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The obligations of Member States under the EU competition rules

1. Introduction

This chapter will examine the obligations of Member States in relation to EU competition law. Specifically, it will consider the obligations that Article 4(3) TEU and Articles 37 and 106 TFEU place upon Member States; Articles 107 to 109 TFEU on state aid will be briefly mentioned at the end of the chapter. The expression 'Member State' for these purposes includes all organs of the state, including a national competition authority[1] and an economic regulator[2]. Article 4(3) imposes a duty of 'sincere cooperation' on Member States and the EU; Article 37 deals specifically with state monopolies of a commercial character; and Article 106 is concerned with measures that are contrary to the Treaty. In *France v Commission*[3] Advocate General Tesauro spoke of the 'obscure clarity' of Article 37 as opposed to the 'clear obscurity' of Article 106. These provisions are complex and the case-law reveals that the encroachment of EU law on national monopolies and state activity is inevitably political and contentious.

Article 3(3) TEU provides that the EU shall establish an internal market which, as explained in Protocol 27 to the Treaties[4], includes 'a system ensuring that competition is not distorted'[5]. Article 3(3) also provides that one of the EU's objectives is a highly competitive social market economy. Article 119 TFEU provides that the activities of the Member States and the EU shall be conducted in accordance with the principle of an open

[1] See eg Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* EU:C:2003:430, discussed at '*Consorzio Industrie Fiammiferi*', p 237 later in this chapter.

[2] For example, in March 2011 the National Lottery Commission (now the Gambling Commission) refused consent to Camelot UK Lotteries Ltd, the operator of the UK Lottery, to provide commercial services such as over-the-counter cash bill payment and mobile phone top-up through its National Lottery terminals as this gave rise to 'serious concerns' about a possible infringement of Article 106 in conjunction with Articles 101 and/or 102.

[3] Case C-202/88 EU:C:1991:120, at para 11 of his Opinion.

[4] Protocols to the Treaties form an integral part thereof: Article 51 TEU.

[5] This objective was previously contained in Article 3(1)(g) of the EC Treaty: see ch 2, 'The competition chapter in the TFEU', pp 48–49.

market economy with free competition[6]. State involvement in economic activities may work against this goal[7]; however, Member States may resist too much interference at an EU level in domestic economic and social policy. Articles 101 and 102 are essentially private law provisions, conferring rights and imposing obligations on undertakings; many other Articles in the TFEU are primarily of a public law nature, imposing obligations on Member States. It can be argued that it is inappropriate for courts and competition authorities to scrutinise state intervention under EU law when domestic public bodies are accountable for their actions through political and democratic control. However, excluding Member States from competition law scrutiny runs the risk that state measures could seriously harm competition. For this reason Articles 101 and 102 have been applied, in conjunction with Article 4(3) TEU and Article 106 TFEU, to impose obligations upon Member States not to act in ways which undermine the effectiveness of the competition rules.

EU law is neutral on the issue of public ownership of industry in itself. Article 345 TFEU provides that the Treaties 'shall in no way prejudice the rules in Member States governing the system of property ownership'. This means that Member States may confer legal monopolies on organs of the state or on undertakings that are not publicly owned, and in cases under Article 106(1)[8] the Court of Justice has held that the conferment of special or exclusive rights on an undertaking is not, in itself, an infringement of EU law. However, there is a tension between this principle and the obligation imposed on Member States by Article 106(1) not to enact nor to maintain in force measures contrary to the competition rules, with the result that property rights are not as inviolable as the wording of Article 345 suggests[9]. Indeed, some of the judgments of the Court of Justice on the relationship of Article 102 with Article 106(1) have come close to challenging the existence of those rights[10].

2. Article 4(3) TEU—Duty of Sincere Cooperation

Article 4(3) TEU provides that the EU and the Member States shall assist each other in carrying out tasks which flow from the Treaties. Article 4(3) imposes positive and negative duties on Member States: it requires them to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the EU institutions and to refrain from any measure which could jeopardise the attainment of the EU's objectives. Article 3(3) TEU and Protocol 27 identify one of those objectives as the institution of a system ensuring that competition in the internal market is not distorted. Taken together, these provisions mean that Member States should not act in such a way as to undermine the effectiveness of the competition rules. Whether and when Article 4(3) TEU requires a Member State to take or to desist from taking measures depends on the particular circumstances of the case; it is for the Member State to choose the most appropriate course of action to take[11].

[6] The Court of Justice stressed the importance of Article 119 TFEU in Case C-198/01 *Consorzio Industrie Fiammiferi (CIF)* EU:C:2003:430, para 47.

[7] Note that Article 119 TFEU does not, by itself, impose obligations on Member States: Case C-181/06 *Deutsche Lufthansa* EU:C:2007:412, para 31.

[8] See eg Case 155/73 *Sacchi* EU:C:1974:40, para 14; Case C-260/89 *ERT v Dimotiki* EU:C:1991:254, para 16; Case C-41/90 *Höfner & Elser v Macrotron GmbH* EU:C:1991:161, para 29.

[9] See further 'Making sense of the case law on Article 102 in conjunction with Article 106(1)', pp 248–253, later in this chapter.

[10] See 'Article 106(1)', pp 240–254, later in this chapter.

[11] *Ryanair Holdings plc v Competition Commission* [2012] EWCA Civ 1632, para 55.

There have been many cases in which individuals and undertakings have invoked Article 4(3) in proceedings in the criminal and civil courts of Member States, both as claimant and defendant, to claim that a particular law of a Member State is unenforceable because of its incompatibility with the competition rules in the Treaty; many of these cases have led to references to the Court of Justice under Article 267 TFEU, and will be discussed in this section of the chapter. The Court has established that the obligation of Member States to disapply national legislation that contravenes EU competition law attaches not only to national courts but also to administrative bodies, including national competition authorities[12]. Where a Member State is in breach of its obligations under Article 4(3) it would also be possible for the Commission to take action against it, either by initiating an infringement procedure under Article 258 TFEU, as in the case of *Commission v Italy*[13], or, where there is an infringement of Article 106(1), by using its powers under Article 106(3)[14].

(A) The relationship between Article 4(3) TEU and Articles 101 and 102 TFEU

The case-law on Article 4(3) is complex, for reasons that are not difficult to understand[15]. It is obvious that measures adopted by Member States may distort competition: they might do so, for example, by imposing minimum or maximum prices for goods or services; by adopting discriminatory measures of taxation; by imposing regulatory rules that make it difficult for undertakings to enter markets; or by operating restrictive licensing regimes for particular economic activities. Each of these measures might have serious implications for the competitiveness of markets. However, the issue that arises in relation to Article 4(3), when read in conjunction with Articles 101 and/or 102, is the extent to which those measures can be challenged, and be found to be unlawful, under EU competition law.

Article 4(3) is addressed to Member States; Articles 101 and 102 are directed to undertakings. The conundrum is to decide when a Member State can be held liable for behaviour of undertakings that infringes the competition rules. On the one hand, Member States are naturally jealous of their sovereignty, and do not welcome the use of Article 4(3) to undermine national laws, delegated legislation, regulatory regimes and other measures because they happen to distort competition; a broad use of Article 4(3) would be particularly objectionable given that there are clear legal bases for proceeding against Member States under other Treaty provisions dealing, for example, with the free movement of goods and services. On the other hand, the full effectiveness of Articles 101 and 102 could be seriously undermined if Member States could facilitate anti-competitive behaviour by adopting measures that have the same effect on the market as the undertakings could

[12] See Case C-198/01 *Consorzio Industrie Fiammiferi (CIF)* EU:C:2003:430, paras 49–50.
[13] Case C-35/96 EU:C:1998:303; see 'Article 106(3)', pp 260–263, later in this chapter.
[14] See further 'Article 106(3)', pp 260–263, later in this chapter.
[15] For interesting discussions of the issues involved see Castillo de la Torre 'State Action Defence in EC Antitrust Law' (2005) 28 World Competition 407; Sauter and Schepel, *State and Market in European Union Law* (Cambridge University Press, 2009), pp 104–119; Fox and Healey 'When the State Harms Competition—The Role for Competition Law' (2014) 79(3) Antitrust Law Journal 769; Lallemand-Kirche, Tixier and Piffaut 'The Treatment of State-owned Enterprises in EU Competition Law: New Developments and Future Challenges' (2017) 8 JECLAP 475; OECD Best Practices Roundtable, *Competition Law and State-owned Enterprises* (2018), available at www.oecd.org/competition; on the position in the US see *North Carolina State Board of Dental Examiners v Federal Trade Commission* 574 US 494 (2015).

have achieved themselves[16]. The case-law of the Court of Justice has sought to achieve a balance and to identify those infringements of Articles 101 and 102 for which Member States must bear responsibility.

(B) The case-law predominantly concerns Article 4(3) TEU in conjunction with Article 101 TFEU

It is noticeable that state measures that raise issues in relation to abusive behaviour under Article 102 usually arise in the context of Article 106(1), which imposes a duty on Member States not to enact nor to maintain in force measures in the case of 'public undertakings and undertakings to which Member States grant special or exclusive rights' which infringe the Treaty and, specifically, the competition rules[17]. The case-law on Article 4(3) therefore has been predominantly concerned with the liability of Member States for infringements of Article 101[18]. Before considering the cases themselves, it may be helpful to illustrate the type of problem that arises. Suppose the following:

- in Member State A all lawyers belong to a privately established bar association and agree to comply with the fees that it recommends for legal services
- in Member State B the state itself fixes legal fees
- in Member State C the bar association is established by law but the association is free to decide whether to recommend fees and, if so, to determine the level of those fees
- in Member State D the state requires the bar association to fix fees but leaves it to set the fees
- in Member State E a government Minister has the power, by order, to decree that all lawyers must comply with a draft tariff of fees prepared by the bar association.

In each of these cases the likely outcome will be that there is little competition in relation to legal fees: the effect is that of a horizontal cartel. However, in EU competition law the important question is which, if any, of these situations is unlawful; and, specifically in the case of Article 4(3), whether there is a Member State measure that violates EU law with the consequence that the state must take appropriate measures to enable EU law to be fully applied[19]. These questions will be considered after the case-law has been analysed.

(C) The case-law on Article 4(3) and the competition rules

(i) The INNO doctrine

In *INNO v ATAB*[20] the Court of Justice, dealing with the taxation of tobacco in Belgium, held that the combined effect of Article 4(3) TEU and Articles 101 and 102 TFEU[21] meant that a Member State could infringe EU law by maintaining in force legislation which could deprive the competition rules of their effectiveness. Subsequent cases have had to search out the implications of this judgment[22].

[16] See eg Case C-347/16 *BEB v KEVR* EU:C:2017:816, para 52.
[17] See 'The obligations on Member States under Article 106(1)', p 245, later in this chapter.
[18] See 'The case law on Article 4(3) and the competition rules', pp 235–239, later in this chapter.
[19] The utility of this case law has been questioned by Faull and Nikpay (eds) *The EU Law of Competition* (Oxford University Press, 3rd ed, 2014), paras 6.06–6.07.
[20] Case 13/77 EU:C:1977:185.
[21] The Court also referred to Article 3(1)(g) EC but this provision was repealed by the Lisbon Treaty with effect from 1 December 2009; on Article 3(1)(g) EC and Protocol 27 to the Treaties see ch 2, 'The competition chapter in the TFEU', pp 48–49.
[22] The Opinion of AG Maduro in Case C-94/04 *Cipolla* EU:C:2006:76, paras 31–40 contains a useful review of the case-law.

(ii) Unsuccessful application of the INNO doctrine

There have been several judgments in which the Court of Justice has concluded that the *INNO* doctrine did not apply to state involvement in the conduct of undertakings. A challenge to French legislation requiring retailers of books to comply with minimum resale prices imposed by publishers failed since the Court of Justice was not certain that this practice was unlawful under Article 101 anyway[23]; a challenge to fixed minimum prices for petrol also failed, since this was a pure state measure unrelated to any agreement between undertakings[24]. In *Ministère Public v Asjes*[25] Asjes was prosecuted for undercutting the air fares approved by the Minister for Civil Aviation and made binding upon all traders by French law. Asjes challenged the compatibility of this law with EU law. The action failed since, at the time, there was no implementing regulation for the application of the competition rules to the air transport sector; this meant that there was no mechanism in place for determining whether any agreements infringed the competition rules[26].

(iii) Successful application of the INNO doctrine

(a) BNIC v Yves Aubert

The *INNO* doctrine was successfully applied in *BNIC v Yves Aubert*[27]. BNIC, a French trade association representing wine-growers and dealers in France, established production quotas for the wine-growers. A ministerial decree was then made making these quotas binding on the entire industry and providing for fines to be imposed on anyone who exceeded them. The Court of Justice held that the decree was itself unlawful since it had the effect of strengthening the impact of the prior agreement made within the membership of BNIC; as such it was a breach of France's obligations under the Treaty. It followed that an action brought against Yves Aubert by BNIC for infringement of the extension order failed[28].

(b) Vlaamse Reisbureaus v Sociale Dienst

In *Vlaamse Reisbureaus v Sociale Dienst*[29] a tour operator in Belgium brought an action against an association of travel agents which was passing on to its customers the commission it received from tour operators. By Belgian law the tour operator was permitted in these circumstances to bring an action for unfair competition against the price-cutter. The defendant raised the incompatibility of this law with Article 101(1). The Court of Justice held that there was a constellation of agreements in the industry between tour operators and agents intended to dampen price competition and which infringed Article 101(1); the Belgian legislation buttressed this anti-competitive system by giving it permanent effect, extending it to non-participating undertakings and providing penalties for firms which passed on their commission. Therefore the legislation infringed Article 101(1) TFEU and Article 4(3) TEU, and the tour operator's action would fail.

[23] See Case 229/83 *Association des Centres Distributeurs Edouard Leclerc v Au Ble Vert* EU:C:1985:1; Case 254/87 *Syndicat des Libraires de Normandie v L'Aigle Distribution SA* EU:C:1988:413.

[24] Case 231/83 *Cullet v Centre Leclerc, Toulouse* EU:C:1985:29.

[25] Cases 209/84 etc EU:C:1986:188.

[26] Ibid, paras 46–69; however the Court continued that, if an adverse finding had been made under Article 104 or 105(2) TFEU, it would have been contrary to Article 4(3) TEU for France to have reinforced the effects of an unlawful agreement: ibid, paras 70–77; on the application of the competition rules to air transport see ch 23, 'Air transport', pp 1098–1101.

[27] Case 136/86 EU:C:1987:524.

[28] In an earlier judgment, Case 123/83 *BNIC v Clair* EU:C:1985:33, the Court of Justice had held that the rules of BNIC infringed Article 101 and that the involvement of the Minister did not prevent the application of Article 101 to them; this confirmed the findings of the Commission in two earlier decisions, *BNIA* OJ [1976] L 231/24 and *BNIC* OJ [1982] L 379/1.

[29] Case 311/85 EU:C:1987:418.

(c) Ahmed Saeed

In *Ahmed Saeed Flugreisen v Zentrale zur Bekämpfung Unlauteren Wettbewerbs*[30] the Court of Justice held that the approval by aeronautical authorities of air tariffs fixed by agreement by airlines involved a breach by Member States of their obligations under Article 4(3) TEU and Articles 101 and 102 TFEU. The material distinction between this case and *Ministère Public v Asjes*[31] was that by the time of the litigation in *Ahmed Saeed* the implementing regulation in the air transport sector had come into effect[32], so that the problem that existed at the time of the earlier case no longer existed[33].

(d) Consorzio Industrie Fiammiferi

In *Consorzio Industrie Fiammiferi*[34] the Court of Justice held that the Italian competition authority was required by Article 4(3) TEU to disapply an Italian law of 1923 which regulated the manufacture and sale of matches in Italy insofar as that law required or facilitated price fixing and market sharing contrary to Article 101; it added that penalties could be imposed on the undertakings involved in the unlawful period, except to the extent that the behaviour in question was required as opposed to merely being permitted by the legislation.

(e) Synthesis

In *Van Eycke v ASPA*[35] the Court of Justice synthesised the case-law which, in its view, showed that a Member State would be in breach of Article 4(3) TEU in conjunction with Article 101 TFEU if it were

> to require or favour the adoption of agreements, decisions or concerted practices contrary to Article [101] or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere[36].

This is a formulation that the Court of Justice has repeated on subsequent occasions[37]. A particularly clear application of the doctrine is to be found in *Commission v Italy*[38], an action brought by the Commission under Article 258 TFEU challenging—successfully—Italian legislation which required the National Council of Customs Agents to set compulsory tariffs for customs agents. The Court of Justice concluded that the National Council had infringed Article 101(1) by adopting the tariff[39]. However, it held further that Italy had also infringed EU law by requiring the Council to compile a compulsory,

[30] Case 66/86 EU:C:1989:140.

[31] Cases 209/84 etc EU:C:1986:188.

[32] See ch 6 n 26 earlier.

[33] See 'The *INNO* doctrine', p 235, earlier in this chapter.

[34] Case C-198/01 EU:C:2003:430; for comment see Nebbia (2004) 41 CML Rev 839; Kaczorowska 'The Power of a National Competition Authority to Disapply National Law Incompatible with EC Law—and its Practical Consequences' (2004) 25 ECLR 591; for discussion of the *CIF* judgment in the UK see Case 1027/2/3/04 *VIP Communications Ltd (in administration) v OFCOM* [2009] CAT 28, paras 20–27.

[35] Case 267/86 EU:C:1988:427.

[36] Ibid, para 16.

[37] See eg Case C-185/91 *Reiff* EU:C:1993:886, para 14; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* EU:C:1994:240, para 14; Case C-38/97 *Autotrasporti Librandi v Cuttica Spedizioni e Servizi Internazionali* EU:C:1998:454, para 26; Case C-338/09 *Yellow Cab Verkehrsbetriebs GmbH v Landeshauptmann von Wien* EU:C:2010:814, para 26; Case C-327/12 *Ministero dello Sviluppo economico v SOA Nazionale Costruttori* EU:C:2013:827, para 38; Cases C-184/13 etc *Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti* EU:C:2014:2147, para 29.

[38] Case C-35/96 EU:C:1998:303; the Commission's decision finding that the National Council itself had infringed Article 101(1), OJ [1993] L 203/27, was upheld on appeal by the General Court in Case T-513/93 *CNSD v Commission* EU:T:2000:91.

[39] Case C-35/96 EU:C:1998:303, para 51.

uniform tariff[40]; by wholly relinquishing to private economic operators the powers of the public authorities to set tariffs[41]; by prohibiting, in the primary legislation, any derogation from the tariff[42]; and by adopting a Decree having the appearance of approving the tariff by public regulation[43]. In *Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti*[44] the Court of Justice held that Italian legislation providing that the price of road haulage services could not be lower than minimum operating costs, which were themselves fixed by a body composed mainly of private economic operators rather than public officials, violated Article 4(3) TEU and Article 101(1) TFEU; more specifically, the Court did not consider that the fixing of minimum costs satisfied the *Wouters* doctrine[45].

(iv) INNO doctrine applies only where there is an infringement of Article 101

Article 4(3) TEU cannot be used simply because a state measure produces effects similar to those of a cartel. The *INNO* doctrine can be used only to challenge state measures if the requirements for the application of Article 101 TFEU, such as the concepts of undertaking[46] and effect on trade between Member States[47], are met. Furthermore, the *INNO* doctrine applies only where any agreement that is entered into is one that infringes Article 101. This was not the case in *AG2R Prévoyance v Beaudout*[48]: there the agreement was the result of collective bargaining between employers' and employees' organisations within the French traditional bakery and pastry-making sector, a type of agreement that the Court of Justice has held to fall outside Article 101[49].

The requirement that there must be an agreement contrary to Article 101 before a Member State can be found to have infringed Article 4(3) places an obvious limit on the scope of the *INNO* doctrine. Several challenges to national legislation have failed where the final determination of prices remained with a Member State. Article 4(3) TEU in conjunction with Article 101 is infringed only where a Member State requires, favours or reinforces an anti-competitive agreement or abandons its own price-setting powers and delegates them to private operators. Thus in *Meng*[50] the Court of Justice declined to strike down a German regulation which prohibited insurance companies from passing on commissions to their customers: unlike the position in *Vlaamse*, where Belgium had acted to reinforce prior agreements between travel agents, there was no agreement in *Meng*[51]; similar conclusions were reached in *Ohra*[52], *Reiff*[53] and a number of later judgments[54].

[40] Ibid, para 56. [41] Ibid, para 57. [42] Ibid, para 58.
[43] Ibid, para 59. [44] Cases C-184/13 etc EU:C:2014:2147, para 29.
[45] Ibid, paras 47–57; on the possible application of *Wouters* to minimum legal fees see Case C-427/16 etc *CHEZ Elecktron Bulgaria AD* EU:C:2017:890, paras 40–58; on the *Wouters* doctrine generally see ch 3, 'The *Wouters* doctrine', pp 144–145.
[46] See Case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft* EU:C:2009:127, para 70.
[47] See Case C-393/08 *Emanuela Sbarigia v Azienda USL RM/A* EU:C:2010:388, paras 32–33.
[48] Case C-437/09 EU:C:2011:112, paras 37–39.
[49] See ch 3, 'Collective labour relations', p 92 on the *Albany* judgment.
[50] Case C-2/91 EU:C:1993:885; note that *Meng* was decided at about the same time as Case C-267/91 *Keck and Mithouard* [1993] EU:C:1993:905, in which the Court of Justice declined to apply Article 34 TFEU to national marketing rules forbidding the use of loss-leaders (selling below cost) in retail outlets: see Reich 'The "November Revolution" of the European Court of Justice: *Keck*, *Meng* and *Audi* Revisited' (1994) 31 CML Rev 459.
[51] Case C-2/91 EU:C:1993:885, para 14. [52] Case C-245/91 EU:C:1993:887.
[53] Case C-185/91 EU:C:1993:886.
[54] See eg Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* EU:C:1994:240; Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TFI and M6* EU:C:1995:26; Case C-96/94 *Centro Servizi Spediporto v Spedizioni Marittima del Golfo* EU:C:1995:308; Cases C-140/94 etc *DIP SpA v Commune di Bassano del Grappa* EU:C:1995:330; Case C-38/97 *Autotrasporti Librandi v Cuttica Spedizioni e Servizi Internazionali* EU:C:1998:454; Case C-266/96 *Corsica Ferries* EU:C:1998:306; Case C-446/05 *Ioannis Doulamis* EU:C:2008:157.

In *Arduino*[55] the Court of Justice held that the involvement of the Italian National Bar Council in the production of a draft tariff for legal fees did not divest the tariff adopted by the Minister of the character of legislation[56]. In *Ministero dello Sviluppo economico v SOA Nazionale Costruttori*[57] the Court of Justice held that Italian legislation on minimum tariffs for the provision of attestation services in the construction sector did not violate Article 4(3) TEU and Article 101(1) TFEU as it did not give effect to an unlawful agreement, nor did it delegate price-fixing powers to private operators.

(D) Application of the case-law to lawyers' fees

Having analysed the case-law under the *INNO* doctrine, we should return briefly to the alternative situations set out earlier in relation to legal fees[58]:

- in Member State A lawyers agreed to comply with the recommendations of a privately established bar association: this is an infringement by object of Article 101(1) TFEU, assuming an appreciable effect on inter-state trade; however, there is no involvement on the part of the state, so the application of Article 4(3) TEU does not arise[59]
- in the second situation Member State B itself fixed the fees: however, in this case there is no suggestion of an agreement, and so there can be no infringement of Article 101(1); this situation may be suitable for 'competition advocacy' by the competition authority of Member State B[60]
- Member State C established a regulatory mechanism, but left it to the bar association to decide whether to recommend fees and, if so, to determine what their level should be: the association in doing so would be infringing Article 101(1), but it is not clear whether Member State C has acted unlawfully; it has given freedom to the bar association to decide how to act, rather than requiring or encouraging the bar association to act anti-competitively
- Member State D, however, delegated its regulatory role to the bar association and required it to fix fees, so that it would be held responsible for the price fixing that ensues[61]
- Member State E could be considered to be strengthening the effect of an agreement contrary to Article 101 by issuing a decree compelling compliance with the bar association's recommendations. However, the Court of Justice has held that if the Minister is free to vary the tariff, acting on the advice of other public bodies, there would be no infringement; the decree retains the character of legislation rather than amounting to the encouragement or reinforcement of an agreement[62].

[55] Case C-35/99 EU:C:2002:97; for discussion of this case see Thunstrom, Carle and Lindeborg 'State Liability Under the EC Treaty Arising from Anti-Competitive State Measures' (2002) 25 World Competition 515.
[56] Case C-35/99 EU:C:2002:97, paras 40–44; see to similar effect Case C-250/03 *Mauri* EU:C:2005:96, paras 31–38; Cases C-94/04 etc *Cipolla* EU:C:2006:758, paras 48–54; Case C-386/07 *Hospital Consulting Srl v Estate SpA*, EU:C:2008:256; Opinion of AG Mengozzi in Case C-437/09 *AG2R Prévoyance* EU:C:2010:676, paras 36–47.
[57] Case C-327/12 EU:C:2013:827, paras 36–39; see similarly Case C-121/16 *Salumificio Murru SpA v Autotrasporti di Marongiu Remigio* EU:C:2016:543.
[58] See 'The case law predominantly concerns Article 4(3) TEU in conjunction with Article 101 TFEU', p 235, earlier in this chapter; there is an Article 267 reference from Bulgaria pending before the Court of Justice on legal fees established by regulation there: Case C-569/23 *Toplofikatsia*, not yet decided.
[59] On the application of the competition rules to the professions see ch 3, 'The professions', pp 90–91.
[60] On competition advocacy see ch 1, 'Overview of the Practices Controlled by Competition Law', pp 4–5.
[61] See Cases C-427/16 etc *CHEZ Elecktron Bulgaria AD* EU:C:2017:890; see also Case C-438/22 *Em akaunt BG EOOD v Zastrahovatelno aktsionerno druzhestvo Armeets AD* EU:C:2024:71.
[62] Case C-35/99 *Arduino* EU:C:2002:97, paras 40–43; Cases C-94/04 etc *Cipolla* EU:C:2006:758.

3. Article 106 TFEU—Compliance with the Treaties

Article 106[63] provides:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

Article 106(1) is a prohibition addressed to Member States themselves; Article 106(2) provides a limited exception for certain undertakings from the application of the competition rules; Article 106(3) provides the Commission with important powers to ensure compliance with Article 106. The case-law under Article 106 is complex and still developing[64]. After a long period when it was little used it has proved to be a formidable provision in the process of liberalising numerous markets in Europe, in particular in 'utility' sectors such as telecommunications, energy and post and related services. The Court of Justice said in *Spain v Commission* that

> paragraph 2 of Article [106 TFEU], read with paragraph (1) thereof, seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or social policy with the [EU's] interest in ensuring compliance with the rules on competition and the preservation of the unity of the [internal] market[65].

The Commission has said that its experience suggests that Article 106 can be an effective instrument for safeguarding competition in newly liberalised markets, especially where these markets are closely linked to markets reserved by the state for public or privileged incumbents[66].

(A) Article 106(1)

Article 106(1) is closely related to Article 4(3) TEU: each seeks to ensure effective adherence to the Treaty on the part of Member States. However, Article 106 goes beyond Article

[63] For further reading on Article 106 see Buendia Sierra *Exclusive Rights and State Monopolies under EC Law* (Oxford University Press, 1999): this book contains an extensive bibliography of literature on Article 106 at pp 431–451; Faull and Nikpay (eds) *The EU Law of Competition* (Oxford University Press, 3rd ed, 2014), paras 6.04–6.08; Buendia Sierra 'Enforcement of Article 106(1) TFEU by the European Commission and the EU Courts' in Lowe and Marquis (eds) *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law* (Hart, 2016), pp 279–306; Bailey and John (eds) *Bellamy and Child: European Union Law of Competition* (Oxford University Press, 8th ed, 2018), paras 11.010–11.030.

[64] On the wider implications of the case law under Article 106 see Colomo 'Will Article 106 TFEU Case Law Transform EU Competition Law?' (2022) 13(6) JECLAP 385.

[65] Case C-463/00 EU:C:2003:272, para 82.

[66] Commission Staff Working Document, *Ten Years of Antitrust Enforcement under Regulation 1/2003*, SWD (2014) 230, para 77.

4(3) in that it has its own sphere of application and is not limited to compliance with general principles of law. Article 106(1) imposes an obligation on Member States not to enact nor to maintain in force measures 'contrary to those rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109'. Two important features of Article 106(1) should be noted at the outset. The first is that Article 106(1) is a 'renvoi' provision or a 'reference rule', that is to say it does not have an independent application but applies only in conjunction with another Article or other Articles of the Treaties. The second point is that Article 106(1) is not limited in its scope only to infringements of the competition rules; although the competition rules (and the rule of non-discrimination in Article 18) are specifically mentioned, measures that infringe, for example, Article 34 on the free movement of goods[67], Article 45 on the free movement of workers[68], Article 49 on the freedom of establishment[69], Articles 56 and 57 on the free movement of services[70] and Articles 63 to 66 on free movement of capital could all result in an infringement of Article 106(1). It follows that Article 106(1) did not need to have been placed in the chapter of the TFEU on competition law; however, the fact that it is there indicates that the Treaty's authors were aware of the potential for Member States to distort competition through the legislative and other measures that they adopt. The importance of Article 106(1) in relation to the competition rules is that, in certain circumstances, a Member State can be liable for the abuses that have been, or would be, carried out by undertakings.

(i) Undertakings

Article 106(1) applies to measures concerning 'public undertakings and undertakings to which Member States grant special or exclusive rights'. The term 'undertaking' has been considered in the context of Articles 101 and 102 in earlier chapters[71]. In particular, it should be noted that state-owned bodies can be acting as undertakings, but that organs of the state that are not involved in any economic activity fall outside the definition[72].

(ii) Public undertakings

The term 'public undertaking'[73] appears only in Article 106(1), and is not defined. There is no uniform notion of this expression among the Member States, and state intervention in and control of economic behaviour takes many different forms. For this reason, Advocate General Reischl has stated that the term is a concept of EU law which should be given a uniform interpretation for all Member States[74]. In Article 2(1)(b) of the Transparency Directive[75] the Commission said that a public undertaking means

> any undertaking over which the public authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

[67] See eg Case C-18/88 *RTT* EU:C:1991:474.

[68] See eg Case C-179/90 *Merci* EU:C:1991:464.

[69] See eg *Greek Insurance* OJ [1985] L 152/25.

[70] See eg Case C-260/89 *ERT v Dimotiki* EU:C:1991:254.

[71] See ch 3, 'Undertaking and Associations of Undertakings', pp 83–104 and ch 5, 'Undertakings', p 184.

[72] See in particular ch 3, 'Regardless of the legal status of the entity and the way in which it is financed', pp 86–87.

[73] For detailed discussion of this concept see *Buendia Sierra* (ch 6 n 63 earlier), paras 1.113–1.139.

[74] Cases 188/80 etc *France v Commission* EU:C:1982:134.

[75] Commission Directive 80/723/EEC, OJ [1980] L 195/35; this has now been repealed and replaced by Commission Directive 2006/111/EC, OJ [2006] L 318/17. A similar definition is used in the Commission's Notice on the application of the competition rules to the postal sector, OJ [1998] C 39/2, para 4.1.

On appeal, the Court of Justice upheld the legality of the Directive and approved this definition, without elaborating further[76]. The crucial question in each case should be whether the state may exercise such influence, not the legal form of the undertaking in question. The Commission has said that a dominant influence on the part of a public authority may be presumed where the authority holds a majority of the capital or of the voting rights in the undertaking[77].

(iii) Undertakings with 'special or exclusive rights'

Article 106(1) applies to measures in the case both of public undertakings and of undertakings having 'special or exclusive rights': sometimes the latter are referred to as 'privileged undertakings' to distinguish them from public undertakings. It is important to understand what each of the expressions 'special' and 'exclusive' means. The Treaty does not define them, but definitions can be found in Article 2(f) and (g) of the Transparency Directive[78]. In *Ministero dello Sviluppo economico v SOA Nazionale Costruttori*[79] the Court of Justice stated that 'special or exclusive rights' exist where a measure

> confers protection on a limited number of undertakings and . . . may substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions.

Often special or exclusive rights will have been given to a public undertaking, in which case it is unnecessary to give separate consideration to this head of Article 106(1); however, many undertakings may have exclusive or special rights without being 'public'. In *FIFA v Commission*[80] FIFA failed to persuade the General Court that the UK Secretary of State for Culture, Media and Sport had conferred exclusive or special rights on the BBC and ITV, two free-to-air television stations, by placing World Cup football matches on a list that they would then be able to broadcast on a non-exclusive basis. FIFA's complaint was that this led to a distortion of competition in which pay-TV companies could not bid for the very valuable right to show such games on an exclusive basis. The Court observed that the pay-TV companies could still broadcast on a non-exclusive basis[81]. In *Ministero dello Sviluppo economico v SOA Nazionale Costruttori*[82] the Court of Justice held that 'attestation organisations' providing certification services in the construction sector in Italy had not been granted special or exclusive rights: no competitive advantage had been given in favour of any particular organisation(s) and entry was possible for anyone that satisfied specified criteria. In *R (Heathrow Hub Ltd) v Secretary of State for Transport*[83] the English Court of Appeal was not convinced that a history of state ownership and extensive regulation of Heathrow Airport meant that it had been granted special or exclusive rights within Article 106(1).

[76] Cases 188/80 etc *France v Commission* EU:C:1982:257, para 25.

[77] Notice on the application of the competition rules to the postal sector, OJ [1998] C 39/2, para 4.1.

[78] See ch 6 n 75 earlier; 'exclusive rights' and 'special rights' are defined in respectively Articles 1(5) and 1(6) of Commission Directive 2002/77/EC on competition in the markets for electronic communications networks and services, OJ [2002] L 249/21.

[79] Case C-327/12 EU:C:2013:827, para 41; see similarly Opinion of AG Jacobs in Case C-475/99 EU:C:2001:284, paras 87–89.

[80] Case T-68/08 EU:T:2011:44, upheld on appeal Case C-205/11 P *FIFA v Commission* EU:C:2013:478; in Case C-333/21 *European Super League* EU:C:2022:993, para 75 AG Rantos noted that neither FIFA nor UEFA had any special or exclusive right to organise an international or European football competition: see ch 3, 'Sport', pp 145–147.

[81] Case T-68/08 EU:T:2011:44, paras 174–180.

[82] Case C-327/12 EU:C:2013:827, paras 40–43.

[83] [2020] EWCA Civ 213, paras 221–229.

(a) *Exclusive rights*

The following are examples of bodies considered to have been granted exclusive rights:

- a company established by insurance undertakings to perform a specific statutory task[84]
- an agricultural marketing board[85]
- an entity granted a monopoly over the provision of recruitment services[86]
- a dock-work undertaking entrusted with the exclusive right to organise dock work for third parties[87]
- a limited partnership between a Member State, a district authority and eight industrial undertakings responsible for waste management[88]
- a state-owned post office granted a monopoly over postal services which do not form part of a universal service obligation[89].

It would appear that an 'exclusive' right can be granted to more than one undertaking: in *Entreprenørforeningens Affalds v Københavns Kommune*[90] the Court of Justice held that three undertakings authorised to receive building waste in Copenhagen had been granted an exclusive right, but it did not explain why these rights were exclusive rather than special, which would have been a more natural finding[91].

A functional rather than a formalistic approach should be taken to the meaning of 'exclusive rights'. Rights may be exclusive in substance, even though they are not described as such (or as monopolies) in the measure in question. For example, in *La Crespelle*[92] the Court of Justice concluded that a scheme for the artificial insemination of cattle in France involved exclusive rights because of the way the national legislation was operated in practice[93]. Furthermore, the exclusive rights may derive from a series of different legislative and administrative measures rather than just one[94].

The Court has held that the mere fact that a body exercises powers conferred upon it by the state and that it has a dominant position in the market is not sufficient in itself to establish that it has exclusive rights[95]. This is consistent with an early Commission decision that a copyright collecting society that could derive benefits from national copyright legislation did not have exclusive rights where there was no impediment to other such societies claiming the same benefit[96]; nevertheless, the Commission did conclude that the society in question had a dominant position for the purpose of Article 102. The concepts of 'exclusive rights' and 'dominant position' are independent of one another.

[84] Case 90/76 *Van Ameyde v UCI* EU:C:1977:101.

[85] Case 83/78 *Pigs Marketing Board v Redmond* EU:C:1978:214.

[86] Case C-41/90 *Höfner & Elser v Macrotron GmbH* EU:C:1991:161, para 34.

[87] Case C-179/90 *Merci* EU:C:1991:464.

[88] Case C-203/96 *Dusseldorp* EU:C:1998:316, para 58.

[89] Case C-340/99 *TNT Traco SpA v Poste Italiane SpA* EU:C:2001:28.

[90] Case C-209/98 EU:C:2000:279.

[91] Cf para 50 of the Opinion of AG Jacobs in Cases C-271/90 etc *Spain v Commission* EU:C:1992:226.

[92] Case C-323/93 EU:C:1994:368.

[93] Although the Court of Justice did not address the point directly, the Opinion of AG Gulmann indicates that the parties agreed that exclusive rights existed: Case C-323/93 EU:C:1994:185.

[94] See *Exclusive Rights to Broadcast Television Advertising in Flanders* OJ [1997] L 244/18, paras 1 and 2, upheld on appeal Case T-266/97 *Vlaamse Televisie Maatschappij NV v Commission* EU:T:1999:144.

[95] Case C-387/93 *Banchero* EU:C:1995:439, paras 47–53.

[96] GEMA OJ [1971] L 134/15.

(b) Special rights

The Court of Justice's judgment in *France v Commission*[97] indicates that there is a distinction between exclusive and special rights. The Court held that the provisions in the Commission's Directive on Telecommunications Equipment[98] were void insofar as they required Member States to remove special rights from national telecommunications services providers, since it had failed to specify which rights were special or why they were incompatible with the Treaty. In the subsequent Directive on Telecommunications Liberalisation[99] the Commission stated at Article 1(4) that, in the telecommunications sector, special rights include:

> rights that are granted by a Member State to a limited number of undertakings, through any legislative, regulatory or administrative instrument which, within a given geographical area, limits to two or more the number of undertakings, otherwise than according to objective, proportional and non-discriminatory criteria[100].

This definition can presumably be carried over to other sectors of the economy, unless there is specific legislation containing a different one. In *Second Operator of GSM Radiotelephony Services in Italy*[101] the Commission decided that the grant to Telecom Italia of the right to operate a GSM radiotelephony network qualified as a special right, since the operator had been designated otherwise than according to objective and non-discriminatory criteria. In *French savings accounts* the Commission concluded that the grant to three banks of the right to distribute tax-free savings products was a special right[102]. In *MOTOE* the power of the Greek Motorcycling Federation, ELPA, to authorise motorcycling events was held to be a special right within the meaning of Article 106(1)[103].

(iv) 'Measures'

For a Member State to be in breach of Article 106(1) it must have adopted a 'measure'. This expression has been given a wide meaning by the Commission, and its approach has been endorsed by the Court of Justice. In an early Directive under Article 34 TFEU[104] the Commission said that measures in that Article included 'laws, regulations, administrative provisions, administrative practices, and all instruments issued from a public authority, including recommendations'; there is no reason to suppose that the expression should have a different meaning under Article 106(1). In another case under Article 34, *Commission v Ireland*[105], the Court of Justice said that a measure did not have to be legally binding, provided that it might be capable of exerting an influence and of frustrating

[97] Case C-202/88 EU:C:1991:120, paras 31–47; see similarly Cases C-271/90 etc *Spain v Commission* EU:C:1992:440, paras 32 and 34.

[98] Commission Directive 88/301/EEC, OJ [1988] L 131/73.

[99] Commission Directive 2008/63/EC, OJ [2008] L 162/20; for discussion of this definition see the Opinion of AG Jacobs in Case C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz* EU:C:2001:284, paras 83–89.

[100] See similarly Article 2(g) of the Commission's Transparency Directive, ch 6 n 75 earlier.

[101] OJ [1995] L 280/49, para 6; see similarly *Second Operator of GSM Radio Telephony Services in Spain* OJ [1997] L 76/19, para 10.

[102] Commission decision of 10 May 2007.

[103] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* EU:C:2008:376, para 43.

[104] Commission Directive 70/50/EEC based on the provisions of Article 33(7) on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, JO [1970] L 13/29.

[105] Case 249/81 EU:C:1982:402 (the '*Buy Irish*' case).

the aims of the Union[106]. The measure does not have to have been adopted by central government or by a national parliament: a measure of any body that is a manifestation of the state could fall within Article 106(1), such as the local communes in *Corinne Bodson v Pompes Funèbres*[107]. The measure must be directed towards one of the categories of undertakings in Article 106(1): a power of authorisation conferred on a minister within the normal framework of his or her powers is not a measure[108].

It is clear that the expression 'measures' has a wide meaning under Article 106(1); for example:

- the grant of a second mobile licence subject to a substantial licence fee which had not been levied on the incumbent operator amounted to a measure[109]
- the refusal to grant a ferry company access to a state-run port was a measure[110]
- systems of stepped landing fee discounts at various airports were measures[111].

In each of the above cases the Member State had adopted specific measures which affected the conduct of the public undertaking or the undertaking given special or exclusive rights. In some cases a public authority enters into an agreement with an undertaking granting the latter an exclusive right to perform a particular task: for example, to provide funeral services[112]. The question here is whether this amounts to a measure granting exclusive rights, in which case Article 106(1) may apply, or an agreement between undertakings that restricts competition, in which case Article 101(1) may apply. In *Bodson* the Court of Justice considered that Article 101(1) would not be applicable where a local authority was acting pursuant to its public law powers, since it would not be acting as an undertaking[113].

(v) The obligations on Member States under Article 106(1)

Article 106(1) requires Member States to refrain from enacting or maintaining in force any measure contrary to the Treaties, and in particular one which would contravene Article 18, Article 101 or Article 102. The relationship of Article 106(1) with Articles 101 and 102 is complex. Articles 101 and 102 are addressed to undertakings, but Article 106 to Member States: as in the case of Article 4(3)[114], the conceptual issue is to determine how, and in what circumstances, these provisions can operate in such a way as to lead to an infringement of the Treaties by a Member State. For many years this issue was barely addressed at all; however, the position began to change as a result of a remarkable series of cases in 1991 in which the Court of Justice delivered four judgments on the relationship between Article 106(1) and other Treaty Articles, including in particular Article 102. A further landmark judgment, in the *Corbeau* case, followed in 1993[115].

[106] Ibid, para 28.

[107] Case 30/87 EU:C:1988:225.

[108] Case 46/90 *Procureur du Roi v Lagauche* EU:C:1993:852, para 46.

[109] See eg *Second Operator of GSM Radiotelephony in Italy* OJ [1995] L 280/49; *Second Operator of GSM Radiotelephony in Spain* OJ [1997] L 76/19.

[110] *Port of Rødby* OJ [1994] L 55/52.

[111] See eg *Brussels National Airport (Zaventem)* OJ [1995] L 216/8; *Portuguese Airports* OJ [1999] L 69/31, upheld on appeal Case C-163/99 *Portugal v Commission* EU:C:2001:189; *Spanish Airports* OJ [2000] L 208/36.

[112] Case 30/87 *Corinne Bodson v Pompes Funèbres* EU:C:1988:225.

[113] See ch 3, 'Activities connected with the exercise of the powers of a public authority are not economic', pp 89–90.

[114] See 'Article 4(3) TEU—Duty of Sincere Cooperation', pp 233–239, earlier in this chapter.

[115] Case C-320/91 EU:C:1993:198.

States and public undertakings[335], which was unsuccessfully challenged in *France v Commission*[336]; the Directive has been amended a number of times and was codified in 2006[337]. The Commission uses the data that it receives through this Directive to monitor the compatibility of state aids with Article 107.

Article 109 TFEU authorises the Council to adopt regulations on state aid, in particular exempting aid from notification. Council Regulation 2015/1588[338] confers powers on the Commission to adopt 'group exemptions' for certain categories of horizontal state aid and to adopt a regulation on *de minimis* aids[339].

As a consequence of Brexit the UK adopted its own rules on 'subsidies' (as opposed to 'state aid'). The Subsidy Control Act 2022 is discussed briefly in chapter 2[340].

[335] OJ [1980] L 195/35. [336] See ch 6 n 76 earlier.
[337] Commission Directive 2006/111/EC, OJ [2006] L 318/17.
[338] Council Regulation 2015/1588, OJ [2015] L 248/1.
[339] The block exemptions are available at www.commission.europa.eu/competition/state_aid/legislation/legislation.html.
[340] See 'Subsidy Control', ch 2, p 61.

7

Articles 101 and 102: public enforcement by the European Commission and national competition authorities under Regulation 1/2003

1. Introduction

Infringement of Articles 101 and 102 has serious consequences for guilty undertakings. Such is the importance of competition law that undertakings are well advised to put in place credible and robust compliance programmes to ensure that the competition rules are not infringed, that directors and employees understand what types of behaviour must be avoided and that the undertaking acts ethically and with integrity; the Commission and the EU Courts are unimpressed by arguments sometimes put forward by undertakings that they intended to comply with competition law, but that their employees disobeyed instructions and wrongly entered into price-fixing or similar agreements. In *SIA 'VM Remonts' v Konkurences padome*[1] the Court of Justice said that any anti-competitive conduct on the part of an employee is attributable to the undertaking to which he or she belongs and that the undertaking is, as a matter of principle, liable for that conduct[2].

In 2012 the European Commission published *Compliance Matters: What Companies Can Do Better to Respect EU Competition Rules*[3] as a guide to companies to develop a proactive compliance strategy; in this document the Commission draws attention to the case-law of the EU Courts which establishes that the existence of a compliance programme is not a mitigating factor when it comes to the determination of fines in cartel cases[4]. Some competition authorities take a more generous approach: for example, in the US the Department of Justice has a policy of incentivising compliance with competition law[5].

[1] Case C-542/14 EU:C:2016:578. [2] Ibid, para 24.
[3] Available at www.commission.europa.eu; a page of DG COMP's website is dedicated to the issue of compliance: www.commission.europa.eu/competition/antitrust/compliance/index_en.html; see also the OECD's Roundtable on *Competition compliance programmes* (2021), available at www.oecd.org/competition.
[4] See Case T-138/07 *Schindler Holding Ltd v Commission* EU:T:2011:362, para 282, upheld on appeal Case C-501/11 P EU:C:2013:522, para 144.
[5] See *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations*, available at www.justice.gov/atr.

The powers of the Commission to enforce Articles 101 and 102 are contained in Regulation 1/2003[6], which became applicable on 1 May 2004. The chapter will begin with a brief overview of Regulation 1/2003. Section 2 of this chapter will explain the main features of the public enforcement system: there are numerous practitioners' books that provide a more detailed analysis of the position[7]. Section 3 provides a detailed examination of the Commission's enforcement powers; it also describes the procedure introduced by the Commission in 2008 whereby it sometimes settles cartel cases and its practice of settling non-cartel cases. Section 4 discusses the operation of Regulation 1/2003 in practice, with particular reference to the European Competition Network ('the ECN'), which brings together the Commission and the national competition authorities of the Member States ('the NCAs'). The final section of the chapter will provide a brief account of judicial review of the Commission's decisions. Articles 101 and 102 are directly applicable and may be invoked in proceedings in the domestic courts of the Member States: the private enforcement of the competition rules will be considered in chapter 8.

In understanding the extent of—or rather the limits to—the Commission's powers, it is important to have reference to the general principles of EU law, some of which, such as respect for the rights of the defence and the principles of proportionality, equal treatment, the protection of legitimate interests, legal certainty and non-retroactivity, have obvious significance for the enforcement of the competition rules[8]. Two further important issues are the relationship between the Commission's procedures and the standards required by the European Convention on Human Rights ('ECHR')[9] and by the Charter of Fundamental Rights of the European Union ('the Charter')[10]; recital 37 of Regulation 1/2003 states that it should be interpreted in accordance with the rights and principles recognised in the Charter, and Article 6(1) TEU provides that the Charter has the same force as the other Treaties[11]. The rights contained in the Charter that correspond to rights guaranteed by the ECHR have the same meaning and

[6] OJ [2003] L 1/1, as amended by Regulation 411/2004, OJ [2004] L 68/1 and Regulation 1419/2006, OJ [2006] L 269/1.

[7] See in particular Kerse and Khan *EU Antitrust Procedure* (Sweet & Maxwell, 6th ed, 2012); Faull and Nikpay (eds) *The EU Law of Competition* (Oxford University Press, 3rd ed, 2014), ch 2; Castillo de la Torre and Gippini Fournier *Evidence, Proof and Judicial Review in EU Competition Law* (Edward Elgar, 2nd ed, 2024); Bailey and John (eds) *Bellamy and Child: European Union Law of Competition* (Oxford University Press, 8th ed, 2018), chs 13 and 14; Rousseva (ed) *EU Antitrust Procedure* (Oxford University Press, 2021); Blanco *EU Competition Procedure* (Oxford University Press, 4th ed, 2021); Lenaerts, Gutman, and Nowak *EU Procedural Law* (Oxford University Press, 4th ed, 2023); for a series of seminal essays on all aspects of public enforcement see Wils *The Optimal Enforcement of EC Antitrust Law* (Kluwer Law International, 2002); Wils *Principles of European Antitrust Enforcement* (Hart, 2005); Wils *Efficiency and Justice in European Antitrust Enforcement* (Hart, 2008); Wils *EU Antitrust Enforcement: Law, Economics, History, Policy & Practice*, Concurrence 2024: these essays are also available at www.ssrn.com.

[8] On general principles of EU law see the books cited in ch 7 n 7 earlier; Tridimas *The General Principles of EU Law* (Oxford University Press, 3rd ed, 2018).

[9] Available at www.echr.coe.int; note that Article 6(2) TEU provides that the EU 'shall accede to the ECHR', but the Court of Justice delivered a negative opinion on the compatibility with EU law of the draft accession agreement: *Opinion 2/13* EU:C:2014:2454.

[10] OJ [2010] C 83/389; on the Charter see Coghlan and Steiert (eds) *The Charter of Fundamental Rights of the European Union: The Travaux Préparatoires and Selected Documents* (EUI, 2020); this open access e-book is available at blogs.eui.eu/library/charter-fundamental-rights.

[11] For discussion see Wils 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay Between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights' (2011) 34 World Competition 189; Jourdan 'Survey on Competition Law and Fundamental Rights' (2018) 9 JECLAP 666; Wils 'Fundamental Procedural Rights and Effective Enforcement of Articles 101 and 102 TFEU in the European Competition Network' (2020) 43 World Competition 5; Jourdan and Abouzeid 'Competition Law and Fundamental Rights' (2020) 11 JECLAP 623.

scope as those laid down by the ECHR[12]; the Court of Justice has held that the rights guaranteed by the ECHR constitute the 'minimum threshold of protection' under EU law[13]. The European Commission publishes an annual report on the application of the Charter by the EU institutions[14], including by the EU Courts[15]. Member States must have regard to the Charter when they apply provisions of EU law, including Articles 101 and 102 TFEU[16].

However, while it is important to ensure that the rights of the defence are respected, it is also important to avoid them being so elevated that it becomes disproportionately difficult for the Commission to enforce the law: a balance has to be struck between the private interest of undertakings not to be found guilty of behaviour of which they are innocent and the public interest of detecting, punishing and deterring infringements. The Commission has published a helpful factsheet on the 'Key actors and checks and balances' in proceedings under Articles 101 and 102[17]. A question that has attracted comment[18] is whether the system of enforcement established by Regulation 1/2003, whereby the European Commission acts as 'investigator, prosecutor, judge and jury', is compatible with the right to a fair hearing by an independent tribunal[19]. That question has been answered in the affirmative by the European Court of Human Rights[20] and by the Court of Justice[21]. However, it is important that the General Court exercises a 'full review' of Commission decisions in order to satisfy the requirements of the ECHR and the Charter. In *Cartes Bancaires v Commission*[22] the Court of Justice held that the General Court had failed to observe the requisite standard of review[23]; a similar reprimand was made in *Intel v Commission*[24]. In particular, the General Court must establish whether the evidence relied on by the Commission is accurate, reliable and consistent and whether that evidence is capable of supporting the conclusions drawn from it[25].

[12] Article 52(3) of the Charter.

[13] See eg Case C-481/19 *DB v Consob* EU:C:2021:84, para 37 and case-law cited.

[14] The annual report is available at www.commission.europa.eu.

[15] See eg Case C-510/11 P *Kone Oyj v Commission* EU:C:2013:696, paras 20–33 and Case T-9/11 *Air Canada v European Commission* EU:T:2015:994 on the principle of effective judicial protection; Case C-580/12 P *Guardian Industries Corp v Commission* EU:C:2014:2363 on the principle of equal treatment.

[16] Article 51 of the Charter.

[17] Available at www.eur-lex.europa.eu/EN/legal-content/summary/implementing-eu-competition-rules-best-practices-for-the-conduct-of-proceedings-concerning-articles-101-and-102-of-the-tfeu.html.

[18] See eg Forrester 'Due Process in EC Competition Cases' (2009) 34 EL Rev 817; Wils 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights' (2010) 33 World Competition 5; Editorial 'Towards a More Judicial Approach? EU Antitrust Fines under the Scrutiny of Fundamental Rights' (2011) 48 CML Rev 1405; Wils 'The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-instance Decision Maker' (2014) 37 World Competition 5; Teleki *Due Process and Fair Trial in EU Competition Law* (Brill, 2021).

[19] See Article 47(1) of the Charter and Article 6(1) of the ECHR.

[20] *Menarini Diagnostics v Italy*, no 43509/08, judgment of 27 September 2011, on which see Green LJ in *CMA v Flynn Pharma Ltd* [2020] EWCA Civ 339, paras 136–140.

[21] See eg Case C-386/10 P *Chalkor v Commission* EU:C:2011:815, paras 45–82; Case C-199/11 P *Europese Gemeenschap v Otis* EU:C:2012:684, paras 38–64; Cases T-56/09 etc *Saint-Gobain Glass France SA v Commission* EU:T:2014:160, paras 75–87; for discussion see Karlsson *Conceptualising Procedural Fairness in EU Competition Law* (Hart, 2020).

[22] Case C-67/13 P EU:C:2014:2204. [23] Ibid, paras 89–92.

[24] Case C-413/14 P EU:C:2017:632, paras 141–146.

[25] See eg Case C-376/20 P *Commission v CK Telecoms UK Investments Ltd* EU:C:2023:561, para 125.

2. Overview of Regulation 1/2003

Regulation 1/2003 abolished the notification of agreements to the Commission for individual exemption and the Commission's exclusive power to make decisions on the application of Article 101(3) in individual cases: that provision is now directly applicable in the same way that Articles 101(1), 101(2) and 102 have always been[26]. Regulation 1/2003 overhauled the enforcement powers of the Commission generally, and the Regulation adopted a number of new provisions including, for example, the possibility of the Commission adopting decisions on the basis of legally binding commitments as to undertakings' future behaviour (Article 9) and the power to conduct inspections at people's homes (Article 21). Regulation 1/2003 also gave the NCAs powers to enforce Articles 101 and 102. Following the Commission's review of the operation of Regulation 1/2003 in 2014[27], the European Parliament and Council adopted the ECN+ Directive, which entered into force on 4 February 2021[28].

In 2023 an invaluable commentary was published on Regulation 1/2003, *Regulation 1/2003 and EU Antitrust Enforcement: A Systematic Guide*[29]. Part I of this authoritative treatise contains a commentary on each provision of the Regulation; Part II contains reflections from a range of contributors including experienced officials, academics, practitioners and other experts.

In 2022 the Commission initiated a review of the operation of Regulation 1/2003 and Regulation 773/2004 since 2004[30].

(A) Overview of Regulation 1/2003

Regulation 1/2003 consists of 11 chapters:

- Chapter I is entitled 'Principles': Article 1 provides for the direct applicability of Articles 101 and 102, Article 2 explains who bears the burden of proof in cases under Articles 101 and 102 and Article 3 deals with the relationship between those provisions and national competition law[31]
- Chapter II of the Regulation sets out the powers of the Commission, the NCAs and national courts
- Chapter III provides for various types of Commission decision: findings of infringement, interim measures, the acceptance of commitments and findings of inapplicability
- Chapter IV is concerned with cooperation between the Commission, NCAs and national courts
- Chapter V deals with the Commission's powers of investigation
- Chapter VI deals with penalties

[26] See ch 4, 'Regulation 1/2003', pp 177–180.
[27] Communication, *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives* COM(2014) 453; see also the accompanying Staff Working Documents *Ten Years of Antitrust Enforcement under Regulation 1/2003*, SWD (2014) 230 and *Enhancing Competition Enforcement by the Member States' Competition Authorities*, SWD (2014).
[28] See 'The ECN+ Directive', pp 316–317 later in this chapter.
[29] Dekeyser, Gauer, Laitenberger, Wahl, Wils and Prete (eds) (Kluwer, 2023).
[30] See 'Regulation 1/2003 in practice', pp 314–317 later in this chapter.
[31] The relationship between EU and domestic competition law is discussed in ch 2, 'The relationship between EU competition law and national competition laws', pp 76–79.

- Chapter VII is concerned with limitation periods for the imposition and enforcement of penalties
- Chapter VIII deals with hearings and professional secrecy
- Chapter IX provides for the withdrawal of the benefit of block exemption regulations in certain circumstances
- Chapter X contains general provisions
- Chapter XI contains transitional, amending and final provisions.

(B) Supporting measures

The Commission has adopted a number of supporting measures necessary for the successful application of Regulation 1/2003. These measures consist of one Commission Regulation and a number of Notices, as follows:

- Commission Regulation 773/2004 relating to the conduct of proceedings under Articles 101 and 102, the 'Implementing Regulation'[32]
- *Notice on cooperation within the network of competition authorities*[33]
- *Notice on the cooperation between the Commission and courts of the EU Member States in the application of Articles [101 and 102 TFEU]*[34]
- *Notice on the handling of complaints by the Commission under Articles [101 and 102 TFEU]*[35]
- *Notice on informal guidance relating to novel questions concerning Articles [101 and 102 TFEU] that arise in individual cases (Guidance letters)*[36]
- *Notice on the effect on trade concept contained in Articles [101 and 102 TFEU]*[37]
- *Guidelines on the application of Article [101(3) TFEU]*[38]
- *Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation No 1/2003 in cartel cases*[39]
- *Notice on best practices on the conduct of proceedings concerning Articles 101 and 102 TFEU ('Best Practices')*[40].

The following documents provide further details of the Commission's procedure in competition cases[41]:

- *Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases*
- *Decision of the President of the Commission on the function and terms of reference of the Hearing Officer in certain competition proceedings*
- *Best Practices on the disclosure of information in data rooms*[42].

DG COMP has published its *Antitrust Manual of Procedures: Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU*[43]

[32] OJ [2004] L 123/18, as amended by subsequent Regulations; a consolidated version is available at www.eur-lex.europa.eu.
[33] OJ [2004] C 101/43. [34] OJ [2004] C 101/54. [35] OJ [2004] C 101/65.
[36] OJ [2022] C 381/9 replacing the Notice published in 2004, OJ [2004] C 101/78.
[37] OJ [2004] C 101/81. [38] OJ [2004] C 101/97.
[39] OJ [2008] C 167/1 as amended by a Communication from the Commission OJ [2015] C 256/2.
[40] OJ [2011] C 308/6. [41] Ibid.
[42] All these documents are available at www.commission.europa.eu/competition-policy/index_en.
[43] November 2019, available at www.commission.europa.eu.

(the 'Manual of Procedures'), which provides guidance on all aspects of the Commission's procedure. Practical information relating to issues such as confidentiality and inspections is also available on DG COMP's website[44].

3. The Commission's Enforcement Powers under Regulation 1/2003

(A) Burden and standard of proof

Article 2 of Regulation 1/2003 provides that the burden of proving an infringement of Article 101(1) or Article 102 is on the person or competition authority alleging the infringement and that the burden of showing that Article 101(3) is satisfied is on the person making that claim. There may be circumstances where the party bearing the burden of proof produces evidence that requires the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been satisfied[45]. The Commission's *Guidelines on the application of Article [101(3) TFEU]*[46] explain the kind of evidence that undertakings should provide when defending an agreement under Article 101(3).

The Regulation does not discuss the burden of proof where an undertaking raises objective justification or efficiency as a defence under Article 102. The position is that the evidential burden in such a situation rests with the undertaking asserting the justification or efficiency defence[47]; if the undertaking discharges that evidential burden, the Commission must show why that justification is inapplicable[48]. Similarly, it would seem that an undertaking that asserts that a contractual restriction is ancillary bears the evidential burden of showing that this is so, and that the Commission should then have to show why this is not so[49].

Recital 5 states that Regulation 1/2003 does not affect national rules on the standard of proof, provided that such rules are compatible with general principles of EU law[50]. Although the standard of proof is a matter of domestic law, the nature of the evidence that will satisfy that standard must take account of the substantive requirements of EU law[51].

(B) Chapter II: powers

Articles 4 to 6 deal with the powers of the Commission, the NCAs and national courts, respectively.

(i) Article 4: powers of the Commission

Article 4 states that the Commission shall have the powers provided for by Regulation 1/2003: of particular importance are the decision-making powers in Chapter III; the

[44] www.commission.europa.eu/competition-policy/antitrust_en.

[45] Cases C-501/06 P etc *GlaxoSmithKline Services Unlimited v Commission* EU:C:2009:610, para 83 and case-law cited.

[46] OJ [2004] C 101/97.

[47] See Case C-209/10 *Post Danmark A/S v Konkurrencerådet* EU:C:2012:172, paras 40–42; Case C-377/20 *Servizio Elettrico Nazionale v Autorità Garante della Concorrenza e del Mercato* EU:C:2022:379, paras 46–47.

[48] See eg Case T-201/04 *Microsoft Corpn v Commission* EU:T:2007:289, para 688.

[49] On this point see a case under the UK Competition Act 1998, Cases 1035/1/1/04 etc *Racecourse Association v OFT* [2005] CAT 29, paras 130–134.

[50] See Case C-74/14 *Eturas* EU:C:2016:42, paras 30–32.

[51] See *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24, para 116.

powers of investigation contained in Chapter V; and the powers to impose penalties provided by Chapter VI. These are described below.

(ii) Article 5: powers of the NCAs

Recital 6 of the Regulation states that, to ensure the effective application of the competition rules, NCAs should be associated more closely with their application. Article 5 therefore provides that NCAs shall have the power to apply Articles 101 and 102 in individual cases. The ECN+ Directive requires Member States to empower their NCAS to become more effective enforcers of competition law[52]. For this purpose the NCAs may make decisions requiring the termination of an infringement, ordering interim measures, accepting commitments and imposing fines and periodic penalty payments. They may also decide that there are no grounds for action on their part, but not that the EU competition rules are not infringed[53]; only the European Commission is entitled to adopt a non-infringement decision[54]. In *Schenker*[55] the Court of Justice held that, in order to ensure that Article 101 is effectively applied in the general interest ('*effet utile*'), an NCA could only exceptionally not impose a fine where an infringement is established[56]: an example would be where an undertaking was a whistleblower whose contribution was decisive in enabling the authority to detect and suppress a cartel[57].

Article 35 of the Regulation requires Member States to designate the competition authority or authorities responsible for the application of Articles 101 and 102 in such a way that its provisions are effectively complied with; the designated authorities can include courts. Designated national authorities must have the right to participate, as a defendant or respondent, in judicial proceedings against a decision that the authority has taken in relation to Articles 101 and/or 102[58]. The Commission works closely with the NCAs through the medium of the ECN, the work of which is discussed in section 4 below.

(iii) Article 6: powers of the national courts

Article 6 provides that national courts shall have the power to apply Article 101, in its entirety, and Article 102. The role of national courts is discussed in chapter 8.

(C) Chapter III: Commission decisions

Articles 7 to 10 deal with Commission decisions. The Commission's *Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 [TFEU] that arise in individual cases (guidance letters)*[59] explains the (rare) circumstances in which it might be prepared to give undertakings informal guidance on the application of the competition rules. The Commission's *Notice on the conduct of settlement procedures*

[52] OJ [2019] L 11/3; see 'The ECN+ Directive', pp 316–317 later in chapter.

[53] Case C-375/09 *Prezes Urzędu Ochrony Konkurencji I Konsumentów v Tele2 Polska sp. Z o.o., now Netia SA* EU:C:2011:270, paras 19–30; this was a case under Article 102 but there is no reason in principle to suppose that it would have reached a different conclusion in the case of Article 101. See also Case T-402/13 *Orange v Commission* EU:T:2014:991, paras 30–31.

[54] On 'Article 10: finding of inapplicability' see p 281 later in this chapter.

[55] Case C-681/11 EU:C:2013:404.

[56] Note that, since an NCA cannot decide that there has been no infringement of EU competition law, it cannot create a legitimate expectation that an undertaking will not be fined for infringing it: ibid, para 42.

[57] Ibid, paras 44–50.

[58] Case C-439/08 *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW* EU:C:2010:739.

[59] OJ [2022] C 381/9.