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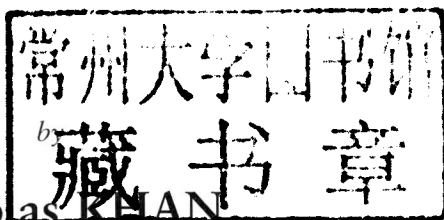
EU ANTITRUST  
PROCEDURE

Sixth Edition

**SWEET & MAXWELL**

KERSE & KHAN  
ON  
EU ANTITRUST  
PROCEDURE

SIXTH EDITION



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**SWEET & MAXWELL**



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# *Preface*

As Chris Kerse observed in the introduction to the 5th edition of this book, Regulation 1/2003 required a fundamental reappraisal of the structure and content of this book, but the 5th edition having been published soon after the entry into force of Regulation, much of what we wrote about the then new regime of Regulation 1/2003 was necessarily tentative. More than eight years on, a new edition is long overdue; abstract descriptions of the regime introduced by Regulation 1/2003 need to be replaced with commentary on the substantial body of practice that has developed.

Early on in planning this new edition, Chris Kerse decided that, having fully retired, he would withdraw from being an author, an understandable decision given he was no longer in day-to-day contact with EU competition law. Although Chris has therefore not contributed to this 6th edition, the very fact that this work is now in its 6th edition is a tribute to his initiative in conceiving the idea of a book dedicated to the procedural aspects of EU antitrust law and the favourable reception given to the earlier editions for which he was responsible.

Although this edition largely preserves the structure of the 5th edition, much of the content is completely new and several chapters have been greatly expanded to reflect the considerable output of the Commission and the Court over the last few years: 2011 alone saw the General Court issue over 100 judgments on competition law and the EU's impending accession to the ECHR has given further impetus to debate about the application of fundamental rights to competition proceedings.

As ever, it is difficult to draw a clear dividing line between procedural and substantive questions; parental liability, for example, is a matter of substantive law going to liability for an infringement, but is inextricably linked to the procedural question of who may be concerned by an investigation and the implications this has for the calculation of fines. I have therefore briefly covered such matters, but generally, numerous other works provide more detailed guidance on the substantive law and I have concentrated on the many developments in practice and procedure in applying EU competition law. Amongst these, it is notable that the Commission has made extensive use of Article 9 of Regulation 1/2003 to dispose of cases where no fine is to be imposed and introduced the Settlements Notice in 2008 to streamline the disposal of cases that do call for the imposition of a fine. On fines, the methodology for setting fines changed quite fundamentally with the 2006 Fining Guidelines, although the transitional rule that the new guidelines would apply only where a statement of objections had not already been issued meant that the impact of the new guidelines was not immediately felt, and the relative paucity of judgments dealing with fines imposed under the 2006 Fining Guidelines leaves some issues still to be fully

## Preface

explored. As fines fixed under the 1998 Fining Guidelines are now only of historic interest, the commentary on fines in Chapter 7 concerns only the 2006 Fining Guidelines, but reference is also made to earlier decisions where they remain relevant to illustrate practice under the 2006 Fining Guidelines.

After a slow start, national courts have become increasingly active in applying EU competition law, especially in the field of actions for damages. The relationship between public and private enforcement and the tensions that have emerged between leniency programmes and the disclosure of documents from the Commission's file, whether through *inter partes* disclosure, access to documents under Regulation 1049/2001 or by the Commission pursuant to Article 15(1) of Regulation 1/2003 have called for substantial revision of the text, although this is an area where as yet few definitive conclusions can be drawn.

The total length of the book has been contained only by removing the annexes of legislation, notices and guidelines that were included in earlier editions. Now that such material is so readily available online, the utility of including these texts is of marginal importance, but I have compensated for this change to some extent by reproducing the most important provisions in the relevant sections of the main text.

Many target dates for completion of this 6th edition have come and gone, partly due to professional commitments and partly due to the Commission and the Court generating new material faster than I could keep up with. I am grateful to my editors at Sweet & Maxwell, Amanda Strange and Jen Warren, for their patience, and to copy-editor Will Prior, for allowing me to amend the text up to the last minute, with a few final changes being made only at the end of October 2012. I have endeavoured to state the law as of the end of September 2012, with a few further additions where this was possible.

I would like to thank those who have assisted me in writing this new edition. Anna Morfey carried out a great deal of research and preliminary redrafting. My colleagues in the Competition team of the Legal Service of the European Commission have provided a constant stream of questions and comments on developments in practice to stimulate thinking. Wouter Wils has kindly reviewed most of the chapters in draft form and his encouragement and advice have been invaluable. Finally, I am particularly grateful for the tolerance of my family. Although I suspect their insistence that I should finish writing this book is not due to their impatience to read the final work, Julia, Christopher and Sebastian have contributed greatly by their forbearance in this sometimes seemingly interminable process.

This is essentially a book that seeks to state what the law is, rather than a polemic about what the law should be, but any opinions expressed are strictly personal and do not necessarily reflect the position of the European Commission.

Nicholas Khan  
November 1, 2012

# *Note on Citations*

References to Articles of the Treaties have generally been updated to the new numbering of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) except where the context requires that reference to an earlier version of the Treaty be retained.

Older Commission decisions, which were published in full in the *Official Journal* are identified by reference to the relevant *Official Journal*. For decisions adopted since the Commission ceased publication of the full text in the *Official Journal*, reserving the full text for publication online only, reference is given only to the DG Competition case number, as the level of detail that readers are likely to require will not be found in the summary publication in the *Official Journal*.

As noted in Chapter 8, the General Court is the judicial organ principally responsible for competition cases and for the sake of simplicity, the text refers simply to “the Court” except where the context requires otherwise and the relevant jurisdiction can of course be identified from the prefix to the case number.

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