

# CONTENTS

<i>Preface</i>	vii
<i>List of Tables and Figures</i>	xv
<i>Table of Cases</i>	xvii
<i>EU and U.S. Secondary Legislation</i>	xxi
<b>PART 1 SETTING THE SCENE</b>	<b>1</b>
1. THE MEANING OF EU COMPETITION LAW	3
1.1 The meaning of EU competition law—the general picture	3
1.2 Article 101 of the TFEU and the control of collusive behaviors	4
1.2.1 Anti competitive agreements under Article 101: horizontal agreements	7
1.3 Article 102 TFEU: abuses of dominant position by one or more undertakings: meaning and issues	9
1.4 State aid	11
2. THE APPLICATION OF EU COMPETITION LAW TO THE FINANCIAL SERVICES SECTOR: GENERAL ISSUES	15
2.1 Banking and insurance services: two faces of the same coin?	15
2.2 Competition law and the financial services sector	17
2.3 Features of banking and insurance arrangements: the importance of competition law	19
<b>PART 2 INSURANCE</b>	<b>21</b>
3. SETTING THE SCENE: THE APPLICATION OF ARTICLE 101 TO THE INSURANCE SECTOR: THE EARLY STAGES AND THE FIRST BLOCK EXEMPTION REGULATION	23
3.1 Introduction	23
3.2 The evolution of the internal market for the insurance industry	24
3.3 The application of competition law to the insurance industry: general issues and background	26
3.4 EU competition policy in the insurance sector: the early years	28
3.5 The first block exemption regulation: council regulation 3932/92	30
3.5.1 Cooperation with respect to the establishment of common risk premium tariffs	31
3.5.2 Standard policy conditions	32
3.5.3 Common coverage of certain types of risk	33
3.5.4 Security devices	34

## CONTENTS

4. THE RECENT PAST SCENARIO: REGULATION 358/2003	37
4.1 Regulation 358/2003	37
4.1.1 The exemption of joint calculations and studies of risks under Regulation 358/2003	38
4.1.2 Common coverage of certain types of risks (pools)	39
4.1.3 Standard policy conditions	40
4.1.4 Joint determination of approved safety equipment	41
5. REGULATION 267/2010: THE CURRENT REGULATORY FRAMEWORK FOR HORIZONTAL AGREEMENTS IN THE INSURANCE SECTOR	43
5.1 The current regime: Regulation 267/2010	43
5.1.1 The new regime for joint compilations, tables, and studies under Regulation 267/2010	44
5.1.2 The new regime for co- and reinsurance pools	47
5.1.3 The future of agreements on standard policy conditions	48
5.2 The future of joint determination of approved safety equipment	51
6. THE WAY FORWARD: A FUTURE WITHOUT THE EU INSURANCE BLOCK EXEMPTION?	53
6.1 The way forward: repealing the EU insurance block exemption	53
6.1.1 Repealing the block exemption for joint calculations and studies of risks?	53
6.1.2 Repealing the block exemption for the cooperation in form of coinsurance and reinsurance?	58
6.2 The U.S. position	62
6.3 The McCarran-Ferguson Act and the EU BER: two faces of the same coin?	64
6.4 Consequences of a complete repeal of the insurance block exemption regulation	66
6.4.1 More in defense of the current insurance antitrust <i>status quo</i>	69
6.5 Balancing the truth: economic theories and further legal considerations	71
6.5.1 A scenario without a block exemption	73
6.6 In defense of the idea of free competition	77
6.7 Conclusive remarks	81
7. ARTICLE 102 TFEU AND MERGERS AND ACQUISITIONS IN THE INSURANCE SECTOR	83
7.1 Introduction	83
7.2 The EU merger regulation regime	84
7.3 Insurance mergers and the analysis of the relevant geographic market	86
7.3.1 The relevant geographic market and credit insurance	87
7.3.2 The geographic dimension of the market of marine, planes and aerospace risk insurance, and the market of reinsurance	89
7.4 The analysis of the relevant product market	90
7.4.1 The definition of the relevant product market in the insurance sector	91
7.4.2 The relevant product market and credit insurance	91
7.4.3 The relevant product market and reinsurance	92
7.4.4 The relevant product market test: analysis of the Commission's approach	93

## CONTENTS

7.5	The assessment of dominance	94
7.5.1	The assessment of dominance: is the Commission’s approach deceitful?	96
7.6	The impact of mergers and acquisitions in the insurance sector	99
7.7	Insurance mergers and acquisitions and the <i>sui generis</i> commission approach: a critical analysis	101
7.7.1	In defense of the concept of “collective dominance”: a possible valid alternative for the assessment of insurance mergers and acquisitions?	106
7.8	The way forward: a possible different regime for mergers and acquisitions in the insurance sector?	108
7.9	Conclusive remarks	111
<b>8.</b>	<b>STATE AID AND THE INSURANCE SECTOR</b>	<b>113</b>
8.1	State aid	113
8.2	State aid and the insurance sector	115
8.3	Commission communication on the application of state aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis	115
8.3.1	Eligibility for a guarantee scheme	117
8.3.2	Temporal scope of the guarantee scheme	117
8.3.3	Aid limited to the minimum—private sector contribution	118
8.3.4	Avoidance of undue distortions of competition	118
8.3.5	Follow-up by adjustment measures	119
8.3.6	Recapitalization of financial institutions	119
8.3.7	Provision of other forms of liquidity assistance	121
8.4	State aid in the insurance sector: the early decisions	122
8.5	State aid in the insurance sector: recent decisions and current state of play	123
8.5.1	Aegon	123
8.5.2	Mutualité Fonction Publique	126
8.5.3	Current state of play	126
<b>PART 3</b>	<b>BANKING</b>	<b>127</b>
<b>9.</b>	<b>THE APPLICATION OF EU COMPETITION RULES TO THE BANKING INDUSTRY: GENERAL ISSUES</b>	<b>129</b>
9.1	Introduction	129
9.2	The application of EU competition rules to the banking sector: general issues	129
9.3	The regulatory framework for the banking sector	130
9.4	The nature of the banking sector and antitrust issues	132
<b>10.</b>	<b>ARTICLE 101 TFEU AND PRICE COMPETITION ISSUES IN THE BANKING SECTOR</b>	<b>137</b>
10.1	Price competition issues in the banking industry: the early stage	137
10.2	The <i>Zuchner</i> case and the judicial assessment of price agreements	139
10.2.1	The assessment of concerted practices: a realistic approach?	140
10.3	The post- <i>Zuchner</i> scenario	141
10.4	Conclusive remarks	144

## CONTENTS

11. PAYMENT CARD SYSTEMS AND COMPETITION CONCERNS: MULTILATERAL INTERCHANGE FEES AND NO-DISCRIMINATION RULES	145
11.1 Background	146
11.2 Competition issues	147
11.3 Antitrust assessment of payment card systems	148
11.4 Multilateral interchange fees	150
11.5 MIFs and EU competition law	153
11.6 The early Commission's decisions relating to MIFs	153
11.7 The post- <i>Eurocheque Package Deal II</i> scenario and the commission's notice on cross-border transfers	155
11.7.1 Possibility of exemption under Article 101(3)	158
11.8 The Commission's decision in Visa international-multilateral interchange fee 2002	159
11.9 The recent Commission decisions in mastercard intra-EEA fallback interchange fee	161
11.10 The Commission's decision in Visa international-multilateral interchange fee 2002 and the decision on MasterCard on intra-EEA fallback interchange fee: two faces of the same coin?	162
11.11 The economic perspective: arguments pro MIFs	164
11.11.1 Are MIFs essential conditions of any payment system?	164
11.12 More economic analysis: arguments contra MIFs	168
11.13 The concrete effects of MIFs	170
11.13.1 The impact on merchants	171
11.13.2 Effects on consumers	171
11.13.3 The impact on the internal market	172
11.14 No-discrimination rules	174
11.14.1 No-discrimination rules and EU competition law	174
11.14.2 The judicial approach to no-discrimination rules	175
11.15 Current state of play and possible alternative scenarios	178
11.15.1 The European position	178
11.15.2 The U.S. position	178
11.16 Possible alternatives to MIFs	181
11.16.1 Bilateral agreements	181
11.16.2 Par collection systems	182
11.17 The way forward: possible regulatory approaches to MIFs	183
11.17.1 A regulatory approach acknowledging the legality of MIFs	184
11.17.2 Full disclosure and strict regulation of costs	184
11.17.3 Regulatory approaches based on the introduction of a general prohibition of MIFs	186
11.18 Conclusive remarks	187
12. ARTICLE 101 AND NON-PRICE COMPETITION ISSUES IN THE BANKING SECTOR	189
12.1 Introduction	189
12.2 Access to essential facilities	189
12.3 Card payment systems: essential facility and membership criteria	190
12.4 The <i>Mountain West</i> case and the U.S. position	191
12.5 Essential facility in the banking sector: the EU perspective, a different approach	192
12.5.1 The <i>SWIFT</i> case	194

## CONTENTS

12.6	Exclusivity rules: the prohibition on participants to adhere to other payment systems	197
12.7	Cooperation agreements between banks	199
12.8	The relationship between price and non-price competition issues	200
13.	ARTICLE 102 AND MERGERS AND ACQUISITIONS IN THE BANKING SECTOR	203
13.1	Introduction	203
13.2	Setting the scene: the EU Merger Regulation	204
13.3	Mergers and acquisitions in the banking sector	205
13.3.1	The relevant geographic market in banking services	205
13.3.2	The relevant product market	206
13.3.3	The assessment of consolidation in the banking sector	207
13.4	Mergers in the banking sector: the empirical and logical perspectives	208
13.5	Mergers and acquisitions in the banking sector: a critical analysis of the legal status quo and possible suggestions for the way forward	212
13.5.1	A new map for the identification of the relevant geographical market?	212
13.5.2	Beyond the concept of interchangeability; new tools for the identification of the product market in the banking sector	214
13.5.3	Collective dominance or not collective dominance? A new assessment of consolidation for banking undertakings	216
13.6	Conclusive remarks	218
14.	ARTICLE 102 AND CLEARING AND SETTLEMENT SERVICES IN THE BANKING SECTOR	221
14.1	Introduction	221
14.2	The application of the EU competition rules to the clearing and settlement sector: meaning and issues	222
14.3	Clearing and settlement services: a competitive market?	223
14.4	The commission decision in <i>Clearstream</i>	225
14.4.1	Grounds of the decision: the concept of relevant product market	225
14.4.2	The concept of relevant geographic market in clearing and settlement services	226
14.4.3	Dominant position	227
14.4.4	Abuse of dominant position	227
14.4.5	The refusal to supply clearing and settlement services to Euroclear	228
14.5	Recent EU initiatives in the securities trading before and after the <i>Clearstream</i> decision: the way forward	229
14.6	The current scenario	232
15.	STATE AID IN THE BANKING SECTOR	235
15.1	Introduction	235
15.2	State aid in the banking industry: the early decisions	236
15.3	The <i>German Landesbank</i> case	240
15.4	State aid in the banking sector: the financial crisis scenario	243
15.5	The Banking Communication	244
15.6	Communication on the recapitalization of financial institutions	247
15.7	Impaired Assets Communication	248
15.8	Restructuring Communication	250

## CONTENTS

15.9	The current scenario	254
15.9.1	Communication on the return to viability and the assessment of restructuring measures in the financial sector	254
15.9.2	Communication Commission on the application, from 1 January 2011, of state aid rules to support measures in favor of banks in the context of the financial crisis	257
15.9.3	The Commission Communication on the application, from 1 January 2012, of state aid rules to support measures in favor of banks in the context of the financial crisis	258
15.10	State aid in the banking industry: the current status quo	259
	<i>Bibliography</i>	261
	<i>Miscellaneous</i>	267
	<i>Index</i>	355