

# Contents

## Part I General Principles

<b>1 The Significance of Freedom of Competition in the European Union Law . . . . .</b>	<b>3</b>
1.1 Foundation for a Pan-European Market . . . . .	3
1.1.1 Competition as an Integrating Factor . . . . .	3
1.1.2 Modified Focus on Integration . . . . .	7
1.1.3 Increased Efficiency Through Distortion-Free Competition . . . . .	9
1.1.4 Distortion-Free Competition . . . . .	10
1.1.5 Equality of Opportunity as a Foundation . . . . .	12
1.1.6 Competition as a Part of the Common Economic System . . . . .	14
1.1.7 Distortion-Free Competition as a System? . . . . .	15
1.2 More Economic Approach . . . . .	20
1.2.1 Rejection from the ECJ . . . . .	20
1.2.2 Ambivalent Position of the Commission . . . . .	27
1.2.3 Practicality of the More Economic Approach . . . . .	33
1.2.4 A Shift in Authority? . . . . .	36
1.2.5 Legal Certainty . . . . .	37
1.2.6 Final Legal Assessment . . . . .	38
1.3 Freedom of Competition and Fundamental Freedoms . . . . .	39
1.3.1 Close Substantive and Legal Connection . . . . .	39
1.3.2 Freedom of Competition as a Fundamental Freedom . . . . .	42
1.3.3 Parallel Structure . . . . .	47
1.3.4 Distinctions . . . . .	71
1.4 Freedom of Competition and Fundamental Rights . . . . .	73
1.4.1 Distinctions and Parallels . . . . .	73
1.4.2 Product of the Duty to Protect Fundamental Rights . . . . .	75
1.4.3 Overlaps . . . . .	76
1.4.4 Fundamental Rights as Defensive and Access Rights . . . . .	78

1.5	Special Regulations . . . . .	92
1.5.1	Transport Sector . . . . .	92
1.5.2	Agriculture . . . . .	93
1.5.3	Coal and Steel . . . . .	94
1.5.4	Nuclear Power . . . . .	94
1.5.5	Measures to Protect Essential National Security Interests . . . . .	95
	References . . . . .	99
<b>2</b>	<b>European, National and International Competition Regime . . . . .</b>	<b>107</b>
2.1	Distribution of Competences Between European Union and Member States . . . . .	107
2.1.1	Developmental Stage . . . . .	107
2.1.2	Substantive Linkage of National and European Competition Law . . . . .	116
2.1.3	Organisational Overlap . . . . .	124
2.2	International Dimension of European Competition Law . . . . .	132
2.2.1	Introduction . . . . .	132
2.2.2	Application of EU Rules on Competition to Undertakings Operating Internationally . . . . .	134
2.2.3	Cooperation with Competition Authorities from Third Countries Using the United States as an Example . . . . .	147
2.2.4	Regarding the Compatibility of the EU Rules on Competition with GATT and WTO . . . . .	150
2.2.5	Influence on International Trade by EU Competition Law . . . . .	163
	References . . . . .	170

## **Part II Business Cooperations and Coordination Actions**

<b>3</b>	<b>Prohibition of Cartels . . . . .</b>	<b>175</b>
3.1	Basic Structure and Objectives . . . . .	175
3.1.1	Purpose . . . . .	175
3.1.2	Relationship to Other Rules on Competition . . . . .	178
3.1.3	Development . . . . .	185
3.1.4	System Design . . . . .	193
3.2	Obligees . . . . .	202
3.2.1	Undertakings . . . . .	202
3.2.2	Associations of Undertakings . . . . .	239
3.2.3	Application to Undertakings in Third Countries . . . . .	241
3.3	Agreements Between Undertakings . . . . .	242
3.3.1	Importance and Distinctions Between Other Forms of Behaviour . . . . .	242
3.3.2	Common Declaration of Intent . . . . .	245
3.3.3	Between Undertakings . . . . .	258

3.4	Decisions by Associations of Undertakings . . . . .	262
3.4.1	Association of Undertakings as a Form of Cooperation . . . . .	262
3.4.2	Possible Forms of Decision-Making . . . . .	266
3.4.3	Actual Measures . . . . .	267
3.4.4	The Question of Binding Effect . . . . .	268
3.5	Concerted Practices . . . . .	270
3.5.1	Definition and Basic Structure . . . . .	270
3.5.2	Coordination . . . . .	274
3.5.3	Behaviour . . . . .	285
3.6	Appreciability as Unwritten Feature . . . . .	290
3.6.1	Explanation and Definition . . . . .	290
3.6.2	De Minimis Notice . . . . .	293
3.7	Object or Effect of Creating an Impairment of Competition . . . . .	301
3.7.1	Structure Based on the Text . . . . .	301
3.7.2	Protected Competition . . . . .	303
3.7.3	Intent of Effect . . . . .	335
3.7.4	Examples Included in Art. 101 (1) lit. a) TFEU . . . . .	349
3.8	Capacity to Impair Trade Between Member States . . . . .	358
3.8.1	Importance . . . . .	358
3.8.2	Generalising Rules . . . . .	360
3.8.3	Trade Between Member States . . . . .	363
3.8.4	Capacity to Impair . . . . .	368
3.8.5	Appreciability . . . . .	374
3.9	Certain Behaviours Falling Outside of the Definition . . . . .	377
3.9.1	Classification . . . . .	377
3.9.2	Relevance of State Action . . . . .	378
3.9.3	Definitional Exclusion of Environmentally-Related Anti-competitive Behaviour? . . . . .	386
3.9.4	Definitional Exclusion of Pro-competitive Measures . . . . .	388
3.10	Rule of Reason? . . . . .	391
	References . . . . .	400
<b>4</b>	<b>Exemptions . . . . .</b>	<b>407</b>
4.1	System . . . . .	407
4.1.1	Direct Application of Defined Exemptions . . . . .	407
4.1.2	Block Exemptions . . . . .	419
4.1.3	Specific Exemptions . . . . .	423
4.2	Block Exemption Regulations . . . . .	427
4.2.1	General Requirements . . . . .	427
4.2.2	Overall System . . . . .	429
4.2.3	Individual Block Exemption Regulations . . . . .	432

4.3	Pursuit of an Objective Eligible for Exemption . . . . .	468
4.3.1	Basic Structure . . . . .	468
4.3.2	Internal Market as a Basis for Refinement . . . . .	471
4.3.3	Sufficient Probability of Direct Gains in Efficiency . . . . .	477
4.3.4	Improvement of Production or Distribution of Goods . . . . .	483
4.3.5	Promotion of Technical and Economic Progress . . . . .	486
4.3.6	Environmental Protection as Additional Grounds for an Exemption? . . . . .	489
4.3.7	Coherence Between the Objectives of the EU or the Member States Not Required . . . . .	491
4.4	Appropriate Participation in the Benefits by Consumers . . . . .	492
4.4.1	Consumers . . . . .	492
4.4.2	Benefits . . . . .	493
4.4.3	Appropriate Participation in Benefits . . . . .	500
4.5	Indispensability . . . . .	503
4.5.1	Comprehensible Examination of Indispensability from a Substantive, Geographic and Temporal Standpoint . . . . .	503
4.5.2	Earlier Achievement of Objectives . . . . .	511
4.5.3	Acceptance of Higher Costs . . . . .	512
4.5.4	Exclusion of Competitors from Other Member States . . . . .	512
4.5.5	The Problem of Uncertain Forecasts . . . . .	513
4.6	Not Possible to Eliminate Competition for a Significant Share . . . . .	515
4.6.1	No Ability to Displace Competitors . . . . .	515
4.6.2	Relationship to a Dominant Position Under Art. 102 TFEU . . . . .	516
4.6.3	Investigative Approach . . . . .	518
4.6.4	Sliding Scale . . . . .	518
4.6.5	Residual Competition in the Case of Extensive Cooperation . . . . .	520
4.7	Additional Justifications? . . . . .	523
4.7.1	Limited Analogous Application of the Barriers to the Free Movement of Goods . . . . .	523
4.7.2	Practical Concordance with EU Objectives . . . . .	531
	References . . . . .	542
5	<b>Horizontal and Vertical Restraints in Practice . . . . .</b>	551
5.1	Horizontal Agreements . . . . .	551
5.1.1	Classic Cartel Agreements, Market Sharing and Price Fixing . . . . .	551
5.1.2	Structural Crisis Cartels . . . . .	554
5.1.3	Specific Agreements Taken from the Guidelines . . . . .	557
5.1.4	Standardisation Agreements . . . . .	577
5.1.5	Exchange of Information . . . . .	579
5.1.6	Consortia . . . . .	584

5.2	Vertical Restraints in Practice . . . . .	586
5.2.1	General Framework and Scope . . . . .	586
5.2.2	Excepted Areas . . . . .	589
5.2.3	Definition of a Cartel . . . . .	592
5.2.4	Exemption Pursuant to Art. 101 (3) TFEU . . . . .	595
5.2.5	Practical Examples . . . . .	598
	References . . . . .	616
<b>6</b>	<b>Consequences in General Under Civil Law . . . . .</b>	<b>619</b>
6.1	Annulment . . . . .	619
6.1.1	Integration into the Prohibition of Cartels as a Whole . . . . .	619
6.1.2	Direct Application . . . . .	620
6.1.3	Absolute Character . . . . .	620
6.1.4	Limited Substantive Scope . . . . .	621
6.2	Right to Injunctive Relief . . . . .	623
6.3	Rights to Damages . . . . .	624
6.3.1	Applicable Law . . . . .	624
6.3.2	Jurisdiction . . . . .	625
6.3.3	Effectiveness . . . . .	626
6.3.4	Fundamental Requirements . . . . .	628
6.3.5	Board Member Liability . . . . .	629
6.3.6	Competition Law Related Compliance . . . . .	631
	References . . . . .	633

### **Part III Abuse of a Dominant Position**

<b>7</b>	<b>Prohibition of Abusive Practices . . . . .</b>	<b>639</b>
7.1	Elements and Significance . . . . .	639
7.1.1	Essential Function for the Internal Market . . . . .	639
7.1.2	Prohibition of Abusive Practices as a Guarantee of Functioning Residual Competition . . . . .	644
7.1.3	Comprehensive Protective Effect . . . . .	646
7.1.4	Distinction from Other Competitive Elements . . . . .	650
7.1.5	Directly Applicable Prohibition . . . . .	658
7.1.6	Structure of the Prohibition of Abusive Practices . . . . .	659
7.2	Dominant Position . . . . .	665
7.2.1	Primary Law Criteria . . . . .	665
7.2.2	Relevant Market . . . . .	670
7.2.3	Defining a Dominant Position . . . . .	686
7.3	Abusive Exploitation . . . . .	701
7.3.1	Comprehensive Consideration of Behaviour Distorting Competition . . . . .	701
7.3.2	Imposing Unfair Trading Conditions (Art. 102 sent. 2 alt. a) TFEU) . . . . .	706

7.3.3	Limiting Production, Markets or Technical Development to the Prejudice of Consumers (Art. 102 sent. 2 alt. b) TFEU) . . . . .	719
7.3.4	Discriminating Against Trading Partners (Art. 102 sent. 2 alt. c) TFEU) . . . . .	745
7.3.5	Unrelated Supplementary Obligations (Art. 102 sent. 2 alt. d) TFEU) . . . . .	757
7.3.6	General Clause Under Art. 102 sent. 1 TFEU . . . . .	764
7.4	Abuse of a Dominant Position by Several Undertakings . . . . .	803
7.4.1	Attainment of a Dominant Position . . . . .	803
7.4.2	Joint Abusive Conduct . . . . .	807
7.5	Potential Impairment of Transnational Trade . . . . .	808
7.5.1	Required International Element . . . . .	808
7.5.2	Effects on Transnational Trade or the Competitive Structure in the Internal Market . . . . .	808
7.5.3	Appreciability . . . . .	811
7.6	Justifying Infringements . . . . .	813
7.7	Legal Consequences . . . . .	814
7.7.1	Effective Prohibition . . . . .	814
7.7.2	Invalidity . . . . .	816
7.7.3	The Limits of Invalidity . . . . .	817
7.7.4	Prohibitions and Compensation for Damages . . . . .	818
	References . . . . .	822

#### **Part IV Anti-trust Proceedings**

8	<b>Anti-trust Proceedings and Fines</b> . . . . .	829
8.1	In General . . . . .	829
8.1.1	Introduction . . . . .	829
8.1.2	Relationship Between European Union Law and National Law . . . . .	830
8.1.3	Temporal Application of Procedural Law . . . . .	834
8.1.4	Official Competences . . . . .	837
8.1.5	The Network of Competition Authorities . . . . .	840
8.2	Commission Proceedings . . . . .	865
8.2.1	Initiation and Advance Actions . . . . .	865
8.2.2	Complaint . . . . .	866
8.2.3	Investigatory Authority . . . . .	874
8.2.4	Procedural Principles . . . . .	920
8.2.5	Potential Actions by the Commission . . . . .	939
8.2.6	Sanctions . . . . .	976
8.3	Calculating Fines . . . . .	995
8.3.1	Relevant Parameters . . . . .	995
8.3.2	Commission Guidelines . . . . .	998

8.3.3	General Standards . . . . .	1012
8.3.4	Compliance . . . . .	1014
8.3.5	Objective View and Mistake of Law . . . . .	1020
8.3.6	Unreasonable Delay . . . . .	1033
8.3.7	Financial Situation . . . . .	1039
8.3.8	Scope of Review . . . . .	1040
8.4	Proceedings Before the National Competition Authorities . . . . .	1044
8.4.1	In General . . . . .	1044
8.4.2	Significance of National Law . . . . .	1045
8.4.3	Significance of Art. 5 Council Regulation (EC) No. 1/2003 . . . . .	1046
8.4.4	Authorities . . . . .	1049
8.4.5	Regulatory Scope . . . . .	1051
8.4.6	Authority to Impose Sanctions . . . . .	1052
8.4.7	Effects in Relation to Other Member States . . . . .	1054
8.4.8	Exemption Decisions . . . . .	1055
8.4.9	Mere Finding of an Infringement . . . . .	1056
8.4.10	No Negative Findings . . . . .	1056
8.5	Legal Remedies . . . . .	1057
8.5.1	Actions Against Commission Decisions . . . . .	1057
8.5.2	Against Decisions of the National Competition Authorities . . . . .	1067
8.5.3	Civil Enforcement of the Prohibition of Cartels Before National Courts . . . . .	1069
8.6	Complaints . . . . .	1071
8.6.1	Admissibility of a Complaint . . . . .	1071
8.6.2	Sequence of the Proceedings . . . . .	1073
8.6.3	Alternative: Bringing an Action Before a National Court . . . . .	1078
	References . . . . .	1085

## Part V Concentrations

9	Merger Control . . . . .	1093
9.1	General Principles . . . . .	1093
9.1.1	Legal System . . . . .	1093
9.1.2	Between Impairment and Promotion of Competition . . . . .	1095
9.1.3	Approaches Taken by the ECJ . . . . .	1097
9.1.4	Prioritisation of the Protection of Competition in Primary Law . . . . .	1100
9.2	Relevant Concentrations . . . . .	1101
9.2.1	System Design . . . . .	1101
9.2.2	Concentration . . . . .	1102
9.2.3	Mandatory Turnover Thresholds . . . . .	1165
9.2.4	Process-Related Expansions . . . . .	1177

9.3	Standard for Evaluation . . . . .	1178
9.3.1	Significant Impairment of Competition (SIEC Test) . . . . .	1178
9.3.2	Relevant Market . . . . .	1184
9.3.3	Impairments to Competition as a Result of Large Market Share . . . . .	1189
9.3.4	Potential Competition as an Equally-Weighted Factor . . . . .	1201
9.3.5	Uncertainties in Forecasting Complicated Developments in Future . . . . .	1202
9.3.6	Mitigation or Prevention of an Impediment to Competition . . . . .	1207
9.3.7	Non-horizontal Concentrations . . . . .	1217
9.3.8	Market-Related Uniform Behaviour . . . . .	1236
9.3.9	Significant Impairment of Effective Competition by an Oligopoly . . . . .	1243
9.3.10	Rescue Mergers . . . . .	1247
9.4	Procedure . . . . .	1251
9.4.1	Basic Process . . . . .	1251
9.4.2	Notice . . . . .	1253
9.4.3	Preliminary Examination and Initiation of Proceedings As Well As Prohibition of Implementation . . . . .	1268
9.4.4	Information, Inspection, Hearing . . . . .	1286
9.4.5	Inter-Relationships with National Authorities . . . . .	1303
9.4.6	Simplified Procedure . . . . .	1319
9.5	Decisions and Legal Protection . . . . .	1322
9.5.1	Potential Decisions and Their Publication . . . . .	1322
9.5.2	Decision-Making Powers . . . . .	1323
9.5.3	Referral to the National Competition Authorities After Notification (Art. 9 ECMR) . . . . .	1342
9.5.4	Fines and Periodic Penalty Payments (Art. 14, 15 ECMR) . . . . .	1346
9.5.5	Legal Remedies . . . . .	1347
	References . . . . .	1351

## **Part VI Special Considerations in Cases of State Influence**

10	Company-Related State Conduct . . . . .	1361
10.1	State Influence of Private Competition . . . . .	1361
10.1.1	Developmental Stage . . . . .	1361
10.1.2	Distinction from the Free Movement of Goods . . . . .	1366
10.1.3	Exclusion of Art. 106 (1) TFEU . . . . .	1367
10.1.4	Direct Application of Art. 101 (1), Art. 102 TFEU . . . . .	1368

10.2	Exemption or Justification . . . . .	1372
10.2.1	Problem . . . . .	1372
10.2.2	Conduct That Facilitates Behaviour . . . . .	1372
10.2.3	Art. 101 (3) TFEU . . . . .	1373
10.2.4	Analogous Application of Barriers Recognised in Connection with the Free Movement of Goods . . . . .	1374
	References . . . . .	1379
<b>11</b>	<b>Services of General Interest and Special Rights . . . . .</b>	<b>1383</b>
11.1	Fundamental Applicability of the Rules on Competition . . . . .	1383
11.1.1	Compromise Character . . . . .	1383
11.1.2	Dual Approach . . . . .	1384
11.1.3	Public and Undertakings Granted Extraordinary Rights . . . . .	1389
11.1.4	Duties of the Member States . . . . .	1395
11.2	Limited Special Status . . . . .	1405
11.2.1	Continuing Authority of Art. 106 (2) Despite Art. 14 TFEU . . . . .	1405
11.2.2	Services of General Economic Interest . . . . .	1407
11.2.3	Revenue-Producing Monopolies . . . . .	1417
11.2.4	Requirements for Dispensation . . . . .	1417
11.3	Existing Arrangements . . . . .	1430
11.3.1	Art. 106 (3) TFEU as Legal Basis . . . . .	1430
11.3.2	Transparency Directive . . . . .	1431
11.3.3	Telecommunications . . . . .	1432
11.4	Significance of Art. 14 TFEU . . . . .	1433
11.4.1	Origins . . . . .	1433
11.4.2	Relationship to Art. 106 TFEU . . . . .	1434
11.4.3	Art. 14 TFEU as an Overarching Equally-Weighted Consideration . . . . .	1436
11.4.4	Organisational Directive . . . . .	1442
11.5	Comprehensive View . . . . .	1450
	References . . . . .	1453
	<b>Register . . . . .</b>	<b>1461</b>