

# FOREWORD

Competition policy – or antitrust, as it is known across the Atlantic – is one of the flagship policies of the European Union and an essential feature of its internal market, ensuring that commercial exchanges among undertakings take place on a level playing field, that consumers benefit from ‘competitive’ prices and that markets for products and services within the Union remain open to innovation, whether by new entrants or by existing players. The substantive legal rules of EU competition law have been the subject of several textbooks by distinguished authors and, although new points of law may still arise, the key concepts are, by now, well-known and broadly understood.

Whilst it is vital to know the content of those substantive rules and how they have been interpreted and applied in previous cases, such knowledge does not necessarily suffice when assessing a competition law file in practice. In addition, familiarity with the rules of evidence and proof applied by the EU Courts, as well as with the rules circumscribing the judicial review that they will carry out, is also essential. It is those rules of evidence, proof and judicial review that are the subject matter of this work.

As long-serving members of the European Commission’s Legal service, Fernando Castillo de la Torre and Eric Gippini Fournier both have extensive experience of EU law in general and of EU Competition law in particular, each having represented the Commission in over 300 cases before the EU Courts. Moreover, they also have experience of case handling from a judicial perspective within the Court of Justice, both having served in the chambers of one of my predecessors as President of that court, Gil Carlos Rodríguez Iglesias. As such, they were particularly well-placed to undertake the in-depth analysis that is necessary to explain the case law of the EU Courts in this field, not only from a theoretical standpoint but also with an eye to its practical application. The result is an extremely thorough and well-structured review of the relevant rules of law and of the precedents.

The book is divided into six chapters. First, an introductory chapter explains the scientific reasons why the authors decided to write this book and sets out a number of key distinctions between related, yet distinct, concepts, notably issues of fact as opposed to questions of law and the standard of proof as opposed to the standard of judicial review. Second, the book deals with the burden and standard of proof in competition cases, noting in particular the importance of the presumption of innocence in relation to findings of an infringement and examining, in concrete terms, the level of evidence that the Commission must adduce in order to establish the existence of an infringement, as well as the rules governing the rebuttal of such evidence by the undertakings concerned. Third, there is a section covering the rules of evidence and proof that apply to a number of specific situations, such as the finding of a single and

continuous infringement and the assessment by the Commission of the duration of an infringement.

Fourth, the authors examine the probative value of different types of evidence, noting the different treatment, in certain respects, of ‘inculpatory’ and ‘exculpatory’ evidence, of contemporaneous, as opposed to *ex post facto* evidence, of direct and indirect evidence and of written evidence, as compared to oral evidence. Fifth, the book covers questions concerning procedure and evidence before the EU Courts that arise in the context of an action for judicial review, such as the principle of equality of arms, the timing of the submission of evidence, the role of the judge in the proceedings and expert reports. Sixth, the closing chapter contains a detailed analysis of the scope of judicial review, examining both issues that relate to the review of substantive findings of infringement and those that pertain to the review of the legality of the fine and to the exercise by the EU Courts of the unlimited jurisdiction conferred on them by the legislator.

As the authors note, public enforcement of EU competition law rules by the European Commission has been the subject of a considerable degree of criticism in the academic literature in the past few years, much of it focusing on the perceived unfairness of administrative procedures, as well as on the alleged inadequacy of the judicial review carried out by the General Court of the European Union. The authors observe, however, that to the extent that these criticisms are a reaction to the increased level of fines imposed by the Commission in recent times, the issue is as much one of perception as of reality. Whilst the amounts of money involved may be eye-catching, those fines, whose principal objective is to deter undertakings from infringing in the first place, are generally imposed on large and profitable companies with substantial financial strength, whose viability is highly unlikely to be affected by such penalties.

In conclusion, I warmly recommend this work to all those who are interested in the practical and procedural aspects of competition law and practice at EU level, whether they are judges, practitioners, academics, or indeed students. In my view, the authors have succeeded in producing an authoritative guide to the rules that govern evidence, proof and judicial review in EU competition law and I congratulate them on that considerable achievement.

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