

Contents

<i>Preface</i>	v
<i>Tables of Cases</i>	xxiii
<i>Tables of Legislation</i>	xc

1. EU COMPETITION RULES AND THEIR ENFORCEMENT

I.	PRELIMINARY	
	Aim and scope of this book	1-001
	Brief historical perspective	1-003
	Article 103 TFEU—implementing powers	1-009
	Article 104 TFEU—transport	1-011
	Block exemptions	1-013
	Relationship with national competition laws	1-015
	Regulation 1/2003—background	1-016
	Regulation 1/2003—key features	1-018
II.	ARTICLES 101 AND 102	
	The competition rules in context	1-020
	Article 101	1-021
	Need for collusion	1-023
	Restriction of competition	1-026
	Effect on trade between Member States	1-028
	Article 101(2)	1-030
	Article 101(3)	
	Directly applicable legal exception	1-031
	End of exemption decisions—transitional arrangements ..	1-034
	Block exemptions	1-036
	Article 102	1-039
	Dominance	1-043
	Relevant market	1-045
	Abuse	1-049
	Applying the competition rules—Commission Notices	1-053
	European Economic Area	1-057
	Restrictive agreements	1-061
	Dominant positions	1-063
III.	ENFORCEMENT BY THE COMMISSION	
	Institutional framework	1-066

Contents

The Commission	
Role and duties	1-068
Internal Organisation—the Directorates-General	1-070
DG Competition	1-071
Impact of “modernisation” on DG Competition	1-073
Hearing Officer	1-074
Legal Service	1-075
 IV. OUTLINE OF THE COMMISSION’S PROCEDURE	
Introduction	1-078
Stage one—fact-finding	1-080
Stage two—the parties’ rights of defence and decisions	
Statement of Objections	1-084
Interim measures	1-086
Parties’ right to be heard	1-087
Advisory Committee	1-088
Transparency	1-090
 2. STARTING THE MACHINERY	
 I. INTRODUCTION	
Historical background—notification	2-001
Information for the Commission	2-003
 II. CASE ALLOCATION WITHIN THE NETWORK	
Case allocation and reallocation	2-006
Allocation of cases involving the European Economic Area	2-016
 III. COMPLAINTS TO THE COMMISSION	2-017
Effects of decentralisation—the Commission’s stated priorities	2-018
Choices and decisions for the complainant	2-019
Legitimate interest	2-021
Examples	
Complainants recognised	2-023
Representative bodies	2-026
Complainants refused recognition	2-027
Form C—formal complaints	2-029
Completing Form C	2-030
Confidential information	2-032
Form C—the detail	2-034
Information regarding the parties	2-035
Details of alleged infringement	2-036
Finding sought	2-039

Contents

Proceedings before national competition authorities or national courts	2-041
Signature of complaint	2-042
Sending and receipt of complaint	2-043
Commission's three-stage procedure—first stage	2-044
Commission's duty of care and vigilance	2-047
Languages	2-049
Responding within a reasonable time	2-050
Commission's three-stage procedure—second stage	2-051
The Article 7 letter	2-052
Responding to the Article 7 letter	2-054
Commission's three-stage procedure—third stage	2-056
Grounds for rejecting complaint	
"EU interest"	2-057
No exhaustive list of criteria	2-058
Availability of relief before a national court	2-059
Gravity and duration of the alleged infringement	2-060
Difficulty of proving the infringement	2-061
Clarification of the law	2-062
Cessation of offending conduct	2-063
Time taken by Commission	2-065
Complaint being dealt with by another authority	2-066
Entitlement to a decision	2-067
The rejection decision	2-068
Re-opening a complaint	2-070
Failure to act on complaint	2-071
Challenging a rejection decision	2-072
Complaints combining Articles 101 and 102 with Article 106 TFEU	2-073
 IV. GUIDANCE LETTERS	
Introduction	2-076
Guidance letters	2-077
The three pre-conditions	2-078
Novelty	2-079
Usefulness	2-080
Resources	2-081
Relationship with other proceedings	2-082
Procedure	2-083
Content of guidance letter	2-084
Publicity	2-085
Legal effect of guidance letter	2-086
 V. DECLARATIONS OF INAPPLICABILITY	
Introduction	2-087

Contents

No notice or specified procedure	2-088
Effects of declaration of inapplicability	2-089
Practice and procedure	2-090
VI. SECTOR INQUIRIES	2-094
VII. INITIATION OF PROCEEDINGS	
Introduction	2-096
Significance of initiating proceedings	2-098
Relationship with national competition authorities and national courts	2-099
Not a challengeable act	2-102
Practice	2-103
3. INVESTIGATIVE POWERS	
I. INTRODUCTION	3-001
II. FUNDAMENTAL RIGHTS	
Increasing importance	3-003
Status of the European Convention for the Protection of Human Rights and Fundamental Freedoms in EU law..	3-004
Criminal or civil nature of proceedings	3-008
III. REQUESTS FOR INFORMATION	
Powers under Article 18	3-013
Necessary information	3-015
Primary and secondary sources	3-017
Who supplies information on behalf of an undertaking?	3-018
Scope of “information”	3-020
Two types of request	3-021
Article 18(2)—simple requests for information	
Form of request	3-022
No compulsion to reply; replying and liability to fines	3-025
Decisions requiring information	
Nature of decisions requiring information	3-028
IV. SELF-INCRIMINATION	
Background	3-031
<i>Hoechst</i> and <i>Orkem</i>	3-032
ECtHR developments	3-034
Implications for requests by decision	3-038

Contents

Other grounds of refusal	
Confidentiality	3-042
Legal professional privilege	
(i) Background	3-043
(ii) Communications protected	3-045
(iii) Restriction to independent lawyers	3-050
(iv) Restriction to lawyers registered in the European Union	3-055
(v) Verification	3-056
(vi) Surrender or loss of protection	3-058
Extraterritoriality	3-061
Location of information	3-063
Foreign law defences	3-064
Fines	3-068
 V. INSPECTIONS OF BUSINESS PREMISES	
Introduction	3-072
Obligations imposed by Article 20	3-073
Persons susceptible to investigation	3-074
Obligations on those inspected	3-075
Two types of investigation	3-079
Inspections by simple authorisation	
Preparation	3-081
Authorisations	3-082
Inspections by decision	
Formal requirements of decision	3-084
Justification for decision	3-086
Notification to undertaking	3-090
Assistance by the NCA	3-091
Fundamental rights and inspections by decision	3-096
The right to a hearing by an independent and impartial tribunal	3-098
“Private life” and business premises	3-101
Compatibility of inspection decisions with ECHR requirements	
Compatibility with Article 6 ECHR	3-106
Compatibility with Article 8 ECHR—Roquette	3-108
The inspectors’ powers	3-110
To enter any premises, etc. of the undertaking	3-112
To examine the books and other records related to the business	3-115
To take copies of books or records	3-122
To seal premises, books and records	3-123
To ask for explanations	
(i) Background	3-128

Contents

(ii) Remaining ambiguities as to scope of powers	3-129
(iii) Representatives or members of staff	3-130
Judicial review of inspection decisions	
Feasibility of review by the Court	3-134
Distinction between review of inspection decisions and review of their execution	3-135
Review by a national court	3-138
 VI. INSPECTION OF OTHER PREMISES	
Introduction	3-139
Necessity for a judicial warrant	3-141
Fundamental rights	3-142
Inspectors' powers	3-143
 VII. POWER TO TAKE STATEMENTS	
Development of use of statements	3-145
Procedure	3-148
 4. THE COMMISSION'S CASE AND RIGHTS OF THE DEFENCE	
 I. GENERAL PRINCIPLES	
Introduction	4-001
When do parties have the right to be heard?	4-006
 II. THE COMMISSION'S CASE	
Nature of the statement of objections	4-011
Language/translations	4-012
Form of statement of objections	4-013
Documentary evidence	4-014
Inferences drawn from the evidence	4-015
Notice of fines	4-016
Cases with multiple parties or multiple infringements	4-018
Effects of statement of objections	4-019
Service of statement of objections	4-022
Supplementary statements of objections and letters of facts ..	4-024
 III. PROCEDURAL RIGHTS OF INTERESTED PARTIES	
The hearing officer	4-027
The hearing officer's responsibilities	4-029
Who must be heard	4-031

Contents

Complainants and other third parties showing a “sufficient interest”	4-032
Other third parties	4-036
Procedure for the participation of third parties	4-037
Witnesses	4-040
Procedural rights of parties under the settlement procedure	4-041
Decisions under Articles 9 and 10	4-045
 IV. ACCESS TO THE COMMISSION’S FILE	
Introduction	4-049
“The file”	4-055
When and how access to the file is given	4-059
Non-accessible documents	4-062
Minutes of meetings	4-065
Accessible documents	4-070
Confidential information and business secrets	4-071
Policing the system—the role of the hearing officer	4-081
Failure to give access to inculpatory or exculpatory documents does not necessarily constitute grounds for annulment	4-086
Does access through other channels vitiate failure by the Commission to disclose documents?	4-092
Regulation 1049/2001	4-096
 V. THE REPLY	4-106
The reply to the statement of objections	4-107
Time limits and copies	4-109
The oral hearing	4-114
Organisation	4-115
Representation at the oral hearing	4-118
Procedure at the oral hearing	4-119
(i) The introduction	4-121
(ii) The party’s oral presentation	4-122
(iii) Questions from the competition authorities of the Member States	4-126
(iv) Questions from the Commission	4-127
(v) Concluding remarks	4-130
Record of the hearing	4-131
After the hearing	4-132
The hearing officer’s reports	
The hearing officer’s interim report	4-133
The hearing officer’s final report	4-134

5. INVOLVEMENT OF NATIONAL AUTHORITIES AND COURTS

I.	INTRODUCTION	5-001
II.	THE NATIONAL COMPETITION AUTHORITIES	
	Definition of competition authorities	5-002
	Designation	5-003
	Powers of national competition authorities	5-005
	Close co-operation	5-014
III.	EXCHANGE AND SHARING OF INFORMATION WITHIN THE NETWORK	
	Preliminary	5-017
	Restrictions on use	5-018
	Professional secrecy	5-022
	Confidential information—the <i>SEP</i> proviso	5-023
	Article 12—information for use in evidence	5-026
	Article 12(1)	5-027
	Article 12(2)	5-038
	Article 12(3)	5-044
	Leniency applications	5-049
	Obligations of the Commission towards NCAs	
	To supply information	5-054
	To notify procedural steps	5-059
	(i) Requests for information under Article 18	5-060
	(ii) Interviews under Article 19	5-061
	(iii) Investigations under Article 20	5-062
	(iv) Hearings	5-065
	(v) Initiation of proceedings	5-066
	(vi) Other procedural steps	5-067
	Assistance, etc. from and between NCAs	
	Information	
	(i) First formal investigative measure and other measures	5-068
	(ii) Obligation to supply information on request	5-070
	(iii) Draft decisions	5-071
	Investigations	
	(i) Assisting the Commission's inspectors	5-073
	(ii) Carrying out the investigation for the Commission	5-074
	(iii) Overcoming resistance or obstruction	5-076
	(iv) UK implementation	5-080
	(v) Carrying out an investigation for another national competition authority	5-081

Contents

Hearings		5-083
IV. THE ADVISORY COMMITTEE ON RESTRICTIVE PRACTICES AND MONOPOLIES		
Constitution and functions		5-085
Consultation before decision-taking		5-086
Ensuring consistency across the Network		5-088
General competition issues		5-089
Procedure		
Meetings		5-090
Shortened notice of meetings		5-091
Practice		5-092
Written procedure		5-094
The Committee's opinion		5-095
Publication of the opinion		5-097
European Economic Area		5-099
V. CO-OPERATION WITH NATIONAL COURTS		
Introduction		5-102
Burden and standard of proof		5-105
Provision of information to and from national courts		5-107
Provision of information by the Commission		5-109
Practice in seeking information from the Commission		5-119
Seeking the Commission's opinion		5-121
Practice in seeking the Commission's opinion		5-122
Provision of information about national court judgments ...		5-125
Interventions by national competition authorities and the Commission in national court proceedings		5-126
Publication of Commission opinions and observations		5-131
Possibility of concurrent proceedings/conflicts		5-132
Avoiding conflicts—primacy of EU law		5-134
Staying national proceedings and making references		5-139
When would a national court decision “run counter” to a commission decision?		5-140

6. COMMISSION DECISIONS

I. GENERAL REQUIREMENTS RELATING TO DECISIONS		
Introduction		6-001
Delegation of powers over decision taking		6-003
Delegation of powers to sign decisions		6-009
Authentication		6-010
Reasoning		6-011

Novelty	6-015
Statement of the right to appeal the Commission's decision	6-017
Errors, formal and clerical	6-018
Addressees of decision	6-020
Notification of decisions	6-025
Amendment and withdrawal of decisions	6-027
 II. FUNDAMENTAL RIGHTS IN RELATION TO THE ADOPTION OF DECISIONS IMPOSING FINES	
Non-retroactivity of penalties	6-030
Hearing by "an independent and impartial tribunal"	6-032
Immediate enforceability and Article 6 ECHR	6-034
 III. FINAL DECISIONS	
Declarations in respect of past breaches	6-039
Cease-and-desist and like-effects orders	6-041
Cease-and-desist orders	6-042
Like-effects orders	6-043
Behavioural or structural remedies	6-046
Relationship with the statement of objections	6-053
Structure of the decision	6-055
 IV. INTERIM MEASURES	
Generally	6-059
Requirements of Article 8	
Can a complainant apply for interim measures?	6-061
<i>Prima facie</i> case	6-064
Urgency of serious and irreparable damage to competition	6-065
(i) Public and private interests	6-066
(ii) Irreparable harm	6-068
Temporary nature of the measures	6-073
Procedural safeguards	6-074
The decision	6-076
 V. PROCEDURAL DECISIONS	6-079
 VI. WITHDRAWAL OF BLOCK EXEMPTIONS	
Article 29	6-080
Procedure	6-081
 VII. ACCEPTANCE OF COMMITMENTS AND INFORMAL SETTLEMENTS	
Background	6-083
Commitments	6-086
Informal settlements	6-091

VIII. PUBLICITY

Publication of decisions	
Obligatory and discretionary publication	6-092
Official Journal and electronic publication	6-094
Protection of business secrets	6-097
Generally	6-098

7. FINES AND PENALTIES

I. PRELIMINARY

Source of fining powers	7-001
Concept of “undertaking”	7-003
Identification of addressees of decisions imposing fines	7-004
Groups of undertakings—parental responsibility	7-006
Restructuring of undertakings—continuity of liability	7-008
Takeovers and mergers—continuity of existence and of liability	7-009
Undertakings assisting in an infringement, or “cartel facilitators”	7-016
Trade associations and their members	7-018
Joint and several liability and the 10 per cent cap	
Companies within a group	7-020
Apportionment of liability	7-026

II. PROCEDURAL INFRINGEMENTS

Change to turnover-based fines	7-029
Article 23(1)(a) and (b)—withholding information/supplying incorrect information	7-033
Article 23(1)(c)—obstructing the Commission’s investigation	7-034
Article 23(1)(d)—incorrect answers to questions during inspections	7-038
Article 23(1)(e)—broken seals	7-039

III. SUBSTANTIVE INFRINGEMENTS

Article 23(2)—Infringements concerned	7-042
Infringement already terminated	7-046
Intentionally or negligently	7-048
The general trend towards higher fines	7-052
The Fining Guidelines	7-055
Methodology of the Guidelines	7-061
First stage—the basic amount	7-063
Value of sales	7-064
Area to which the sales relate	7-070

Contents

Relevant year of turnover.....	7-072
Proportion of turnover to be taken into account	7-075
Nature of the infringement	7-077
Market share	7-081
Geographic scope	7-082
Implementation	7-083
Multiplier for duration	7-087
The additional amount (or “entry fee”).....	7-089
Second stage—adjustments to the basic amount	7-090
Aggravating and mitigating factors	7-092
Aggravating factors	7-097
Repeated infringement	7-099
Refusal to co-operate with the Commission/ obstructing the investigation	7-110
Role of leader in, or instigator of, the infringement	7-112
Retaliatory measures and other practices	7-120
Other aggravating factors	7-122
Mitigating or attenuating factors.....	7-124
Prompt termination of the infringement	7-125
Infringements committed by negligence	7-129
Symbolic fines	7-133
Non-imposition of a fine	7-135
Substantially limited involvement in the infringement	7-136
Co-operation outside the scope of the Leniency Notice	7-139
Infringement authorised or encouraged by public authorities or legislation	7-147
Other attenuating circumstances	
“Innocent” parties/victims	7-153
Restitution of victims	7-156
Sanctions against personnel implicated in the infringement	7-157
Reliance on legal advice/compliance programmes	7-158
Effect of notification.....	7-160
Delays by Commission	7-164
Deterrence	7-172
Need to exceed the amount of gains improperly made	7-181
Application of the 10 per cent limit	7-184
Flexibility available under the 2006 Fining Guidelines	7-191
Methodology of calculation.....	7-193
Leniency Notice—a subsequent step in the calculation	7-194
Preliminary	7-195

Contents

Conditions for the grant of immunity	
(i) Basic conditions	7-204
Immunity under point 8(a)—enabling the Commission to carry out a targeted inspection	7-206
Immunity under point 8(b)—enabling the Commission to find an infringement	7-210
(ii) Conditions for immunity to become definitive	7-213
Immunity markers	7-218
Formal applications	7-221
Conditions for the grant of a reduction in fine	
(i) “Significant value”	7-227
(ii) Scale of reductions	7-229
Procedure for applications for a reduction in fine	7-232
Tactical aspects	7-234
Ability to pay	7-236
Double jeopardy—proceedings within the Union	7-251
Double jeopardy—third country regulatory action	7-256
 IV. PERIODIC PENALTY PAYMENTS	
Article 24(1)—enforcing compliance with decisions	7-259
Relationship between final and periodic penalties	7-263
 V. LIMITATION PERIODS	
Two types of limitation period	7-264
Limitation periods in proceedings	7-265
Interruption and suspension of the limitation period	7-271
Limitation period for the enforcement of sanctions	7-276
 VI. PAYMENT AND ENFORCEMENT OF FINES AND PENALTIES	
Interest on unpaid fines	7-279
Provisional payment or guarantee pending judgment	7-284
Tax implications	7-286
Enforcement	7-288
 8. JUDICIAL REVIEW BY THE EUROPEAN COURT OF JUSTICE	
 I. INTRODUCTION	
Function of the Court	8-001
Forms of direct action	8-004

Contents

II.	PRACTICE BEFORE THE COURT	8-007
	Commencing proceedings in direct actions	
	Limitation	8-008
	Notification	8-010
	Representation	8-012
	Written pleadings	8-013
	Interventions	
	Persons with an interest	8-017
	Complainants and competitors/customers	8-020
	Shareholders in the addressee of an act	8-023
	Persons jointly and severally liable with the main applicant	8-025
	Potential claimants for damages	8-027
	Trade and consumer associations	8-030
	Procedure	8-034
	Hearings	
	Joinder of cases	8-038
	The Report for the Hearing	8-039
	Conduct of hearings	8-040
	Speeches and questions	8-041
	Evidence and witnesses	8-042
	Appeals	
	Limited scope of appeals	8-052
	Procedure on appeals	8-058
	Costs	
	Discretion as to liability	8-060
	Principles applied on taxation	8-061
III.	ARTICLE 261 TFEU—THE COURT’S “UNLIMITED JURISDICTION”	
	Nature of Article 261 TFEU	8-064
	How unlimited is “unlimited jurisdiction”?	8-068
	Approach of the Court to the exercise of its unlimited jurisdiction	8-071
	Influence of the Commission’s Fining Guidelines	8-072
	Reluctance to increase fines	8-079
IV.	ARTICLE 263 TFEU—ACTION FOR ANNULMENT	
	Introduction	8-083
	Locus standi	8-094
	Acts which may be challenged	
	Form of acts not decisive	8-099
	Preliminary steps not reviewable acts	8-102
	Catalogue of reviewable acts	8-105

Contents

Grounds of annulment	
Failure to substantiate infringements	
(i) Classification within Article 263 TFEU.....	8-107
(ii) Burden and standard of proof	8-110
(iii) No formal rules of evidence	8-114
(iv) Evaluation of evidence relating to certain issues ..	8-116
Documentary evidence	8-117
Leniency statements	8-123
Whether a leniency applicant's evidence provides "significant added value"	8-126
Duration	8-129
Lack of competence	8-136
Infringement of an Essential Procedural Requirement	
(i) Breach must have been potentially decisive	8-139
(ii) Consultation and hearings	8-140
(iii) Not all procedural requirements are statutory	8-142
(iv) Lack of reasoning	8-143
Infringement of the Treaties or of any rule of law relating to their application	8-150
Misuse of powers	8-152
Remedies	8-154
 V. ARTICLE 265 TFEU—ACTION FOR FAILURE TO ACT	
General	8-167
Infringement of the Treaty	8-168
Addressed to the applicant	8-169
"Acts"	8-171
Request to act	8-172
Definition of position	8-173
Remedy	8-176
 VI. INTERIM RELIEF	
Introduction	8-178
Basic requirements and criteria	8-179
Article 278 TFEU—Suspension of acts	
Suspension of decisions ordering undertakings to alter their conduct	8-187
Suspension of decisions ordering the payment of fines	8-191
Suspending investigative measures	8-203
Article 279 TFEU—other interim measures	8-204
Third parties and interim relief	8-208
 Index	625