

1 Introduction

An active protection of competition in and across Member States was recognized in the Treaty of Rome of 1957 as an important fundament for a unified European Economic Community (EEC). The importance of economic analysis in European competition policy has increased over the history of its enforcement. European competition law enforcement is an active area where law and economics meet. This book presents a systematic analysis and classification of all formal decisions adopted by the European Commission in antitrust cases between 1962, when European competition policy became effective, due to the adoption of Regulation 17,¹ and 2009. Included are all Commission decisions pursuant to Articles 101 (agreements and concerted practices), 102 (abuse of dominance), and 106 (special or exclusive rights granted to undertakings by Member States) of the Treaty on the Functioning of the European Union (FEU Treaty).² The book also contains a chapter on mergers and acquisitions (M&As) landmark cases dealt with by the European Commission. Finally, the book lists the decisions the Commission adopted in case of lack of due cooperation by the undertakings involved in antitrust proceedings.

The leading principle in classifying and presenting the decisions in this book is the economic issue central to a case. We have drawn up an extensive list of mainstream economic theories of anticompetitive behavior, and describe the first and landmark European Commission decision in which that type of behavior was at the core of the analysis. This book brings together “economic landmark cases.” A decision is considered to be an economic landmark decision if it is the first decision in which the Commission adopted and applied a particular economic argument or principle, an application which was confirmed in later decisions thus becoming a reference point for that type of (anti)competitive behavior. Where changes to the economic application in the decision have been made – for example, in response to rulings in appeals – these modifications are described as well. In addition, all subsequent decisions in which the Commission applied the same economic concept are set out chronologically. The book provides a complete and coherent picture of the evolution of the Commission’s economic approach to competition law.

The book is organized to allow users rapid access to all information provided with reference to each of the economic issues analyzed. A standard template systematically provides the same type of information for each of the topics discussed. The respective sections describe a category of economic principles underlying the Commission decision. We provide references to the economic and legal literature, as well as European legislation, accompanied by lists of all related Commission decisions.

This book is a reference guide for courses in industrial organization (IO). Lecturers can find which Commission decisions relate to a large variety of topics typically taught in IO courses. The

1 Regulation No. 17: First Regulation Implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204, English special edition OJ [1959–62] 87.
2 That is, Articles 81, 82 and 86 until the adoption of the Treaty of Lisbon in 2007 (entered into force in December 2009) and Articles 85, 86, and 90 until the adoption of the Treaty of Amsterdam in 1997 (entered into force in May 1999). Both Treaties re-enumerated the articles.

book will also benefit master and PhD students specializing in the IO field. In addition, it may be of interest to economists and lawyers in their academic and professional activities, be it in a competition authority, a firm, or in academia.

In the description of the cases, the aim is not to make a normative evaluation of the Commission's approach, nor to assess its conformity with the orientation generally adopted by economists concerning certain behavior. Rather, the scope of the book is limited to presenting interpretations given by the European Commission, and more generally by EU competition law, to a number of types of market behavior possibly creating anticompetitive effects.

The information on all such decisions taken by the European Commission in relation to antitrust was collected from the official decision documents as published by the Commission in the *Official Journal of the European Union* (OJ). The first decision is from 1964, after which a total of 544 formal decisions were taken, up to and including all decisions adopted until 31 December 2009.³ Landmark decisions presented have been confirmed in substance by the European Courts. Although in some cases reductions of fines have been granted, the appeal courts – i.e. the European Court of Justice (ECJ) and the Court of First Instance (CFI, currently named General Court after the Lisbon Treaty has entered into force) – have confirmed the Commission's assessments in principle in all the cases discussed here. As such, the decisions have become case law of EU competition law and the Commission has recalled and confirmed an orientation previously expressed by the Courts in their later judgments. Only in rare circumstances (e.g. predatory pricing), have the Courts intervened to partially modify the approach of the Commission. This happened in issues that were deemed highly controversial and were fiercely debated at the time. Throughout the book, in paragraphs (c) and (e) of the presentation of the relevant cases, it is mentioned if the decision triggered a further clarifying or modifying jurisprudential intervention.

A somewhat different approach has been adopted in the choice of landmark decisions on mergers. Merger control in Europe has recently been object of incisive intervention by the ECJ and the CFI. To describe the current position of EU law on mergers without taking account of these recent judicial developments would be missing a core part of the development of case law. Therefore, we chose to present decisions as landmark cases sometimes not because of their content, but rather because they led to, or were the result of, judicial intervention by the European Courts which established important principles for the Commission to take into consideration in merger control.

In order to survey the high level of production of formal decisions by the European Commission, we have restricted our analysis in several ways. On antitrust, only those decisions formally adopted by the Commission under Article 101, 102 and 106 FEU Treaty have been analyzed. Decisions adopted under the European Coal and Steel Community Treaty (ECSC Treaty), decisions ordering interim measures, (dis)comfort letters, decisions rejecting complaints, decisions concerning the air transport sector, and the commitments decisions adopted pursuant to Article 9 of Regulation No. 1/2003 have been excluded. Furthermore, notices published pursuant to Article 19(3) of Regulation No. 17 (which concerned the hearing of interested third parties in case of envisaged adoption of a negative clearance decision but is no longer in force), the so-called Carlsberg's

3 The book lists a total of 576 decisions, as it includes also those adopted by the Commission in case the companies provided incomplete, false, or misleading information, or did not duly cooperate with the Commission in the course of the proceedings. There is only one example of an infringement decision also including a fine for procedural reasons. The case *Theal/Watts* (*Theal/Watts* Commission decision 77/129/EEC [1977] OJ L 39/19, Case IV/28.812) involved a vertical agreement preventing parallel imports notified by the parties, but with incorrect information about the underlying agreement. The two companies were fined ECU 25,000 for procedural errors and the agreement was prohibited.

notices about notified cooperation agreements, which invited interested third parties to submit observations, and the notices published pursuant to Article 27(4) of Regulation No. 1/2003 in case of intended adoption of a decision pursuant to Article 9 of the same Regulation have not been included either.

Furthermore, only a subset of all Commission decisions concerning M&As has been included. The large number of European merger decisions – over 3,500 since the Merger Regulation was adopted in 1989, almost all of which were clearance decisions – makes a consistent overview of all of them beyond the scope of this book.⁴ We present only selected landmark merger decisions. Among those, the cases extensively described explain the position of the European Commission and, more generally, of EU law concerning different potential effects of mergers on competition. In addition, the rare cases of mergers treated under Article 102 FEU Treaty before 1989, which were treated as cases of dominance, have all been included in the book. Finally, decisions adopted pursuant to the State aid rules of the EU Treaty are not included in the book.⁵

This introductory chapter is organized as follows. In section 1.1, a brief description of European competition policy is presented together with descriptive statistics and several highlights of European Commission competition decisions. Section 1.2 lays out the organization of the materials and the structure of the book. Section 1.3 provides guidance to instructors on how to use the book in graduate courses.

1.1 A brief history of European competition policy

1.1.1 Institutional and legal framework

European competition policy is a highly visible element of EU policy. The foundation of European competition law was laid in 1957 in the Treaty of Rome establishing the European Economic Community (EEC). Since 1957, the Treaty of Rome has been amended several times, the latest major amendments being made by the Treaty of Lisbon in 2007, which entered into force on 1 December 2009.⁶ As a result of those changes, the institutional and normative structure of the EU is now based on two core treaties: the Treaty on European Union (EU Treaty) and the Treaty on the Functioning of the European Union (FEU Treaty). The EU Treaty sets out the rules establishing the objectives, tasks, and institutions governing the EU, the introductory part is dedicated to the principles inspiring it. Article 3(3) identifies as one of the general objectives of EU the achievement of “a highly competitive social market economy.” The provision is further clarified by the Protocol No. 27 attached to the Treaties that, recalling the wording of previous versions of the EU Treaty, states that “the internal market as set out in Article 3 of the Treaty on

4 Council Regulation (EEC) No. 4064/89 etc. of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 395/1. The first Merger Regulation, as subsequently amended by Council Regulation (EC) No. 1310/97 [1997] OJ L 40/17, has been substituted by Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

5 Articles 107–109 FEU Treaty. State aid has only recently come under the influence of the “more economic approach,” see Röller, L.-H., H. W. Friederiszick, and V. Verouden, “European State Aid Control: An Economic Framework,” in P. Buccirossi (ed.), *Advances in the Economics of Competition Law*, Cambridge, MA: MIT Press, 2008.

6 After the referendum of 2005 in France and the Netherlands rejecting the adoption of the newly drafted “European Constitutional Treaty” that had been signed in June 2004 in Rome by the Head of State and Government of the (then) twenty-five Member States, the institutional reforms in the EU suffered a slowdown only partly overcome in the European Council of June 2007 in which Member States, under the German Presidency of the Council, agreed upon partial reform of the EU Treaty. The final outcome of that agreement has been a substantial amendment to the EU and EC Treaties signed in Lisbon by the twenty-seven EU leaders on 13 December 2007 (the “Treaty of Lisbon”) that brought to an end several years of negotiations about institutional reforms. After a long and turbulent ratification process (which suffered a slowdown after Ireland, as a result of a referendum held in 2008, initially rejected its adoption), the Lisbon Treaty finally entered into force on 1 December 2009.

European Union includes a system ensuring that competition is not distorted.” The competition rules are set out in Articles 101–106 of the FEU Treaty.⁷

The system of EU law provided by the Treaties entitles the Commission to a monopoly position on the proposal of new or additional legislation. Legal acts are subsequently to be adopted by the European Council, together with the European Parliament. In several amendments, the European Parliament has obtained wider power in the legislative process. The FEU Treaty today provides for different systems for the adoption of legislative acts (Regulations and Directives).⁸ In case of competition law, Article 103 FEU Treaty explicitly refers to the consultation procedure for the adoption of “the appropriate regulation or directives to give effect to the principles set out in Articles 101 and 102.” Under the consultation procedure, the Council, acting by a qualified majority, can adopt legislative acts on a proposal from the Commission after having consulted the European Parliament. The Commission is only entitled to adopt implementing legislation when so empowered by the Council. The Council of the European Union is composed of the competent ministers from the national governments, representing the interests of the Member States. Council or Commission regulations and decisions are legally binding. Regulations do not need to be transposed into national legislation and are immediately enforceable. In contrast, directives, which are addressed to Member States and provide for legislative goals to be achieved rather than the means to achieve them, need to be implemented by Member States in their national legal system within a time limit established in the same directive. In contrast, Notices and Guidelines, which are usually adopted by the Commission to express its interpretation of certain rules or its orientation towards certain circumstances, serve only as guidance and are not legally enforceable.

The European Commissioner for Competition watches over the rules established in European competition law. He or she is assisted by the Directorate-General (DG) for Competition and acts in close cooperation with the national competition authorities (NCAs) of the various Member States. Formal decisions as well as notices and guidelines are adopted by the European Commission as a whole, at the proposal of the Commissioner for Competition.

The history of European competition law enforcement is shorter than that of the US Department of Justice’s Antitrust Division. Nonetheless it is no less lively. In recent years, the European Commission has been very active in promoting competition. This is not only due to the growth of the number of countries that are members of the EU.⁹ Enforcement has also become stricter, as exemplified by an increase in recent fines and new and stringent fining guidelines. Furthermore, in recent years the Commission has introduced anticartel units as well as adopting and revising a leniency program and settlement procedure.

European competition policy is increasingly relying on economists to advise in cases. Since September 2003, the Commission has a Chief Economist position at DG Comp (the Commission

7 The current numeration of the articles has been adopted by the Treaty of Lisbon entered into force in December 2009. Prior to that, the original numeration set by the Treaty of Rome (where competition rules were provided in Articles 85–90) had already been changed by the Treaty of Amsterdam where competition rules were in Articles 81–86.

8 The procedure in which the Parliament is recognized to have more power is the co-decision procedure pursuant to Article 294 of the FEU Treaty. The other main legislative procedure is the cooperation procedure ex Article 252 of the Treaty. Other procedures recognizing more minor power of intervention by the Parliament in the adoption of legislation are the consultation procedure and the assent procedure.

9 The six founding Member States were Belgium, Federal Republic of Germany, France, Italy, Luxembourg, and the Netherlands. In 1973, Denmark, Ireland, and Great Britain entered the EEC. In 1981 Greece became the tenth Member State. In 1986, Spain and Portugal joined the EEC. In 1995, the Member States became fifteen with the accession of Austria, Finland, and Sweden. In 2004, the Czech Republic, Cyprus, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia became members of the EU. Member States became twenty-seven after the last enlargement of January 2007, in which Romania and Bulgaria became members of the EU.

Directorate-General for Competition). The office is supported by a team of IO economists. The Commission has adopted a more economic and effects-based approach in its decisions.¹⁰ This has been triggered by an increased need to justify the benefits of competition, by advances in IO thinking, and by the close scrutiny exercised by European Courts.¹¹ In addition, the Commission increasingly relies on outside economic advice. The Commission is furthermore open to novel enforcement methods that are suggested by law and economics research. In 2006, for example, it refined the method for imposing fines for breaches of Article 101 and in 2008 adopted a system of direct settlement as a further enforcement instrument in case of antitrust violations.¹² On the whole, awareness of the seriousness of the social effects of competition law infringements in Europe is increasing.

DG Comp prepares decisions in three broad areas: antitrust, merger, and State aid cases. The Commission’s sector and individual investigations, decisions, interpretations, and opinions often have far-reaching implications for industry structure and individual firms. The Commission decisions are daily news in international media, they involve many firm representatives, competition lawyers, and economic consultants. Recent examples of high-profile cases include the fine of 497 million Euros imposed in 2004 on Microsoft Corporation for abuse of dominance, the record-breaking cartel fine of 1,328 million Euros imposed in 2008 on four car glass producers, the Commission’s decision to block the merger between General Electric and Honeywell, which had already been approved by the US competition authorities, and the Commission’s strict application of the State Aid rules to government aids to financial institutions in distress during the latest financial crisis.¹³

In this section, we briefly review fifty years of European competition law enforcement.¹⁴ Subsection 1.1.2 briefly describes how the European competition rules evolved and what they currently are. Subsection 1.1.3 presents a brief descriptive history of their enforcement, with some trends over time. Subsection 1.1.4 contains summary statistics on the investigative process of the Commission. Subsection 1.1.5 focuses on remedies and sanctions for infringements of European competition rules.

1.1.2 European competition policy and rules

Article 101(1) FEU Treaty establishes the prohibition of agreements and concerted practices among undertakings affecting trade between Member States when restrictive of competition within the common market. An official investigation under Article 101(1) can lead to the finding

10 See Röeller and Stehmann (2005).
11 In 2002, with a series of significant judgments, the CFI annulled three Commission decisions clearing mergers since affected by “a series of errors of assessment” concerning in particular the economic evidences. The cases were Case T-342/99 *Airtours plc v. Commission* [2002] ECR II-2585; Case T-5/02 *Tetra Laval v. Commission* [2002] ECR II-4381, and Case T-310/01 *Schneider Electric v. Commission* [2002] ECR II-4071. These three judgments were among the elements that triggered the wide-ranging reform of merger policy in 2004.
12 See Commission Notice on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 [2006] OJ C 210/2, and Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases [2008] OJ C 167/01.
13 See Communication from the Commission The return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State Aid rules, [2009] OJ C 195/9.
14 This section is based in part on Carree, Günster, and Schinkel (2010), and some of the sources used in that study, including Davies, Driffield, and Clarke (1999), Lauk (2002), and Gual and Mas (2005). Information on mergers also refers to Lindsay (2006). The more than 100-year-old history of competition policy enforcement in the United States since the passing of the Sherman Act in 1890 has been a rich source of empirical analysis and learning, including Corwin (1992), Gallo, Dau-Schmidt, Craycraft, and Parker (1994, 2000), Lin, Baldev, Sandfort, and Slotje (2005), Ghosal and Gallo (2001), and Martin (2007). Data on Commission decisions adopted in 2009, included in the book, are not part of this section.

of an infringement. When the Commission adopts an infringement decision, it has the right to impose remedies and/or sanctions according to Council Regulation No. 1/2003.¹⁵

Article 101(3) grants the possibility of an exemption conditional on industry or market circumstances, when agreements (i) contribute to improving the production or distribution of goods or to promoting technical or economic progress, (ii) allow consumers a fair share of the resulting benefit, (iii) impose restrictions on competition only when indispensable for the attainment of those objectives, (iv) do not afford undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question. Examples of exemptions that have been granted are to industries in structural crisis, that were temporarily allowed to form cartel agreements. This has happened only twice, during the oil shock in the early 1980s and in 1993.¹⁶ Article 101(3) also facilitates licensing and joint venture creation or shared patent agreements with the intention to foster innovation.

Article 102 FEU Treaty prohibits abuse of dominant positions on markets. Article 102 comprehends several types of potential abuses summarized under one heading, including excessive pricing and price discrimination, tying, bundling, and predatory pricing. All cases that have been decided under Article 102 have been infringements, with the exception of one case involving minority shareholder agreements before the introduction of the Merger Regulation.¹⁷

Finally, Article 106 addresses monopolistic behaviors that are in principle similar to behaviors falling under Article 102, the difference being that dominance is authorized, maintained, or fostered by a Member State regulation. Article 106 has been central in the liberalization of State monopolies.

The antitrust enforcement process in the EU started with the implementation of Council Regulation No. 17. This Regulation constituted the basis for the Commission to adopt decisions establishing: (i) an infringement of Article 101(1) or 102 FEU Treaty; (ii) an exemption from the applicability of Article 101(1) FEU Treaty when the conditions laid down in Article 101(3) FEU Treaty were satisfied; or (iii) declaring the non-applicability of competition rules to a certain agreement (negative clearance). All Commission decisions are possibly subject to judicial review by the European judicatures. Regulation No. 17 also laid down the legal foundation for the Commission to start investigations (Articles 11, 12, 14 and 19); for individuals to lodge complaints with the Commission concerning undertakings' allegedly anticompetitive behaviors, and for firms to file notifications about their own agreements and concerted practices (Articles 4 and 5). Moreover, Regulation No. 17 established the power for the Commission to impose fines and remedies upon firms infringing Articles 101(1) or 102 FEU Treaty (Articles 15 and 16).

In May 2004, Regulation No. 1/2003 replaced Regulation No. 17. It confirmed and strengthened the powers granted to the Commission by Regulation No. 17 and introduced the possibility for the Commission to close the investigations, accepting commitments proposed by the parties (Article 9).

Regulation No. 1/2003 constituted a turning point for competition law in Europe as it abolished the notification system provided by Regulation No. 17 under which firms were obliged to notify any potentially anticompetitive agreement(s), upon which the Commission would take a formal decision, alternatively a negative clearance, an exemption decision, or an infringement decision. Since Regulation No. 1/2003 became effective, the notification system has been replaced by the

15 Regulation No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1. Until May 2004, the Commission's enforcement power were provided by Council Regulation No. 17: First Regulation Implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204, English special edition OJ [1959–62] 87.

16 See European Commission, *XXIII Report on Competition Policy* 1993, p. 49.

17 *Metaleurop SA* Commission decision 90/363/EEC [1990] OJ L 179/41, Case IV/32.846.

“directly applicable exemption” system. This implies that firms entering in an agreement must self-determine the existence of the conditions for the applicability of Articles 101(1) and 101(3) FEU Treaty.¹⁸ Undertakings no longer need to notify the agreement to the Commission and depend on it to determine whether they qualify for an exemption pursuant to Article 101(3). The abolishment of the obligation to notify every agreement potentially covered by Article 101(1) has significantly reduced the number of cases that the Commission needs to investigate.

Since 1962, DG Comp has been divided into sector-specific units screening industries for anti-competitive conduct. In 1998, the first anticartel unit was formed, with about twenty specialized officials. This unit deals with cartel formation throughout all sectors of the economy. The set of enforcement instruments of DG Comp had been extended in 1996 with the introduction of the leniency program, which aimed to encourage participants of cartels to inform the authorities of their involvement in an undetected collusive arrangement in exchange for a full or partial reduction in fines.¹⁹ After a revision in 2002, and most recently again in 2006, a substantial number of leniency applications have been made to the Commission and fine discounts have been given accordingly in the majority of cartel decisions.²⁰ With the revised leniency program, the Commission installed a second cartel unit. Furthermore, in 2008 the Commission introduced a settlement procedure to settle cartel cases through a simplified procedure, according to which firms acknowledging their involvement in the cartel under investigation are granted a 10 percent fine reduction.²¹

DG Comp has undergone some important reorganization during its existence. The Commissioner for competition has always been one of the most powerful positions in the Commission. The impact of enforcement prepared by DG Comp (formerly DG IV) has grown steadily during the last three decades under Commissioners Andriessen, Sutherland, Brittan, Van Miert, Monti, and Kroes. Over the years, the complexity of economic content in competition cases increased. In response, the European Commission strengthened its in-house economic expertise with the creation of the revolving-door position of Chief Competition Economist and its support team of economists. In addition, the Economic Advisory Group on Competition Policy, a group of leading academic advisors, was formed. These developments, together with increased international co-operation with antitrust agencies worldwide through transatlantic agreements and the International Competition Network (ICN), have advanced an effects-based approach to the Commission’s decisions on antitrust.

Until Council Regulation No. 1/2003, the Commission exercised predominance over NCAs. Merger control was the main exception, it was mainly a national issue until the first EC Merger Regulation of 1989 was approved. From 1986 onwards, NCAs could also decide on purely national clear-cut cases under Article 101(1), 102, and group exemption regulations.²² However, NCAs were not allowed to grant exemptions under Article 101(3).

Regulation No. 1/2003 operated an important decentralization of the enforcement competences fully involving NCAs and national Courts in the application and execution of Articles 101 and 102. Accordingly, the Commission is statutorily no longer the sole executor of European competition

18 Pursuant to Article 1 of Regulation No. 1/2003 “1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required. 2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required. 3. The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required.”

19 Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C 207/4.

20 Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/17.

21 See Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases [2008] OJ C 167/01.

22 See European Commission, *XVI Report on Competition 1986*, p. 52.

law but instead a member of a network of European competition authorities with which it cooperates in the enforcement of competition rules. The Commission also cooperates with national Courts.²³ However, NCAs and national Courts cannot take decisions that run counter to (other) decisions already adopted by the Commission.²⁴ As for Article 106 – i.e. cases addressed to Member States – it is important to note that the Commission is the only European authority implementing these Treaty provisions.

To give an example of the work division among cases after the introduction of decentralization, in 2004 the Commission dealt with 150 out of a total of 707 investigations opened pursuant to EU rules. France led in the activity list of the NCAs with 111 investigations, followed by Germany with 74, The Netherlands with 51, Hungary with 44, and finally Denmark with 41.²⁵ In addition to decentralization, the Commission has recently focused on the introduction of a legal system facilitating private litigation with the 2008 White Paper.²⁶

Next to changes in the regulatory framework, the institutional system of the EU has undergone several changes in the last four decades. In 1989, the Court of First Instance (CFI, now “General Court”) became the institution dealing with (first instance) appeal proceedings relating to competition cases. From then onwards, the ECJ has only been responsible for appeal proceedings involving Member States and appeal proceedings of second instance exclusively on legal grounds. The first discussions on the introduction of the CFI had already taken place in 1981.²⁷

Over the history of European competition law enforcement, some early regulations were set up to exempt certain sectors from the application of EU competition law.²⁸ An early example is Council Regulation No. 141 of 1962, exempting the transport sector. Certain sectors such as transport, motor vehicle distribution, communication, banking, and energy have continuously received special treatment.²⁹ These sectors used to be characterized by state monopoly in most European countries. Former state monopoly sectors involving networks or high entry barriers received critical regulatory attention in the late 1990s.³⁰

Additional block exemption regulations were issued, mainly in the 1980s, not covering a specific sector but rather focusing on a specific economic conduct. The large backlog of notifications that the Commission had to deal with, which had accumulated throughout the 1960s and 1970s, forced the Commission to reconsider its decision making system. In the early 1980s the backlog was more than 4,000 pending cases, many of which had little or no restrictive effect on competition. The Commission had to speed up its decision making process.

The Commission therefore introduced block exemption regulations for certain forms of economic conduct, as well as with small and medium-size enterprises (SMEs), in part in an attempt to alleviate its workload in the 1980s. Council Regulation No. 19 of 1965 and Commission Regulation No. 67 of 1967 were the first block exemption regulations setting standards for

23 See in particular Articles 5 and 6 of Regulation No. 1/2003, Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C 101/43, and Commission Notice on the cooperation between the Commission and the Courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C 101/54.
24 See in particular Article 16 of Regulation No. 1/2003.
25 European Competition Network (2007) http://ec.europa.eu/comm/competition/ecn/index_en.html.
26 Commission White Paper – Damages actions for breach of the EC antitrust rules, COM (2008) 165, published on 2 April 2008 on DG Comp website.
27 See European Commission, *XI Report on Competition 1981*, p.28.
28 The power to adopt such a kind of Regulations (and Decisions) is provided by Article 103 EU Treaty.
29 See, as an early examples among others, European Commission, *II Report on Competition Policy 1972*, p. 70.
30 See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Review of the EU Regulatory Framework for electronic communications networks and services SEC(2006) 816 and SEC(2006) 817 of 29 June 2006. See also DG Comp report on the energy sector inquiry SEC(2006) 1724 of 10 January 2007.

patent licensing and exclusive distribution cases, respectively, to be considered eligible for an exemption. In the first half of the 1980s, more than ten block exemption regulations were adopted for specialization and research and development (R&D) joint ventures, exclusive distribution, and purchasing agreements, as well as patent and know-how licensing agreements.³¹ Furthermore, at the end of the 1990s the Commission adopted a general block exemption regulation covering all kinds of vertical agreements considered to have a minor impact on competition.³² In the same period, the Commission adopted new and more economically oriented exemption regulations for R&D, specialization, and technology transfer agreements.³³

More generally, in 1997, the Commission adopted the “*de minimis doctrine*” establishing that, hardcore restrictions aside, agreements between either competitors with less than 5 percent market share or non-competitors with less than 10 percent market share would be considered of minor importance, thus not appreciably restricting competition (the thresholds were raised to 10 percent and 15 percent, respectively, in 2001).³⁴ All of this helped to speed up the decision making process and clear the Commission’s large backlog of more than 4,000 notifications, which had accumulated in the 1960s and the 1970s. At the same time, however, the increasing number of Member States joining the EU brought more cases to the Commission’s attention.

In 1989, after intense and long debate, the first Merger Regulation was approved.³⁵ It filled a gap that had characterized European competition law until then. The few merger cases treated so far had been analyzed via an extensive interpretation of Article 102.³⁶ However, this had already been judged to be inappropriate by the ECJ in 1969.³⁷ The first proposal for a regulatory framework on M&As dates back to 1973. As the Council and the Parliament were not fully convinced by this draft version, it took another sixteen years and four amendments in 1981, 1984, 1986, and 1988 until the European Community Merger Regulation (ECMR) was approved jointly by the three institutions in 1989. Since 1998, this Regulation has also applied to full-function joint ventures previously decided under Article 101.³⁸

The 1989 Merger Regulation gave the Commission the discretion to preemptively scrutinize the effect on competition of envisaged mergers and prohibit those potentially creating or strengthening a dominant position on the relevant market. It provides a system of mandatory notifications that is similar to the one provided by Regulation No. 17 in case of agreements under Article 101. The first Merger Regulation was revised in 2004.³⁹ The new Merger Regulation – which maintained a notification requirement – widened the scope for assessing the restrictive effects of mergers.

31 They led to a great deal of use of comfort letters by the Commission. A “comfort letter” is a weak form of negative clearance that postpones further investigations with the promise that, should the notified agreement later be found to be an infringement, it would be treated leniently.

32 Regulation No. 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L 336/1.

33 Regulation No. 2958/2000 on the application of Article 81(3) of the EC Treaty to categories of specialization agreements [2000] OJ L 304/3. Regulation No. 2659/2000 on the application of Article 81(3) of the EC Treaty to categories of research and development agreements [2000] OJ L 304/7. Regulation No. 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements [2004] OJ L 123/11.

34 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] OJ C 368/13.

35 Council Regulation (EEC) No. 4064/89 etc. of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 395/1.

36 The most significant of these cases is *Continental Can Company* Commission decision 72/71/EEC [1972] OJ L 7/25, Case IV/26.811. The handful of merger decisions adopted before the endorsement of the first Merger Regulation is listed in the introduction to chapter 8, see *infra*.

37 European Commission, *I Report on Competition* 1971, pp. 16 and 23.

38 Council Regulation (EC) No. 1310/97 of 30 June 1997 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings [1997] OJ L 40/17.

39 Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

Particularly, while in the first regulation only concentrations that created or strengthened a dominant position with a consequent impediment of effective competition were prohibited, under the new Article 2(3) of the new Merger Regulation, no merger – at least in case of non-coordinated effects⁴⁰ – that in any way significantly impedes effective competition in the internal market is likely to be cleared by the Commission.⁴¹ Both in Phase I of a merger investigation and in Phase II of the procedure, the merging firms can propose remedies and commit to comply with them. The Commission will consider whether the proposed commitments are sufficient to overcome its competition concerns. If so, the Commission can declare these proposed remedies binding upon the undertakings and clear the merger conditional on those divestments, as well as other conditions and obligations.⁴² The 2004 revision of the Merger Regulation also introduced the possibility of an efficiency defence.

The system of merger control in Europe is based on a jurisdictional division of competences between the Commission and the NCAs. The Merger Regulation applies only when certain threshold requirements concerning the merging firms are satisfied (i.e. the merger needs to have a *Community dimension*) and only if the merger results in a lasting change in the control of the undertakings concerned.⁴³ Otherwise, only national legislations may apply. Nonetheless, the Merger Regulation provides a system of case referrals between the Commission and the NCAs. In circumstances in which the notified merger might specifically affect a national market or a part thereof, the Commission can refer the case to the NCA of the Member State concerned.⁴⁴ In cases of Member State(s) dealing with a merger without a Community dimension but still affecting trade between Member States and threatening to affect competition in the State(s) involved, Member State(s) can request the Commission to examine the concentration.⁴⁵ If in the opinion of the merging parties a merger affects a market in only one particular Member State, the parties can ask the Commission to refer the whole or part of the case to the competent NCA. Similarly, if a merger does not have a Community dimension but affects competition in at least three Member States, so that it is subject to revision under three different national merger legislations, the parties can ask the Commission to deal with the case rather than the individual NCAs.⁴⁶

1.1.3 Commission decisions over time⁴⁷

Figure 1.1 shows the number of decisions adopted by the Commission pursuant to Articles 101, 102, and 106 FEU Treaty as well as decisions adopted for procedural reasons from 1964 to 2008. In the first few years after the approval of Regulation No. 17, the Commission published only a few competition decisions. Thereafter, their number rose steadily over the years.

40 Recital 25 of the introduction of the Merger Regulation states: “... The notion of ‘significant impediment of effective competition’ in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to anticompetitive effects of a concentration resulting from the non-coordinated behavior of undertakings which would not have a dominant position on the market concerned.”

41 This is determined by the so-called SIEC test, for Significant Impediment of Effective Competition. See Article 2(3) of the Merger Regulation.

42 See Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 [2008] OJ C 267/1.

43 See in particular Articles 1 and 3 of the Merger Regulation.

44 See Article 9 of the Merger Regulation.

45 See Article 22 of the Merger Regulation.

46 See Articles 4(4) and 4(5) of the Merger Regulation.

47 Carree, Günster, and Schinkel (2010) provide a complete analysis of the European Commission’s antitrust decisions up to and including 2004. The case file analyzed for this book includes all relevant decisions up to and including December 2009.