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# 1 Competition Law and Policy in the EU, 2 EU Competition Law and Policy

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## 2. EU Competition Law and Policy

### (a) The EU Treaties

From the EEC to the EU.

**1.003** On 25 March 1957 France, Germany, Italy, Belgium, the Netherlands and Luxembourg, signed a Treaty at Rome to establish what was then called the 'European Economic Community' ('EEC').[6] Subject to transitional arrangements,[7] the EEC Treaty came into force on 1 January 1958. The Treaty of Rome sought to create a 'common market' based on an economic union between the Member States, an objective (p. 3) which received a major boost from the creation of the single market with effect from 1 January 1993.[8] It has since been substantially amended, in particular by the Treaty on European Union signed at Maastricht (below)[9] which replaced the term 'European Economic Community' with 'European Community'; by the Treaty of Amsterdam,[10] which (amongst other changes) renumbered the Articles of the EC Treaty; and by the Treaty of Nice,[11] which enacted institutional reforms in anticipation of further accessions to the EU. The 'European Community' was subsumed into the 'European Union' by the Treaty of Lisbon[12] with effect from 1 December 2009.

The TFEU.

**1.004** The Treaty of Lisbon renamed the EC Treaty as the Treaty on the Functioning of the European Union[13] and effected a renumbering of the Treaties. The Treaty of Lisbon has an annex containing a table of equivalences between old and new Treaties. Article 3(1)(b) TFEU provides that the EU has exclusive competence in 'the establishing of the competition rules necessary for the functioning of the internal market'. Article 4 TFEU lists those areas

where the Union shares competence with the Member States, including the internal market, consumer protection, transport, and energy.

The TEU.

**1.005** The Treaty on European Union[14] was signed at Maastricht and entered into force on 1 November 1993. The TEU marked a further substantial stage in the integration of the Member States by establishing a European Union that embraces a wide range of additional areas of cooperation between the Member States, for example on defence and in the area of justice and home affairs. The TEU was also amended by the Treaty of Lisbon. Some of the provisions that were previously in the early articles of the old EC Treaty have been replaced by provisions in the new TEU.[15] Of particular relevance to competition law is Article 3(3) TEU which establishes that the 'Union shall establish an internal market'. Protocol 27 to the TEU and TFEU states that that internal market includes a 'system ensuring that competition in the internal market is not distorted'.[16]

Article 3 TEU.

**1.006** Article 3 TEU contains a list of socio-economic objectives which it is said to be the task of the Union to achieve. Article 3(1) provides that 'the Union's aim is to promote peace, its values and the well-being of its peoples'. Article 3(2) continues that 'the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured'. Of particular importance (p. 4) for the interpretation and application of EU competition law is the objective set out in Article 3(3) TEU which provides (amongst other things):

> 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.'

Protocol 27.

**1.007** Protocol 27 on the internal market and competition, which is annexed to the TEU and the TFEU, provides that the internal market referred to in Article 3(3) TEU is to include 'a system ensuring that competition is not distorted'. Protocols have the same force as the main provisions of the Treaty to which they are annexed.[17] The EU Courts have referred to Protocol 27 in support of a teleological interpretation of the competition rules in the same way as they had done with its forerunners, Article 3(f) EEC and Article 3(1)(g) EC.[18]

## (b) EU competition law

Generally.

**1.008** EU competition law consists of legal rules that are intended to protect the process of competition, so that goods and services are sold at competitive prices and that consumers have a choice as to the goods and services they wish to purchase. EU competition law is contained in Articles 101 to 109 TFEU of Chapter 1 of Title VII of the TFEU. They constitute the rules that implement Article 3(3) TEU and Article 3(1)(b) TFEU.[19] They comprise two main sections, namely 'rules applying to undertakings' (Articles 101–106) and 'aids granted by States' (Articles 107 to 109).[20]

Article 101.

**1.009** Article 101 consists of three paragraphs. The first prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Article 101(1) can apply to horizontal and vertical agreements; it can apply to intra- as well as inter-brand restrictions of competition; and it can apply to an improper exercise of intellectual property rights. Article 101(2) provides that any agreements or decisions prohibited by Article 101(1) shall be automatically void. This has been interpreted by the Court of Justice to mean that only those provisions of the agreement which restrict competition contrary to Article 101(1) are void.[21] The doctrine of direct effect means that provisions of an agreement which are void by reason of Article 101(2) are unenforceable in the national courts of the Member States.[22] Article 101(3) provides that the prohibition in Article 101(1) may be declared to be inapplicable to agreements, decisions or concerted practices, or categories thereof, (p. 5) which contribute to improving the production or distribution of goods, or to promoting technical or economic progress, provided that they also allow consumers a fair share of the resulting benefit, only impose restrictions indispensable to achieving those objectives and do not permit the elimination of competition. Agreements, decisions or concerted practices that are caught by Article 101(1), but fulfil the conditions of Article 101(3) are lawful as from the time they were concluded, without the need for any prior decision.

Article 102.

**1.010** Article 102 provides that an abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited insofar as it may affect trade between Member States.[23] Whereas Article 101 prohibits various forms of illicit cooperation between undertakings, Article 102 prohibits abuse by one or more undertakings[24] that hold a dominant position and affects trade between Member States. Articles 101 and 102 seek to achieve the same overarching aim, the maintenance of effective competition within the internal market.[25] There is no equivalent to Article 101(3) providing an exception to the prohibition under Article 102.[26] It is now well-established case law, however, that dominant undertakings may submit an objective justification for their conduct, even if it appears, *prima facie*, to be an abuse.[27]

Article 103.

**1.011** Article 103 imposes upon the Council, acting on a proposal from the Commission and after consulting the European Parliament, the duty to adopt appropriate regulations[28] or directives[29] to give effect to the principles set out in Articles 101 and 102. Such regulations and directives may be designed in particular: (i) to ensure compliance with the prohibitions of Article 101(1) and Article 102 by making provision for fines and other penalty payments; (ii) to lay down detailed rules for the application of Article 101(3); (iii) to define the scope of Articles 101 and 102 ‘in various branches of the economy’; (iv) to define the respective functions of the Commission and the Court of Justice of the European Union; and (v) to determine the relationship between national laws and EU competition law.

Regulations and directives under Article 103.

**1.012** The Council has exercised its power under Article 103 to make the five principal regulations establishing the current competition (p. 6) regime: Regulation 1/2003[30] sets out the general implementing provisions; Regulations 19/65, 2821/71, 1534/91, 169/2009, 246/2009, 487/2009 enable the Commission to adopt block exemption regulations covering categories of agreements in various fields;[31] and Regulation 139/2004 sets out the regime

for merger control.[32] These Regulations empower the Commission to make subordinate regulations. The EU Damages Directive of the European Parliament and of the Council was adopted pursuant to Articles 103 and 114 TFEU.[33] The Commission's Proposal for the ECN+ Directive, which would harmonise and strengthen the NCA's powers of investigation and enforcement, is also based on Article 103.[34]

Articles 104 and 105.

**1.013** Article 104 provided transitional provisions relating to the enforcement of Articles 101 and 102 pending the entry into force of measures taken under Article 103. Since all areas of the economy are now covered by the procedural rules laid down in Regulation 1/2003, Article 104 has become otiose.[35] Article 105 provides that the Commission 'shall ensure the application of the principles laid down in Articles 101 and 102'. It also set up some machinery for the Commission to investigate infringements in the absence of implementing legislation that empowers the Commission directly to enforce the competition rules.

Article 106.

**1.014** The purpose of Article 106 is to ensure that Member States do not adopt measures which favour undertakings in the public sector of the economy or on whom the State has conferred special rights. It differs from Articles 101 and 102 in being addressed to Member States rather than to undertakings, although a breach of the rules contained in the Treaties (the TEU and/or the TFEU) by an undertaking is an essential component in any breach of Article 106. Article 106(2) provides that undertakings entrusted with the operation of services 'of general economic interest' or 'having the character of a revenue-producing monopoly' are subject to the competition rules only insofar as the application of those rules 'does not obstruct the performance in law or fact of the particular tasks assigned to them'. Article 106(3) requires the Commission to ensure the application of the provisions of Article 106 and, where necessary, to address appropriate directives or decisions to Member States. The application of Article 106 is discussed in Chapter 11, below.

Articles 107 to 109.

**1.015** Since 'State aid generally means a conflict of interests between the recipient economic agents and their competitors in other Member States',[36] Article 107(1) declares incompatible with the internal market, insofar as it affects trade between Member States, 'any aid granted by a Member State which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods'. Article 109 empowers the Council to make regulations for the application of the State aid provisions in Articles 107 and 108. Under this provision, the Council adopted Regulation 2015/(p. 7) 1588 enabling the Commission to adopt block exemption regulations for State aids, and Regulation 2015/1589 setting out general procedural rules for State aid notifications.[37] Articles 107 to 109 are considered in Chapter 17, below.

## (c) EU competition policy

Competition policy and the benefits of competition.

**1.016** The EU policy of protecting and promoting competition, and the legal rules giving effect to that policy, are based on the principle that the process of competition in a market is the best mechanism for an efficient allocation of resources. It is the competitive activities of firms driven by self-interest,[38] rather than state control or private monopoly, that is good for consumers. Competition compels producers to charge lower prices, provide better quality, develop new products, and offer greater choice. Competition also means that firms will have a greater incentive to be innovative to win new business.[39] For these reasons, competition is generally believed to have a positive effect on the economic well-being of consumers (commonly referred to as 'consumer welfare') and, by increasing productivity, on the total welfare of society.[40] More generally, Jean-Claude Juncker, the President of the European Commission, has said that a 'fair playing field also means that in Europe, consumers are protected against cartels and abuses by powerful companies … The Commission watches over this fairness. This is the social side of competition law. And this is what Europe stands for.'[41]

EU competition policy and the control of market power.

**1.017** A firm (or group of firms) that exercises market power is likely to be able to deprive consumers of the benefits that flow from competition. Market power refers to the power to influence market prices, output, innovation, the variety or quality of goods or services for a significant period, and also denotes the ability to exclude existing or potential competitors from the market. One of the objections to cartels under Article 101(1) TFEU is that they enable competitors to exercise collective market power that they would not otherwise have, to the detriment of competition and consumers. Market power also lies at the heart of the concern under Article 102 TFEU that the conduct of dominant firms may make it difficult for other firms to compete on the market. Similarly, the concern about certain mergers under the Merger Regulation is that the merged firm will be able to exercise greater market power than either (p. 8) of the merging parties on their own. The creation, strengthening or maintenance of market power is therefore a keystone of EU competition law and policy.

EU competition policy and the single market.

**1.018** The TFEU is designed to create and maintain a single internal market in which the conditions prevailing in a national market are reproduced on a Union scale and where there are to be no impediments to the free movement of goods, services, workers or capital. The EU competition rules must be understood in that context. If such a market is working effectively, it becomes impossible to maintain artificially different prices in different parts of the market because the consumer should be able to buy goods from the cheapest source anywhere in the Union. Goods should freely flow from the low-price areas into the high-price areas, in particular by 'parallel trading' by intermediaries who buy from the manufacturer in one Member State to sell on to consumers in another Member State undercutting the higher prices in that latter State. The result should be that prices settle down at broadly the same level so that, subject to transport costs, the price of a given brand of (say) computer equipment eventually becomes the same whether it is purchased in Manchester, Madrid or Munich.[42] The rules on free movement seek to prevent barriers to trade being maintained by Member States.[43] The competition rules may be seen as complementing those provisions by preventing such barriers being re-erected by private agreements, for example by a manufacturer prohibiting its distributors from supplying customers outside a defined territory.[44] Thus, parallel exports and imports enjoy a certain degree of protection in EU law because they encourage trade and help reinforce competition.[45] Similarly, achievement of a truly integrated market would be hampered if a

Member State were to subsidise domestic industries, and thereby hinder imports from other Member States or artificially stimulate exports to other Member States. The State aid rules, which are a distinguishing feature of EU competition law, therefore play an essential role in furtherance of this fundamental objective.[46]

EU competition policy and the digital single market.

**1.019** In 2015, the Commission launched a roadmap for completing the 'Digital Single Market',[47] which seeks to provide better access for consumers and businesses to digital goods and services across Europe; to create the right conditions and a level playing field for digital networks and innovative services to flourish; and to maximise the growth potential of the digital economy. In 2017, the Commission published its final report on its two-year e-commerce sectoral inquiry,[48] (p. 9) having gathered evidence from about 1,800 companies and having analysed about 8,000 distribution contracts. The final report describes the growth and characteristics of competition in e-commerce and in particular distribution strategies; its findings have informed the Commission's competition law enforcement in relation to vertical restraints of online sales and 'geo-blocking',[49] both of which affect the creation of the digital single market.

EU competition policy and economic growth.

**1.020** In 2000 the European Council adopted the so-called Lisbon Strategy to 'make Europe, by 2010, the most competitive and the most dynamic knowledge-based economy in the world'. This was followed by a second ten-year strategy, known as Europe 2020, which seeks to revive the economy of the EU. Europe 2020 aims at 'smart, sustainable, inclusive growth'.[50] President Juncker has said that 'competition policy is one of the areas where the Commission has exclusive competence and action in this field will be key to the success of our jobs and growth agenda'.[51] Competitive markets contribute to international competitiveness and economic growth. Competition places pressure on undertakings to increase their own efficiency and ensures that more efficient undertakings increase their market share at the expense of the less efficient. The European Commission is committed to pro-active competition policy and enforcement as a means of enhancing productivity of the EU.[52] The Commission's White Paper on the Future of Europe stated that, post-Brexit, the remaining 27 Member States will continue to focus on jobs, growth and investment by strengthening the single market and by stepping up investment in digital, transport and energy infrastructure;[53] competition policy plays a vital role in each of these sectors.[54]

EU competition policy and market liberalisation.

**1.021** The Commission has stressed the importance of the process of liberalisation, that is to say, the introduction of competition to (and deregulation of) sectors in which goods or services were previously supplied exclusively by a single, often State-owned, undertaking.[55] Electronic communications, the energy industries, transport and postal services have all been the subject of various EU legislative initiatives.[56] The Commission and NCAs see the enforcement of the EU competition rules, notably Article 102 TFEU, as essential in liberalised sectors to prevent former state monopolies from foreclosing access to the market.[57] The application of Article 106 (p. 10) TFEU seeks to reconcile the EU objectives of competition and internal market freedoms on the one hand, with ensuring the provision of services of general economic interest on the other hand. The interpretation and application of Article 106 is discussed in Chapter 11.

## (d) Interpretation of EU competition law

EU competition law is interpreted purposively.

**1.022** When interpreting a provision of the Treaties or secondary EU legislation, it is necessary to consider not only its wording but also the context in which it occurs and the objectives of the rules of which it is part.[58] The EU Courts' approach to the interpretation of the Treaties is to give effect to what they understand to be the Treaties' task or purpose, without, of course, placing an intolerable strain on language. This is sometimes referred to as adopting a 'teleological' or purposive interpretation.[59] For example, in *France v Commission*[60] the Court of Justice had regard to the purpose and general structure of the original EU Merger Regulation in support of its conclusion that it was capable of application to mergers that lead to several undertakings holding a collective dominant position. In *AC-Treuhand v Commission*,[61] one of the appeals against the *Heat Stabilisers* cartel decision, the Court of Justice held that the main objective of Article 101(1) TFEU is to ensure that competition remains undistorted within the internal market, and therefore it prohibits the active contribution of an undertaking to a restriction of competition even though that contribution does not relate to the market on which that restriction comes about or is intended to come about. Put simply, a company that does not produce a cartelised product, but facilitates the operation of a cartel, may be held liable for its conduct. Judge Kutscher, a former member of the Court of Justice, has summarised the correct approach to the interpretation of EU law as follows:

> 'You have to start with the wording (ordinary or special meaning). The Court can take into account the subjective intention of the legislature and the function of a rule at the time it was adopted. The provision has to be interpreted in its context and having regard to its schematic relationship with other provisions in such a way that it has a reasonable and effective meaning. The rule must be understood in connexion with the economic and social situation in which it is to take effect. Its purpose, either considered separately or within the system of rules of which it is a part, may be taken into consideration.'[62]

(p. 11) There is also a principle of interpretation, sometimes referred to as the *Marleasing* principle, according to which the national courts of the Member States should, when applying domestic legislation which is designed to implement EU legislation, interpret that legislation, so far as possible, in the light of the wording and purpose of a directive in order to comply with the obligations imposed by that EU legislation directive.[63]

EU competition law is interpreted in the context of the Treaties.

**1.023** The Court of Justice has observed that the competition rules are 'so essential that without [them] numerous provisions of the Treaty would be pointless'.[64] For example, Articles 101 and 102 TFEU should be understood in the overall context of the Treaty provisions on the internal market in which there are to be no impediments to the free movement of goods, services, workers or capital. The Court of Justice has held that agreements aimed at partitioning markets according to national borders or making the interpenetration of national markets more difficult are normally prohibited by Article 101(1) TFEU.[65] Likewise, practices of a dominant undertaking aimed at preventing or restricting parallel trade from one Member State to another may fall within the mischief of Article 102 TFEU.[66]

EU competition law consists of legal rules based on economic analysis.

**1.024** Competition law is concerned with economic phenomena such as market structures and the behaviour of firms. The application of EU competition law is symbiotically linked to economic concepts, such as counterfactuals, theories of harm, anti-competitive foreclosure[67] and relies upon economic models to estimate the effects of behaviour and transactions.[68] For example, in *Intel v Commission*[69] the Grand Chamber of the Court of Justice held that where a dominant firm submits, on the basis of supporting evidence, that its exclusivity rebates are not capable of restricting competition, the Commission is required to analyse, first, the extent of the firm's dominant position on the relevant market (which implies an economic assessment of its market power); secondly, the share of the market covered by the rebates, as well as the conditions and arrangements for granting the impugned rebates, their duration and their amount (which, again, entails an economic analysis of the capability of the rebate to foreclose access to the market); and, thirdly, to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market. From a legal and an economic perspective, the key question is whether the dominant firm's pricing is capable of foreclosing competition.[70] (p. 12) Economic analysis may inform the legal standard to be applied to the behaviour of firms and suggest why, for example, conduct always, or almost always, tends to restrict competition and should be presumed unlawful[71] or, conversely, rarely harms competition and should be presumed lawful.[72]

EU competition law and the principles of effectiveness.

**1.025** The EU Courts interpret and apply the EU competition rules in a manner that secures their effectiveness. The principle of effectiveness prohibits national procedural rules that render practically impossible or excessively difficult the exercise of rights conferred by EU law, including EU competition law. For example, the Court of Justice relied on the principle of effectiveness to find that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101(1) TFEU.[73] The principle of effectiveness has also played an important role in the way in which the Court of Justice has interpreted and applied Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU.[74] It is also enshrined in Article 4 of the EU Damages Directive.[75]

## Footnotes:

**6** The EC Treaty (Cmnd 4864) was not published in the Official Journal but the text of that Treaty and all the Treaties referred to here is available on the EUR-Lex website. At the same time the original Member States signed the European Atomic Energy Community, OJ 2010 C84/1, which is of indefinite duration.

**7** Pursuant to Art 8 of the original Treaty of Rome, the transitional period expired on 31 December 1969. The rules on competition came fully into effect with the adoption of Reg 17, the first main implementing Reg, on 13 March 1962, JO 1962 13/204; OJ Sp Ed 1959-62, 81, see para 1.042, below.

**8** Introduced by the internal market programme following the amendments to the EC Treaty, as it was called at that time, made by the Single European Act signed in Luxembourg in February 1986.

**9** Maastricht Treaty (signed on 7 February 1992 and coming into force on 1 November 1993) Cmnd 1934, OJ 1992 C191.

**10** Treaty of Amsterdam (signed on 2 October 1997 and entered into force on 1 May 1999), OJ 1997 C340/1.

**11** Treaty of Nice (signed on 26 February 2001 and entered into force on 1 February 2003), OJ 2001 C80/1.

**12** Treaty of Lisbon (signed on 13 December 2007 and entered into force on 1 December 2009), OJ 2007 C306/1.

**13** Treaty on the Functioning of the European Union, OJ 2010 C83/47.

**14** Maastricht Treaty (n 9, above). The EU did not replace the EC at this stage although the TEU made extensive changes to the EC Treaty.

**15** Treaty on European Union, OJ 2010 C83/13.

**16** See para 1.007, below.

**17** Art 51 TEU provides that Protocols and Annexes to the TEU and TFEU form an integral part of the Treaties.

**18** See, eg Case C-52/09 *Konkurrensverket v TeliaSonera Sverige* [2011] ECR I-527, EU:C:2011:83, para 20; Case C-496/09 *Commission v Italy* [2011] ECR I-11483, EU:C:2011:740, para 60; Case T-456/10 *Timab Industries v Commission* EU:T:2015:296, paras 211–212 (further appeal dismissed, Case C-411/15P EU:C:2017:11).

**19** See para 1.004, above.

**20** The full text is available at DG Comp's website.

**21** Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235, 250, EU:C:1966:38; Case 319/82 *Soc de Vente de Ciments et Bétons v Kerpen & Kerpen* [1983] ECR 4173, 4184–4185, EU:C:1983:374.

**22** See Chap 16, below.

**23** See generally Chap 10, below.

**24** Note that an abuse may be committed through an agreement, such as an exclusive purchasing agreement, but the principal focus is upon the behaviour of the dominant firm in such cases.

**25** Case 6/72 *Continental Can* [1973] ECR 215, EU:C:1973:22, para 25; Case 66/86 *Ahmed Saeed* [1989] ECR 803, EU:C:1989:140; Case T-51/89 *Tetra Pak v Commission* (*'Tetra Pak I'*) [1990] ECR II-309, EU:T:1990:41.

**26** On the relationship between Arts 101(3) and 102, see *Tetra Pak I*, above, paras 25–29 and paras 3.019 and 3.020, below.

**27** See, eg Case 311/84 *Centre Belge d'Etudes de Marche-Télémarketing v CLT* [1985] ECR 3261, EU:C: 1985:394, para 27; Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, EU:T:2007:289, para 688.

**28** Regs made by the Council or the Commission have immediate legal effect. According to Art 288 TFEU, they are binding in their entirety and directly applicable in all Member States. By contrast, directives are addressed to, and binding upon, Member States as to the result to be achieved, but leave to the national authorities the choice of form and methods of achieving that objective.

**29** A national court is under a duty to construe its national law, so far as possible, to achieve the result pursued by a directive which that national law is intended to implement: see cases in n 63, below. Under the doctrine of 'vertical direct effect', certain directives can become binding on bodies that constitute 'emanations of the State' and thereby confer rights on private individuals and other non-State undertakings, but they cannot impose obligations on private undertakings until incorporated into national law: see Case 152/84 *Marshall* [1986] ECR 723, EU:C:1986:84; Cases C-6&9/90 *Francovich v Italian Republic* [1991] ECR I-5357, EU:C:1991:428; and in the UK, see *R v Durham County Council, ex p Huddleston* [2000] 1 WLR 1484. See further Prechal, *Directives in EC Law* (2nd edn, 2005).

**30** See paras 1.042 et seq, below.

**31** See Chap 3, below.

**32** Reg 139/2004, OJ 2004 L24/1, replacing Reg 4064/89, OJ 1989 L395/1. For EU merger control generally see Chap 8, below.

**33** Directive 2014/104/EU, OJ 2014 L349/1. For discussion of the Damages Directive generally see Chap 16, below.

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

**35** Air transport between EU and third country airports was brought within the general system of enforcement by an amendment to Reg 1/2003 by Reg 411/2004, OJ 2004 L68/1; for the position before Reg 411/2004, see *Emerald Supplies v British Airways* [2017] EWHC 2420 (Ch); international tramp vessels and intra-Member State maritime transport were brought within Reg 1/2003 by Reg 1419/2006, OJ 2006 L269/1.

**36** 1st Report on Competition Policy (1971), point 133.

**37** Reg 2015/1588, OJ 2015 L248/1 and Reg 2015/1589, OJ 2015 L248/9, both are discussed in Chap 17, below.

**38** cf Adam Smith: 'Although an individual undertaking striving to maximise profits intends only his own gain … he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention … By pursuing his own interest he frequently promotes that of society more effectually than when he really intends to promote it'. *The Wealth of Nations* (Cannan, ed, 1977), 477.

**39** See, eg Tirole, *The Theory of Industrial Organization* (1988); Scherer and Ross, *Industrial Market Structure and Economic Performance* (3rd edn, 1990); Motta, *Competition Policy: Theory and Practice* (2004); Carlton and Perloff, *Modern Industrial Organisation* (4th edn, 2005); Lipsey and Chrystal, *Principles of Economics* (13th edn, 2015).

**40** On the economic theory of competition see, eg Bergh and Camesasca, *European Competition Law and Economics: A Comparative Perspective* (2nd edn, 2006); Bishop and Walker, *The Economics of EC Competition Law* (3rd edn, 2010); Niels, Jenkins and Kavanagh, *Economics for Competition Lawyers* (2nd edn, 2016). For a historical perspective on EU competition law, see Patel and Schweitzer (eds), *The Historical Foundations of EU Competition Law* (2013).

**41** Juncker, 'State of the Union Address 2016: Towards a better Europe – a Europe that protects, empowers and defends', speech of 14 September 2016, available at ec.europa.eu.

**42** cf Cases 100/80, etc, *Musique Diffusion Française v Commission* ('the *Pioneer* case') [1983] ECR 1825, EU:C:1983:158.

**43** See para 1.149, below and in relation to intellectual property rights, see Chap 9.

**44** See, eg Cases C-403&429/08 *Football Association Premier League v QC Leisure* [2011] ECR I-9083, EU:C:2011:631, para 139; Cases 56&58/64 *Consten and Grundig v Commission* [1966] ECR 299, 340, EU:C:1966:41; Cases 96/82, etc, *IAZ International Belgium v Commission* [1983] ECR 3369, EU:C:1983:310, paras 23–27; Case C-306/96 *Javico v Yves Saint Laurent Parfums* [1998] ECR I-1983, EU:C:1998:173, paras 13–14; Case C-551/03P *General Motors v Commission* [2006] ECR I-3173, EU:C:2006:229, paras 67–69.

**45** See, eg Case 26/75 *General Motors Continental v Commission* [1975] ECR 1367, EU:C:1975:150, para 12; Case 226/84 *British Leyland v Commission* [1986] ECR 3263, EU:C:1986:421, para 24; Cases C-468/06, etc, *Sot. Lélos kai Sia v GlaxoSmithKline* [2008] ECR I-7139, EU:C:2008:504, paras 65–66.

**46** See Chap 17 on State aids.

**47** Commission Communication, 'A Digital Single Market Strategy for Europe' COM(2015) 192 final, 6 May 2015; see also speech by Commissioner Vestager, 'Competition and the Digital Single Market', 15 September 2016, both available at ec.europa.eu.

**48** Report from the Commission to the Council and the European Parliament, 'Final report on the E-commerce Sector Inquiry' COM(2017) 229 final, 10 May 2017, available at ec.europa.eu.

**49** Press Release IP/17/201 (2 February 2017). Geo-blocking refers to the practices of retailers and digital content providers that prevent consumers from purchasing goods or accessing digital content services due to the consumer's location or country of residence: 'Final report on the E-commerce Sector Inquiry', above, para 45. See also Commission Proposal for a Reg on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence, or place of establishment within the internal market, COM/2016/0289 final, available on the Commission's website.

**50** Commission Communication, 'Europe 2020: A strategy for smart, sustainable and inclusive growth' COM(2010) 2020 final, 3 March 2010, available at ec.europa.eu.

**51** See the Mission Letter from President Juncker to Commissioner Vestager of 1 November 2014, available at ec.europa.eu.

**52** See, eg DG Comp Management Plan 2017, available at DG Comp's website.

**53** Commission White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025, 1 March 2017, available at ec.europa.eu. For a useful discussion of the likely effect of Brexit on competition law in the UK, see the report of the House of Lords EU Committee *Brexit: competition and state aid*, HL Paper 67, February 2018, available on the UK Parliament's website.

**54** See DG Comp Strategic Plan for 2016–2020, available at DG Comp's website.

**55** See XXth Report on Competition Policy (1990), point 53, and more recently, XXXIInd Report on Competition Policy (2002), points 74 et seq; XXXIIIrd Report on Competition Policy (2003), points 86 et seq; Report on Competition Policy 2005, pts 36 et seq.

**56** See Chap 12 on the liberalisation of these sectors.

**57** See speech by Commissioner Vestager, 'Competition policy in context' 1 December 2016, available at DG Comp's website. See also *Deutsche Telekom*, OJ 2003 L263/9 (upheld on appeal Case T-271/03 *Deutsche Telekom* [2008] ECR II-477, EU:T:2008:101, and on further appeal Case C-280/08P *Deutsche Telekom* [2010] ECR I-9555, EU:C:2010:603) as an eg of the interrelation of EU liberalising legislation, national regulation and the application of Art 102.

**58** See Cases T-22&23/02 *Sumitomo v Commission* [2005] ECR II-4065, EU:T:2005:349, paras 41 et seq (in the case of divergence between the different language versions of a regulation, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part: para 46). *Sumitomo* also confirms that the same principles apply to interpreting EU secondary legislation: ibid, para 77, on which see also Case T-251/00 *Lagardère and Canal+ v Commission* [2002] ECR II-4825, EU:T:2002:278, paras 72 et seq. For a similar exercise in interpreting the corresponding provisions of the EEA Agreement, see Case E-8/00 *LO and NKF v KS* [2002] Rep EFTA Ct 114.

**59** See Schermers and Waelbroeck, *Judicial Protection in the European Union* (6th edn, 2001), paras 40 et seq. For an eg of purposive interpretation in a non-competition case, see Opinion 2/94 *Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, EU:C:1996:140, para 29.

**60** Cases C-68/94&C-30/95 *France v Commission (Kali+Salz)* [1998] ECR I-1375, EU:C:1998:148, paras 152 et seq.

**61** Case C-194/14P *AC-Treuhand v Commission* EU:C:2015:717, para 36.

**62** Cross, Statutory Interpretation (3rd edn, 1995), 105–112, cited by Lord Steyn in *Shanning International v Lloyds TSB Bank* [2001] UKHL 31, [2001] 1 WLR 1462, para 24.

**63** Case C-106/89 *Marleasing v La Comercial* [1990] ECR I-4135, EU:C:1990:395, para 8; Case C-671/13 *Indėlių ir investicijų draudimas and Nemaniūnas* EU:C:2015:418, para 56. For discussion in the UK of the EU and domestic authorities on the correct approach to construing EU legislation see, eg *R (Buckinghamshire County Council) v Secretary of State for Transport* (‘*HS2*’) [2014] UKSC 3 and the cases cited therein; the UK CAT in *T-Mobile v Office of Communications* [2008] CAT 15, paras 80–86 (appeal dismissed, [2008] EWCA Civ 1373); *Office of Communications v Floe Telecom* [2009] EWCA Civ 47, paras 83–114: the *Marleasing* principle did not apply to the construction of a public mobile operator licence.

**64** Case 6/72 *Continental Can v Commission* [1973] ECR 215, 244, EU:C:1973:22. For an overview of competition policy over the last 40 years see Report on Competition Policy (2010) paras 4–33 and Staff Working Paper on Annual Report (2010), pp 11–15.

**65** See, eg Cases C-501/06P *GlaxoSmithKline v Commission* [2009] ECR I-9291, EU:C:2009:610, para 59.

**66** See, eg Cases C-468/06, etc, *Sot. Lelos kai Sia EE* [2008] ECR I-7139, EU:C:2008:504, para 66.

**67** eg when considering the effect on competition of vertical agreements or of a concentration between two undertakings in a vertical relationship.

**68** For the content and presentation of economic and econometric data see Best Practices: economic evidence, available at DG Comp’s website and linked to Press Release IP/10/02 (6 January 2010).

**69** Case C-413/14P *Intel v Commission* EU:C:2017:632, paras 137–138; on the CJ’s judgment in *Intel* see further para 10.103, below.

**70** See, eg the Article 102 Enforcement Priorities Guidance, OJ 2009 C45/7, paras 19–20.

**71** eg where a dominant firm sells at prices below cost and thereby excludes competitors as efficient (or more efficient) than the dominant firm: see paras 10.078, below.

**72** eg where a dominant firm offers quantity rebates that are presumed to reflect gains in efficiency and economies of scale of the dominant firm: see paras 10.102, below

**73** See, eg Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, EU:C:2001:465, para 26; Cases C-295/04, etc, *Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I-6619, EU:C:2006:461, paras 60–61; Case C-360/*09 Pfleiderer v Bundeskartellamt* [2011] ECR I-5161, EU:C:2011:389, paras 29–32; Case C-199/11 *Europese Gemeenschap v Otis* EU:C:2012:684, para 41. On the enforcement of Arts 101 and 102 in the national courts see generally Chap 16, below.

**74** See, eg Case C-429/07 *Inspecteur van de Bleastingdienst v X* [2009] ECR I-4833, EU:C:2009:359, paras 36–39 (powers of the Commission to submit written observations to a national court); Case C-439/08 *VEBIC* [2010] ECR I-12471, EU:C:2010:739, para 61 (ability of a NCA to participate in appeals against its decisions); and Case C-557/12 *Kone* EU:C:2014:1317, paras 32–34 (availability of 'umbrella damages', that is, claims for damages from cartelists in respect of higher prices charged by non-cartelists who follow the cartelists in increasing their prices).

**75** Damages Directive (n 33, above).