Commission's activity in this field during the year and provide helpful indications as to the Commission's approach to policy issues. The Commissioner's written answers to questions put to it by Members of the European Parliament and speeches given by the Commissioner also give a valuable insight into the Commission's current and proposed thinking on casework and policy matters.

(vi) DG Competition documents and website

DG Competition documents.

1.053 DG Competition often publishes staff working papers or its own discussion papers on various matters, such as staff reflections on issues of competition law and policy or best practices on the conduct of competition cases. DG Competition publishes the *Competition Policy Brief* four or five times a year; it also regularly publishes a *Competition Merger Brief* and a *Competition State Aid Brief*. These Briefs contain short articles by its officials discussing significant antitrust, merger and State aid cases.¹⁷⁵

DG Competition's website.

1.054 DG Competition's website is http://ec.europa.eu/competition/index_en.html and provides a rich and extremely useful source of information enabling the practitioner to keep up-to-date with developments in the competition law field. The website provides information about the Commissioner for competition policy, DG Competition, the Hearing Officers and the European Competition Network. It has pages dedicated to six 'policy areas':¹⁷⁶ antitrust (Articles 101 and 102), mergers, State aid, cartels, liberalisation, and international cooperation. Each policy area includes an 'Overview' section; a 'What's new?' section; a list of documents recently published in the Official Journal; legislation relating to that policy area; and details about ongoing and decided cases.¹⁷⁷ There is also a dedicated 'case search tool' that enables the user to search by case number,¹⁷⁸ case title or company name, decision date, economic sector and/or date of electronic publication. In addition the website provides details of the Commission's activities in particular sectors such as agriculture and food, consumer goods, energy, financial services, information and communication technologies, media, and pharmaceuticals. The DG Competition website also includes press releases,¹⁷⁹ gives details of 'current issues' in competition policy, public consultations and reproduces the text of speeches given by the Commissioner for competition policy and leading officials of DG Competition. (p. 26) It contains electronic versions of the Reports on Competition Policy, and the *Competition Policy Briefs*, *Competition Merger Briefs* and *Competition State Aid Briefs*.

(c) The Court of Justice of the EU

The Court of Justice of the European Union.

1.055 The Court of Justice of the European Union¹⁸⁰ comprises the Court of Justice, the General Court (together, 'the EU Courts') and specialised courts,¹⁸¹ all of which sit in Luxembourg. It is the duty of the EU Courts, under Article 19 TEU, to ensure that 'the law is observed' when interpreting and applying the Treaties. The EU Courts have three functions.¹⁸² The first is to rule on actions brought by a Member State, an institution of the EU or a natural or legal person. The second function is to give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of EU law or the validity of acts adopted by the Union institutions. The third function is to rule in other cases provided for in the Treaties. Cases brought before the Court of Justice are numbered 'C-' and those brought before the General Court are numbered 'T'.¹⁸³ The working language of the EU Courts is French, and nearly all judgments are drafted in French. However, cases may be pleaded in any of the 24 official languages of the Union.¹⁸⁴ The language used in the application will be the language in which the proceedings will be conducted. Judgments of the Court of Justice and of the General Court are cited using the European Case-Law Identifier ('ECLI'), which is a uniform identifier for judgments of national courts of the Member States and the EU Courts. The ECLI is composed of five, mandatory, elements: the country code ('EU'); the code of the court that rendered the judgment ('C' for the Court of Justice and 'T' for the General Court); the year the judgment was handed down; and an ordinal number.¹⁸⁵ The judgments of the EU Courts are binding in matters of EU law in the Member States.¹⁸⁶

Composition and procedure of the General Court.

1.056 The General Court was originally known as the Court of First Instance and was attached to the Court of Justice by a decision of the Council on 24 October 1988.¹⁸⁷ The purpose of the Court of First Instance (p. 27) was to improve judicial protection of individual interests with respect to actions requiring close examination of complex facts, and to lighten the workload of the Court of Justice. The General Court was given its current name by the Treaty of Lisbon and is now directly constituted by Article 19 TEU. The General Court currently consists of 47 judges; this number will increase to 54 on 1 September 2019, so that there are two judges from each Member State.¹⁸⁸ The appointment of judges to the General Court is by the same process as the one used for the Court of Justice (discussed below). The members of the Court are divided into nine Chambers of five judges, each Chamber being able to sit in two formations of three judges presided over by the President of the Chamber of five judges. Competition cases are normally assigned to Chambers of three judges.¹⁸⁹ Certain cases (but not competition cases) may be heard by a single judge¹⁹⁰ and cases of particular legal difficulty or factual complexity may be heard by the Grand Chamber.¹⁹¹ One of the judges of the General Court may be appointed to sit as Advocate General, but this is rarely done in practice.¹⁹² The General Court therefore differs from the Court of Justice in that it normally operates without the assistance of an Advocate General. The procedure of the General Court is governed by the Statute of the Court of Justice annexed as a Protocol to the Treaties¹⁹³ and by the Rules of Procedure.¹⁹⁴ The General Court may adjudicate under an 'expedited procedure'¹⁹⁵ which may involve the imposition of a limit on the number of pleas and compression of the timetable for the proceedings. The General Court has dealt with several competition cases under the expedited procedure.¹⁹⁶

Jurisdiction of the General Court.

1.057 The original jurisdiction of the General Court was much narrower than it is today, but included competition cases.¹⁹⁷ The General Court hears, among other matters, applications for the annulment of Commission decisions applying Articles 101 and 102 TFEU.¹⁹⁸ Decisions produce legal effects until such time as they are withdrawn or annulled in an action for annulment.¹⁹⁹ While pending before (p. 28) the Court, actions for annulment have no suspensory effect on any orders made by the Commission.²⁰⁰ The Court may, however, order that the contested decision be suspended 'if it considers that circumstances so require'.²⁰¹ The Commission will suspend the obligation to pay a penalty pending an appeal, provided that a bank guarantee for the amount of the fine is provided by the appellant.²⁰² The President of the General Court is competent, sitting alone, to hear applications for interim measures.²⁰³ The General Court also has unlimited jurisdiction to review the decisions of the Commission imposing penalties or periodic penalty payments.²⁰⁴ The General Court does not presently hear references for preliminary rulings, but the TFEU enables that development to take place in specific areas by a future amendment of the Statute of the Court of Justice of the European Union.²⁰⁵ The Court of Justice is due to report by 26 December 2017 on possible changes to the distribution of competence for preliminary rulings and by 26 December 2020 on the functioning of the General Court; where appropriate, the Court of Justice may make legislative requests in relation to either issue.

Composition and procedure of the Court of Justice.

1.058 The Court of Justice consists of one judge from each Member State and 11 Advocates General.²⁰⁶ Article 19 TEU provides that the judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 TFEU. They are appointed by common accord of the Member States for six years. Retiring judges and Advocates-General may be reappointed. The procedure of the Court is governed by the Statute of the Court of Justice annexed as Protocol 3 to the Treaties and by its Rules of Procedure.²⁰⁷ There are no court fees for proceedings before the Court of Justice. The Court of Justice has introduced an IT application known as 'e-Curia' for lodging and notifying documents electronically.²⁰⁸

Jurisdiction of the Court of Justice.

1.059 The jurisdiction of the Court of Justice is set out in the Treaties. It is therefore not a court of general jurisdiction. The Court has two main functions relevant here.²⁰⁹ The first is to hear appeals on points of law against judgments and orders of the General Court.²¹⁰ An appeal to the Court of Justice lies on the grounds of lack of competence of the General Court, a breach of procedure before it that adversely (p. 29) affects the interests of the appellant and the infringement of EU law by the General Court.²¹¹ The General Court's assessment of the facts does not, save where there may have been distortion of the evidence, constitute an appealable point of law.²¹² If an appeal is upheld, the Court of Justice sets aside the judgment of the General Court and may either refer the case back to the General Court,²¹³ or, as it has done in some competition cases, it may give final judgment in the matter.²¹⁴ The second jurisdiction of the Court, under Article 267 of the TFEU, is to give preliminary rulings (below), at the request of a court or tribunal of a Member State, concerning the interpretation or validity of an act of EU law. The preliminary ruling of the Court of Justice is binding upon the national court or tribunal, which must apply that ruling when giving judgment in the proceedings before it.

Judicial review by the EU Courts.

1.060 The review provided for by the Treaties involves review by the EU Courts of both the law and the facts, and means that the Courts have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine.²¹⁵ The General Court must generally undertake, on the basis of the evidence adduced by the applicant in support of the pleas in law put forward, a full review of a disputed decision applying Article 101 and 102 TFEU.²¹⁶ The General Court must also establish that the Commission has stated reasons for

its decision.²¹⁷ In *Cartes Bancaires v Commission*²¹⁸ the Court of Justice held that the General Court cannot use the margin of assessment which the Commission enjoys by virtue of the role assigned to it in relation to competition policy by the TEU and TFEU, as a basis for dispensing with an in-depth review of the law and of the facts. In particular, the Commission's margin of appreciation with respect to economic matters does not mean that the General Court must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must it establish, in particular, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.²¹⁹ In *Cartes Bancaires* the General Court failed to observe the standard of review required under the case law by simply reproducing the contents of the Commission's decision on a number of occasions.²²⁰

Judgments of the EU Courts.

1.061 The Judges of the EU Courts typically deliberate based on a draft judgment prepared by the Judge-Rapporteur.²²¹ Judgments of the EU Courts are unanimous, that is to say, no record is made public of any concurring or dissenting (p. 30) opinions. Judgments are made available on the Court website on the day they are handed down. The judgments of the Court of Justice and the General Court have had a major influence on the development of EU competition law, for example establishing the principle that Articles 101 and 102 TFEU are about not only 'competition' in the normal sense of that term, but are also concerned with the integration of national markets into a single internal market.²²² As a matter of safeguarding a fair administrative process, the Court of Justice has established various methods for respecting the 'rights of defence', in particular that the undertaking concerned must have had an opportunity to express its views effectively on the documents used by the Commission to support its allegation of an infringement'.²²³ The EU Courts have also made a considerable contribution to the development and protection of certain fundamental rights, both in competition cases and more generally.²²⁴ Where the EU institutions have a discretion, respect for the rights guaranteed by the legal order of the EU in administrative procedures is of fundamental importance.²²⁵

Preliminary rulings.

1.062 Any national court or tribunal which is called upon to decide a dispute involving the application of EU law may, and a national court of final resort normally must, submit questions to the Court of Justice for a preliminary ruling under Article 267 TFEU. The Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretations of acts of the institutions of the Union. The Court has stated that '[t]he system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary'.²²⁶ A reference from a national court may be refused only if it is obvious that the interpretation of EU law sought bears no relation to the actual facts of the domestic proceedings or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions referred to it.²²⁷ Save for such cases, the Court must give a preliminary ruling on questions of EU law, or domestic law based on EU law,²²⁸ that have arisen in the course of litigation within a Member State.²²⁹ The national court may ask the Court to adopt an 'accelerated procedure' in very urgent cases.²³⁰ Although it is for the national court to make the final assessment of questions of fact, the Court of Justice can, in preliminary ruling proceedings, provide the national court with all the guidance it needs to facilitate its judgment.²³¹ (p. 31) The Court

of Justice has delivered a number of wide-ranging rulings which have done much to develop and shed light on the rules on competition.

Opinions of the Advocates General.

1.063 The Advocate General summarises the arguments of the parties and provides an advisory opinion as to how he or she believes the Court of Justice should decide a case.²³² Such opinions often contain useful analyses of the relevant principles and case law. The Advocates General rank equally in precedence with the judges of the Court. Their opinions are not legally binding. Under the Statute of the Court of Justice, the Court of Justice has the power to determine a case without a submission from the Advocate General if the case involves no new point of law.²³³

(d) The NCAs and National Courts

Enforcement by national competition authorities ('NCAs').

1.064 A principal purpose of Regulation 1/2003 was to share the responsibility for enforcing Articles 101 and 102 between the Commission and the NCAs.²³⁴ Article 35 of Regulation 1/2003 requires Member States to designate the NCA or NCAs responsible for the application of Articles 101 and 102. Article 3(1) of the Regulation obliges NCAs (and national courts) to apply those Articles in cases where they apply national competition law²³⁵ to agreements or conduct affecting trade between Member States. According to the Commission, this obligation has led to a substantial increase in the level of enforcement of the EU competition rules at the Member State level since the entry into force of Regulation 1/2003.²³⁶ Article 5 of Regulation 1/2003 lists the types of decisions that NCAs can make in individual cases: finding an infringement of Articles 101 and 102 TFEU, ordering interim measures, accepting commitments and imposing fines and other penalties. NCAs are responsible for ensuring, among other matters, that Article 101 TFEU is observed and must not apply national legislation which contravenes the Member State's duty, under Article 4(3) TEU, to refrain from introducing measures contrary to the EU competition rules.²³⁷ NCAs do not have the power to decide that there has been no infringement of Article 101 or 102.²³⁸ On 22 March 2017, the Commission proposed the ECN+ Directive which, if enacted, will provide NCAs with the powers needed to investigate suspected infringements, gather evidence and impose sanctions for infringements.²³⁹

(p. 32) The European Competition Network.

1.065 The system of EU competition law enforcement rests on a duty of wholehearted cooperation owed by Member States to the EU and each other.²⁴⁰ The practical importance of this duty is reflected in the formation of the European Competition Network ('the ECN'), consisting of the European Commission and the NCAs. The ECN is dedicated to the effective enforcement of EU competition rules throughout the EU.²⁴¹ The ways in which the members of the ECN are expected to cooperate, and the manner in which cases are allocated among them, are set out in the Commission's Notice on cooperation within the network of competition authorities.²⁴² Representatives from the members of the ECN meet together to discuss areas of competition policy to help ensure a consistent approach to difficult issues which arise across all Member States.²⁴³ Although Regulation 1/2003 does not harmonise the procedures or sanctions for enforcing Articles 101 and 102 in the Member States,²⁴⁴ cooperation within the ECN has facilitated voluntary convergence of national laws and practice to a certain extent, in particular in relation to leniency applications in secret cartel cases.²⁴⁵ The European Commission, the NCAs of the EU and of the EEA have established a 'Merger Working Group' under the aegis of the ECN in order to foster increased consistency, convergence and cooperation among EU merger

jurisdictions.²⁴⁶ The ECN provides details of the activities of the ECN and its members on its website.²⁴⁷

Enforcement by national courts.

1.066 Articles 101(1) and 102 have direct effect, which means that they create rights for individuals (and companies) which must be enforced by the national courts.²⁴⁸ National courts may be called upon to apply Articles 101 and 102 in proceedings between private parties, such as actions for damages, and also in appeals brought against decisions of the NCAs applying the competition rules. The Commission has published a Notice on cooperation with courts of the EU Member States²⁴⁹ describing a number of mechanisms designed to ensure coherent application of the competition rules by national courts. For example, national courts can ask the Commission for information or its opinion on questions concerning the application of Articles 101 and 102 TFEU.²⁵⁰ The Commission also has the power, under Article 15(3) of Regulation 1/2003, to make observations as *amicus curiae* and has exercised that power in a number of cases.²⁵¹ An additional, important way in which national courts contribute to the development and coherence of EU competition law is by referring questions for preliminary rulings under (p. 33) Article 267 TFEU.²⁵² The non-confidential versions of some judgments of the national courts are available on the DG Competition website.²⁵³ It is apparent that national courts have applied Articles 101 and 102 TFEU in a variety of contexts and, where appropriate, reference will be made to judgments of national courts in this work. When national courts rule on agreements or practices under Article 101 or 102 which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.²⁵⁴ Similarly, a final NCA infringement decision is binding on a national court in the same Member State.²⁵⁵ A final NCA infringement decision may be presented in proceedings before a national court of another Member State as *prima facie* evidence that an infringement of competition law has occurred.²⁵⁶ A judgment of a national court of one jurisdiction is not binding in another, save where the same parties are seeking to re-litigate a dispute which has been judicially determined elsewhere.²⁵⁷

Footnotes:

76 The TFEU also establishes a European Investment Bank: Arts 308–309 TFEU. For further discussion of the European Central Bank and the European Investment Bank see, Lenaerts, Van Nuffel, Bray and Cambien, *European Union Law* (3rd edn, 2011). For a ‘who’s who’ of the Union institutions, see *European Union & Public Affairs Directory 2017* (Dods, 2017).

77 The official languages are: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

78 See ec.europa.eu/education/official-languages-eu-0_en.

79 Reg 1/58 OJ Sp Ed 1952-58 (I), 59 (determines the languages to be used by the EU). For the relevance of the language skills of the Commission’s services handling a case file see, eg Case C-328/05P *SGL Carbon v Commission* [2007] ECR I-3921, EU:C:2007:277, paras 70–74. See also Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, EU:C:1970:71, paras 49–50; Case T-151/05 *Nederlandse Vakbond Varkenshouders v Commission* [2009] ECR II-1219, EU:T:2009:144, para 211 (the fact that an administrative meeting was not conducted in a party’s preferred language does not breach its rights of the defence unless it can show that it was prejudiced by this).

- 80** Case C-161/06 *Skoma-Lux v Celiní Editelství Olomouc* [2007] ECR I-10841, EU:C:2007:773 (however, legal certainty required that this should not affect the validity of national decisions taken pursuant to those EU provisions, with the exception of decisions which were the subject of administrative or judicial proceedings at the date of the CJ's judgment).
- 81** See, generally Art 14 TEU and Arts 223–234 TFEU.
- 82** The maximum number is limited to 751 and each Member State will have between six and 96 members.
- 83** See Art 1(15) of the Treaty of Lisbon.
- 84** See Art 294 TFEU and Hartley, *The Foundations of European Union Law* (8th edn, 2014), 13–21.
- 85** Art 228 TFEU; the European Ombudsman's website contains details of the complaints about maladministration and her decisions and recommendations.
- 86** Art 17(3) and 17(7) TEU.
- 87** Art 17(8) TEU and Art 234 TFEU. The threat of such a vote prompted the resignation of the Santer Commission in 1999. For the effect of this mass resignation on the Commission's decision-making power in a competition case, see Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, EU:T:2003:343, para 55 (appeal on other grounds dismissed, Case C-95/04P [2007] ECR I-2331, EU:C:2007:166).
- 88** Art 197 TFEU.
- 89** Protocol 1 on the Role of National Parliaments in the European Union which can be found at OJ 2010 C83/203.
- 90** Protocol 2 on the application of the Principles of Subsidiarity and Proportionality.
- 91** European Council Conclusions, 26/27 June 2014, EUCO 79/14, 27 June 2014, available at the Council's website.
- 92** Arts 5(3) and 12(b) TEU. At least one-third of national Parliaments have issued three reasoned opinions stating their collective view that draft EU legislation did not comply with the principle of subsidiarity (a so-called 'yellow card'); see, The Principle of Subsidiarity, Fact Sheet of the European Union – 2017, available at the EU Parliament's website.
- 93** Art 18(1) TEU.
- 94** Art 18(2) TEU.
- 95** Art 16 TEU and Arts 290–291 TFEU. The Council of the European Union is not to be confused with the Council of Europe, an organisation of European States founded on 5 May 1949 through which was established the European Convention for the Protection of Human Rights and Fundamental Freedoms: paras 1.154–1.157, below, nor with the European Council, which consists of Heads of Government of the Member States: paras 1.154–1.156, below.
- 96** See Council Decn of 1 January 2007 determining the order in which the office of President of the Council shall be held, OJ 2007 L1/11.
- 97** Art 16(1) TEU.
- 98** Art 16(3) TEU states that the Council shall act by a qualified majority 'except where the Treaties provide otherwise'. For the definition of a qualified majority, see Art 16(4) TEU.
- 99** See para 1.012, above.

100 See para 1.043, below.

101 White Paper on Modernisation, OJ 1999 C132/1; see the Commission's XXXth Report on Competition Policy (2000), points 37-67.

102 Report on the Commission White Paper on modernisation of the rules implementing Articles [101 and 102 of the TFEU], Final A5-0069/1999 available as a Plenary Report from the archive section of the European Parliament's website 1999-2004 session and in part at OJ 2000 C304/66.

103 COM(2000)582 final. For the constitution and advisory functions of this Committee see Arts 304 et seq TFEU.

104 ie comprising a draft text of the proposed regulation: OJ 2000 C365E/28.

105 This is a 'special legislative procedure' according to Art 289(2) TFEU, the 'ordinary legislative procedure' being the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission: Art 292(1) TFEU.

106 Opinion of European Parliament, OJ 2002 C72E/305 (6 September 2001).

107 ECOSOC Opinion, OJ 2001 C155/73 (29 March 2001).

108 See, eg the orientation debate on 14/15 May 2001: Press Release PRES/01/181 (14 May 2001).

109 Art 17(5) TEU (providing that, from 1 November 2014 the Commission shall consist of a number of members corresponding to two-thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number). In 2009, the European Council decided that the number of Commissioners should equal the number of Member States. Following the UK's departure from the EU on 29 March 2019, the number of Commissioners will be 27.

110 Art 17(7) TEU.

111 Art 17(8) TEU and Art 234 TFEU; on a European Parliament motion of censure of the Commission see n 87, above.

112 Art 17(3) TEU.

113 Art 17(1) TEU.

114 Art 17(1) TEU and Art 291 TFEU. The Commission also has powers to enact directives under Art 106(3): see paras 11.025 et seq, below.

115 Art 49 TEU.

116 See, eg Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-935, EU:C:1991:91, para 44; Case C-344/98 *Masterfoods v HB Ice Cream* [2000] ECR I-11369, EU:C:2000:689, para 46.

117 Art 249 TFEU. See, eg Case C-137/92P *BASF v Commission* [1994] ECR I-2555, EU:C:1994:247 (failure to authenticate the *PVC* cartel decision, in accordance with the Commission's Rules of Procedure, led to annulment of the decision for infringement of an essential procedural requirement). For the current Rules see Procedure of the Commission, OJ 2000 L308/26 (as amended by Commission decn of 24 February 2010, OJ 2010 L55/60).

118 Art 250 TFEU.

119 See, eg Cases 43&63/82 *VBVB and VBBB v Commission* [1984] ECR 19, EU:C:1984:9; Case 5/85 *Akzo v Commission* [1986] ECR 2585, EU:C:1986:328 (the fact that a decn ordering an investigation was adopted by the Commissioner for Competition alone did not

contravene the principle of collegiate responsibility as there had been valid delegation of authority to the Commissioner and it had been exercised properly).

120 HR Key Figures: Staff Members, 1 January 2017.

121 DG Comp Annual Management Plan for 2017; the Commission has published a brochure on 'Compliance matters' (2012); both are available at DG Comp's website.

122 DG Comp Annual Activity Report 2015, 12, available at DG Comp's website.

123 Available at ec.europa.eu.

124 This Directorate was formed in 2005.

125 There is an organigram of DG Comp available at DG Comp's website.

126 See Röller and Buigues, 'The Office of the Chief Competition Economist at the European Commission' (2005), available on DG Comp's website.

127 See, eg the EAGCP reports on 'An economic approach to Article 82' (July 2005) and 'Hardcore restrictions under the Block Exemption Regulation on vertical agreements: An economic view' (September 2009), both available at DG Comp's website.

128 See XXIIIrd Report on Competition Policy (2003), p 16.

129 See, eg Albers and Jourdan, 'The Role of the Hearing Officers in EU Competition Proceedings: A Historical and Practical Perspective' (2011) 2 *Journal of European Competition Law and Practice* 185; Wils, 'The Oral Hearing in Competition Proceedings before the European Commission' (2012) 35 *World Competition* 397; and Wils, 'The Role of the Hearing Officer in Competition Proceedings before the European Commission' (2012) 35 *World Competition* 431.

130 Commission decn 2001/462, OJ 2001 L162/21. See further para 13.088, below.

131 Hearing Officer Terms of Reference, Decn 2011/695/EU, OJ 2011 L275/29.

132 Hearing Officer Terms of Reference, Art 1(2).

133 Reg 17, JO 1962 13/204; OJ Sp Ed 1959-62, 81.

134 Reg 17, above, Art 4.

135 See earlier editions of this work; eg 5th edn (2001), para 11-017.

136 For the historical problems caused by the exclusive competence of the Commission, see, eg the procedural history of the analysis of ice cream freezer exclusivity clauses described in Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653, EU:T:2003:281 (appeal dismissed, Case C-552/03P *Unilever Bestfoods v Commission* [2006] ECR I-9091, EU:C:2006:607).

137 Reg 1/2003, OJ 2003 L1/1. See Wils, 'Ten Years of Regulation 1/2003-A Retrospective' (2013) 4 *Journal of European Competition Law and Practice* 293. The provisions of Reg 1/2003 are considered in detail in Chaps 13, 14 and 15, below.

138 Commission Communication, 'Report on the Functioning of Regulation 1/2003' COM(2009) 206 final, para 12, available at DG Comp's website.

139 Reg 1/2003 (n 137, above), Art 2.

140 Reg 1/2003 (n 137, above), Art 3; see Chap 15, below.

141 Commission Communication, 'Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives' COM(2014) 453, available at DG Comp's website.

- 142** Proposal for ECN+ Directive, COM(2017) 142 final, available at DG Comp's website. See also, Commission Communication, 'EU law: Better results through better application' OJ 2017 C18/10 (advocating a robust, efficient and effective enforcement system to ensure that Member States fully apply, implement and enforce EU law).
- 143** Reg 1/2003 (n 137, above) Arts 7-10.
- 144** Ten Years of Antitrust Enforcement under Regulation 1/2003 (n 141, above) paras 8-11.
- 145** On the purpose of commitment decns see Case C-441/07P *Commission v Alrosa* [2010] ECR I-5949, EU:C:2010:377, para 35; on the effect of commitment decns on national courts see Case C-547/16 *Gasorba SL* EU:C:2017:891, paras 22-30; and on commitment procedures see, Best Practices: conduct of proceedings, OJ 2011 C308/6, paras 115-133.
- 146** On the non-use of Art 10 of Reg 1/2003 see, eg Bailey, 'Reinvigorating the Role of Article 101(3) under Regulation 1/2003' (2016) 81 Antitrust LJ 111, at 136-139.
- 147** Reg 773/2004, OJ 2004 L123/18 sets out further detailed provision of the enforcement procedure to be adopted by the Commission, concerning the handling of complaints, the exercise of the right to be heard and access to the file.
- 148** For an overview of the power in Art 17 of Reg 1/2003 to carry out sector inquiries see ec.europa.eu/competition/antitrust/sector_inquiries.html.
- 149** Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors, COM(2006) 851 final.
- 150** Pharmaceutical Sector Inquiry Final Report, 8 July 2009.
- 151** Final report on the E-commerce Sector Inquiry, COM(2017) 229 final.
- 152** Report on Competition Policy (2010), point 116 and, following the E-commerce sector inquiry, Press Release IP/17/201 (2 February 2017).
- 153** Report on Competition Policy (2010), points 87-91.
- 154** Reg 2015/1588, OJ 2015 L248/1 empowers the Commission to adopt block exemption regulations in relation to State aids: for the exercise of this power see Chap 17, below.
- 155** See, eg Article 101(3) Guidelines, OJ 2004 C101/97; Vertical Restraints Guidelines, OJ 2010 C130/1; Horizontal Cooperation Guidelines, OJ 2011 C11/1; Technology Transfer Guidelines, OJ 2014 C89/3.
- 156** See, eg Guidelines on the application of the specific rules set out in Arts 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors, OJ 2015 C431/1 (providing guidance to farmers on the application of Art 101 to joint selling of olive oil, beef and veal, and arable crops).
- 157** See, eg Article 101(3) Guidelines (n 155, above), para 7.
- 158** See, eg *De Minimis* Notice, OJ 2014 C291/1, para 8. See also the CJ's judgment in Case C-226/11 *Expedia* EU:C:2012:795, para 28.
- 159** Technology Transfer Guidelines (n 155, above), para 183 (listing obligations in licence agreements that are generally not restrictive of competition within the meaning of Art 101(1)).
- 160** Best Practices: conduct of proceedings, OJ 2011 C308/6.
- 161** For the Advisory Committee see Reg 1/2003, Art 14 and para 13.093, below.
- 162** Press Release IP/09/1197 (28 July 2009).

163 Legal instruments such as regulations are published in the 'L' series of the Official Journal and Notices or Guidance are published in the 'C' series; on the distinction see Case C-428/14 *DHL Express (Italy) Autorità Garante della Concorrenza e del Mercato* EU:C:2016:27, para 34 and the case law cited.

164 See, eg Case C-360/09 *Pfleiderer* [2011] ECR I-5161, EU:C:2011:389, para 21; cf each of the NCAs has signed a statement to abide by the principles set out in the Network Notice, see Annex to OJ 2004 C101/43, on which see Case C-226/11 *Expedia* EU:C:2012:795, para 26.

165 See, eg Case C-557/12 *Kone* EU:C:2014:1317, para 36. The same point applies to the ECN Model Leniency Programme: *DHL Express* (n 163, above) para 42.

166 Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, EU:T:1991:75, para 53 and the case law cited there (appeal dismissed, Case C-51/92P *Hercules Chemicals v Commission* [1999] ECR I-4235, EU:C:1999:357); Cases T-67/00, etc, *JFE Engineering v Commission* [2004] ECR II-2501, EU:T:2004:221, para 537 (point not considered on appeal, Cases C-403&405/04P *Sumitomo Metal Industries* [2007] ECR I-729, EU:C:2007:52); Case T-114/02 *BaByliss v Commission* [2003] ECR II-1279, EU:T:2003:100, para 143 (Remedies Notice); Case T-282/06 *Sun Chemical Group v Commission* [2007] ECR II-2149, EU:T:2007:203, paras 55-57 (Horizontal Merger Guidelines).

167 Cases C-189/02P, etc, *Dansk Rørindustri v Commission* [2005] ECR I-5425, EU:C:2005:408, para 211. The CJ found that there had been no breach of the principle of non-retroactivity on the facts of the case.

168 Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, EU:T:2005:456, para 519 and the case law cited.

169 See, eg Case T-175/12 *Deutsche Börse v Commission* EU:T:2015:148, paras 235-300 (reviewing the Commission's interpretation and application of the Horizontal Merger Guidelines on efficiencies).

170 Article 102 Enforcement Priorities Guidance, OJ 2009 C45/7. On the Commission's guidance on enforcement priorities see, para 10.004.

171 *De minimis* Notice, OJ 2014 C291/1.

172 *De minimis* Notice, above, para 5.

173 Informal Guidance Notice, OJ 2004 C101/78; see also Reg 1/2003 (n 137, above) recital 38.

174 Note Cases C-319/93, etc, *Dijkstra* [1995] ECR I-4471, EU:C:1995:433, para 32, where the CJ stated that the practice of the Commission is to be discerned not only from its decisions but also from its annual Reports on Competition Policy and its communications. The EFTA Surveillance Authority also publishes an annual report that contains a section on competition policy and enforcement.

175 The Briefs (and their predecessor, the Competition Policy Newsletters) can be found at ec.europa.eu/competition/publications/cpn.

176 The website also has a series of links under the heading 'Competition and you' which explains competition policy, its relevance to consumers, and how the law is enforced in the EU. DG Comp also organises a 'European Consumer and Competition Day' to present EU competition policy to non-specialists.

177 The policy areas of mergers and cartels also contain tables of up-to-date statistics.

178 The case numbers used to comprise five digits with a point after the first two. More recently the point has been omitted and the current search engine on the website depends on the five digits being entered without the point, regardless of the date of the case.

179 Some of the more important press releases are referred to in the Commission's annual Reports on Competition Policy.

180 Art 19(1) TEU.

181 Art 257 TFEU. The Civil Service Tribunal was established to hear EU civil service cases, and heard staff cases between December 2005 to September 2016: Council decn 2004/752, OJ 2004 L333/7.

182 Art 19(3) TEU.

183 The 'C' stands for *Cour de Justice* (CJ) and the 'T' stands for *Tribunal de premier instance* (GC). Cases in the CJ which are on appeal from the GC are distinguished by an additional letter 'P' after the case number, which stands for *pourvoi* (appeal).

184 The language of the case in references for a preliminary ruling under Art 267 TFEU is that of the national court which made the reference to the Court of Justice.

185 See Council conclusions of 29 April 2011 inviting the introduction of the European Case Law Identifier (ECLI) and a minimum set of uniform metadata for case law, OJ 2011 C127/1. Until the end of 2011, many of the judgments of the CJ and GC were reported in the European Court Reports: they were two series of Reports; those where the page number is preceded by 'I' are reports of judgments of the CJ and those where the page number is preceded by 'II' are reports of judgments of the GC. The final volumes of the ECR were 2011 v.12C for Series I and 2011 v.11/12 for Series II.

186 See, eg s 3(1) of the European Communities Act 1972, incorporating this obligation into domestic law of the United Kingdom; if enacted, the European Union (Withdrawal) Bill 2017 will repeal the European Communities Act 1972 with effect from 29 March 2019.

187 Council decn 88/591, OJ 1988 L319/1. On the evolution of the General Court see 'From 20 to 2020 - Building the CFI of tomorrow on solid foundations', 25 September 2009, available on the GC's section of the EU Courts' website.

188 Reg 2015/2422, OJ 2015 L341/14. The figure of 54 assumes that the UK will leave the EU on 29 March 2019.

189 The GC introduced a new structure on 1 September 2016: see GC of the EU Press Release 35/16 (4 April 2016).

190 Council decn of 26 April 1999, OJ 1999 L114/52.

191 See, eg the Grand Chamber of the GC sat in Case T-201/04 *Microsoft* (n 27, above). For the composition of the Grand Chamber of the GC see, OJ 2010 C288/4.

192 See, eg Opinion of Mr Vesterdorf, acting as AG, in Cases T-1/89, etc, *Rhône-Poulenc v Commission* [1991] ECR II-867, EU:T:1991:38.

193 Protocol 3 on the Statute of the Court of Justice of the European Union. A consolidated text of the Statute is available on the Court website.

194 Rules of Procedure of the GC, OJ 2015 L105/1. See also Chap 13, below.

195 Rules of Procedure of the GC, above, Art 151.

196 See, eg Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071, EU:T:2002:254; and Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381, EU:T:2002:264 (both appeals against merger prohibition decisions); Case T-464/04 *Independent Music Publishers and Labels Association v Commission* [2006] ECR II-2289, EU:T:2006:216 (appeal against a merger clearance decision); Case T-170/06 *Alrosa v Commission* [2007]

ECR II-2601, EU:T:2007:220 (appeal against a decision accepting commitments under Art 9 of Reg 1/2003).

197 Council Decn 88/591 (n 190, above) Art 3(1).

198 Art 263 TFEU. The grounds of annulment are lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to its application, or misuse of powers: see paras 13.128 et seq, below.

199 Art 278 TFEU.

200 Art 278 TFEU.

201 Arts 278 and 279 TFEU.

202 For the circumstances in which the GC will dispense with the requirement to provide a bank guarantee see para 13.173, below.

203 Statute of the Court of Justice (n 193, above), Art 39 and Rules of Procedure of the GC (n 194, above), Arts 156–161; see, eg Case T-371/17R *Qualcomm v Commission* EU:T:2017:485.

204 Art 261 TFEU and Art 31 of Reg 1/2003 (n 137, above). On judicial review of fines see Case C-386/10P *Chalkor v Commission* ('Copper Plumbing Tubes') [2011] ECR I-13085, EU:C:2011:815, para 67; Case C-501/11P *Schindler v Commission* ('Elevators and Escalators') EU:C:2013:522, paras 30–38; see further Chap 14, below.

205 Art 256(3) TFEU.

206 Art 252 TFEU. For general works on the CJ, see n 769 to para 13.127, below.

207 Rules of Procedure, OJ 2012 L265/1.

208 Decn of 13 September 2011 on the lodging and service of procedural documents by means of e-Curia, OJ 2011 C289/7.

209 Other jurisdictions of the CJ in which competition issues may arise include infraction proceedings against Member States under Art 258 TFEU; actions for failure to act under Art 265 TFEU; and actions for damages against the EU under Art 340 TFEU.

210 Art 256(1) TFEU; Statute of the Court of Justice, Art 51.

211 Statute of the Court of Justice, Art 51, first para. On the meaning of a 'point of law' see the Opinion of AG Jacobs in Case C-53/92P *Hilti v Commission* [1994] ECR I-667, EU:C:1993:875.

212 See, eg Cases C-628/10P, etc, *Alliance One International v Commission* [2007] ECR I-2331, EU:C:2012:479, para 84 and the case law cited.

213 See, eg Case C-413/14P *Intel v Commission* EU:C:2017:632, paras 148–150.

214 Statute of the Court of Justice (n 193, above) Art 61. See, eg Case C-441/07P *Commission v Alrosa* [2010] ECR I-5949, EU:C:2010:377, paras 98 et seq.

215 Case C-386/10P *Chalkor AE Epexergasias Metallon v Commission* [2011] ECR I-13085, EU:C:2011:815, para 67.

216 See, eg Case 42/84 *Remia v Commission* [1985] ECR 2545, EU:C:1985:327, para 34.

217 *Chalkor* (n 215, above) para 61.

218 Case C-67/13P *Cartes Bancaires v Commission* EU:C:2014:2204, para 45 and the case law cited.

219 *Cartes Bancaires*, above, para 46.

220 *Cartes Bancaires* (n 218, above) paras 90–91.

221 The Judge-Rapporteur is a judge who is a member of the Chamber to which the case is allocated and who has been designated to perform certain functions during the course of the appeal.

222 See paras 1.018 and 1.023 et seq, above on the role of single market integration in EU competition law.

223 See, eg Cases 43&63/82 *VBVB and VBBB v Commission* [1984] ECR 19, EU:C:1984:9, para 25.

224 On fundamental rights, see para 1.154, above.

225 See, eg Case T-175/12 *Deutsche Börse v Commission* EU:T:2015:148, para 67 and the case law cited.

226 Case C-2/06 *Kempter v Hauptzollamt Hamburg-Jonas* [2008] ECR I-411, EU:C:2008:78, para 42.

227 See, eg Case C-415/93 *Bosman* [1995] ECR I-4921, EU:C:1995:463, paras 59–61; Case C-105/94 *Celestini* [1997] ECR I-2971, EU:C:1997:277, para 22; Case C-355/97 *Beckand Bergdorf* [1999] ECR I-4977, EU:C:1999:391, para 22.

228 See, eg Case C-7/97 *Bronner v Mediaprint* [1998] ECR I-7791, EU:C:1998:569, paras 17–20; Case C-238/05 *Asnef-Equifax v Ausbanc* [2006] ECR I-11125, EU:C:2006:734, paras 12–25.

229 The CJ has introduced a simplified procedure for dealing with a question referred for a preliminary ruling which is identical to a question on which the Court has already been called on to rule, or where the answer to the question admits of no reasonable doubt or may be clearly deduced from existing case law: Art 99 of the Court of Justice Rules of Procedure (n 207, above). For an account of references for preliminary rulings, see Chap 16, below.

230 Art 105 of the Court of Justice Rules of Procedure (n 207, above).

231 See, eg Case C-237/04 *Enirisorse* [2006] ECR I-2843, EU:C:2006:197, para 30; Cases C-295/04, etc, *Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I-6619, EU:C:2006:461, paras 47 et seq; Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v CEPSA* [2006] ECR I-11987, EU:C:2006:784, para 50.

232 Art 252 TFEU. For the position in the GC, see para 1.056, above.

233 Art 20, 5th para, of the Statute of the Court of Justice (n 193, above).

234 Reg 1/2003 (n 137, above) Recitals (2), (3) and (4).

235 For discussion of the meaning of ‘national competition law’ under Art 3 of Reg 1/2003 see the English Court of Appeal in *IB v R* [2009] EWCA Crim 2575, paras 28–38.

236 By the end of March 2009, more than 1,000 cases have been pursued on the basis of the EU competition rules: see the Commission’s Report on the functioning of Regulation 1/2003, COM(2009) 206 final, para 29.

237 Case C-198/01 *Consorzio Industrie Fiammiferi* [2003] ECR I-8055, EU:C:2003:430. For the principle of sincere cooperation see para 1.142, below.

238 See, in relation to Art 102, Case C-375/09 *Tele2 Polska* [2011] ECR I-3055, EU:C:2011:270, paras 19–30. A NCA has the power to close proceedings on the basis that there is insufficient information to proceed with an investigation, even if the domestic legislation does not so provide: *ibid.*

239 Proposal for ECN+ Directive, COM(2017) 142 final, 22 March 2017, available at DG Comp's website.

240 See para 1.142, above.

241 See the Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, 10 December 2002, Doc 15435/02 ADD1 available at DG Comp's website.

242 The Network Notice, OJ 2004 C101/43.

243 See, eg the Commission Staff working document accompanying the Report on Competition Policy 2016, pp 14–15, available at DG Comp's website.

244 NCAs apply the procedures and powers provided by national law when applying Arts 101 and 102 TFEU, subject to the EU principles of equivalence and effectiveness: see further paras 15.001 et seq, below.

245 See, eg the ECN Model Leniency Programme, 29 September 2006, available at DG Comp's website.

246 See, eg Best Practice for cooperation among NCAs in Merger Review, available at DG Comp's website.

247 See ec.europa.eu/competition/ecn/index_en.html.

248 See para 16.006, below. For the direct effect of the provisions relating to State aids, see paras 17.115 et seq, below.

249 See National Courts Notice, OJ 2004 C101/54 (as amended, OJ 2015 C256/5).

250 Reg 1/2003 (n 137, above) Art 15(1); see the Commission's Staff working paper accompanying the Commission's Report on the functioning of Regulation 1/2003, SEC/2009/0574 final, para 277.

251 See, eg Case C-429/07 *Inspecteur van de Bleastingdienst v X* [2009] ECR I-4833, EU:C:2009:359.

252 See para 1.062, above and para 16.004, below on preliminary rulings.

253 See ec.europa.eu/competition/elojade/antitrust/nationalcourts; this database is based on the judgments transmitted to the Commission pursuant to Art 15(2) of Reg 1/2003 (n 137, above).

254 Reg 1/2003 (n 137, above) Art 16(1).

255 Damages Directive (n 33, above) Art 9(1).

256 Damages Directive (n 33, above) Art 9(2).

257 In which case the judgment of the court of another Member State on a competition matter receives recognition under Reg 1215/2012, OJ 2012 L351/1.