Contents

F	orewor	d to the	e Fourth.	Edition		V
F	orewor	d to the	e Seventh	Edition		vii
P	reface					ix
Ta	able of	Cases			X	xvii
Та	able of	Legisla	ation			li
1	Intro	duction				1
	1.1	The C	ommon I	Market		2
	1.2	The co	ompetitio		\sim	3
		1.2.1			on that restricts competition	4
		1.2.2			use of a dominant position	5
					—the control of concentrations	7
		1.2.4			he competition rules and the	
			-		Common Market	8
		1.2.5		•	all sectors of the economy	9
	1.3			narket pow		10
		1.3.1			—efficiency	11
		1.3.2			cortholling market power	13
			1.3.2.1			13 14
				Fair comp	medium-sized firms	14
				Political f		15
					competition	15
			1 3 2	Cultural	environmental and social policy	15
					s of national law	16
				Conflict of		16
		1.3.3			nd substitutes may define the relevant	
			market		.,	19
			1.3.3.1	Substitute	es on the demand side	19
				Barriers to	o entry	20
					Minimum efficient scale	21
				1.3.3.2.2	Contestable markets	22
					Network markets	22
					Two-sided markets	23
				1.3.3.2.5	Government regulation	23
				1.3.3.2.6	Intellectual property rights (iprs)	24
					1.3.3.2.6.1 Free riders	24
	1.4	Institu	itions of	the EC		26

xiv CONTENTS

		1.4.1	The Council	26
		1.4.2	The Commission—the executive of the Communities	26
		1.4.3	Community courts	27
			1.4.3.1 Membership of EC courts	28
			1.4.3.2 The jurisdiction of CFI and ECJ	30
	1.5	Enforc	cement of the competition rules	32
		1.5.1	Regulation 1/2003	32
		1.5.2	Enforcement by national courts	33
			Enforcement by national authorities	34
		1.5.4	Enforcement by the Commission	34
	1.6	Extrat	erritorial competence	35
		1.6.1	Free Trade Agreements	36
		1.6.2	European Economic Area	37
	1.7	The in	nportance of the competition rules	37
	1.8	Plan fo	or the book	40
	1.9	Bibliog	graphy	41
			or the book graphy Article 81(1) Juction Juction	
2	Analy	sis of A	Article 81(1)	43
			15	
	2.1	Introd	uction	44
	2.2		sion between undertakings	45
		2.2.1	Undertakings	45
			2.2.1.1 Entities	46
			2.2.1.2 Economic activities	47
			2.2.1.2.1 Social security	48
			2.2.1.2.2 Buying is not an economic activity	49
			2.2.1.2.3 Other criteria	49
		2.2.2	Agreements	51
		~	2.2.2.1 Unsigned agreements that are acted on	51
			2.2.2.2 Unilateral conduct in the context of a long-term	m
			contract with selected distributors	52
			2.2.2.3 Tenuous evidence on which collusion is sometime.	imes
			found	56
		2.2.3	'Decisions by associations of undertakings'	57
		2.2.4	Concerted practices	58
			2.2.4.1 Economic considerations	58
			2.2.4.2 Legal precedents	61
			2.2.4.3 Agreements to exchange information	65
	2.3	'Which	h may affect trade between Member States'	66
		2.3.1	Market integration	66
		2.3.2	Condition often fulfilled even if agreement is confined to	
			single Member State	69
		2.3.3	The condition has been further narrowed	72

		2.3.4		sion's notice on effect on trade	12
		2.3.5	The com	parable provision in Article 82 is similarly	
			construe	-,	72
		2.3.6	The EEA	A	73
	2.4	'Have	as their o	bject or effect the prevention, restriction or	
				mpetition within the Common Market'	73
		2.4.1		and Grundig	75
		2.4.2		ons by object	76
		2.4.3		on by effect—Technique Minière	77
		2.4.4		ad economic context—Delimitis	78
			2.4.4.1	Market definition	79
				Counterfactual—Technique Minière	80
			2. 1. 1.2	2.4.4.2.1 Ancillary restraints	80
			2443	The principle in <i>Wouters</i>	83
				Workable competition	84
				National public interest	85
				Are all these exceptions to Article 81(1) part	0.5
			2.7.7.0	of the same principle?	86
			2.4.4.7	The Commission's view	86
		2.4.5		restrictions	88
		2.4.6			88
	2.5	Nullit		able effects	91
	2.6		y graphy	300	91
	2.0	DIUIIO	grapny		91
				able' effects 3)	
2	Analı	raia of	Article 81(2)	93
3	Allaly	SIS OI A	Article of	3)	93
	3.1	A mtial	e 81(3)		93
	3.1	3.1.1	\ /	al exceptions	95
		3.1.1			93
			3.1.1.1	Right of complainant to appeal against a clearance	96
		2 1 2	Charma		90
		3.1.2		xemptions	
				Withdrawal of group exemptions	98 98
				No exemption from Article 82	98
			3.1.2.3	Advantages and disadvantages of	00
			2121	group exemptions	99
			3.1.2.4	Effect of group exemption on national	100
	2.2	D'1 1'	1	competition law	100
	3.2	Biblio	graphy		100
4	Domi	nant Po	osition		101
	4.1	Introd	luction		101
	т. 1	IIIIIUU	ucuon		101

xvi CONTENTS

	4.2	Object 4.2.1	ions to economic strength Power over price	102 102
		4.2.2	1	103
			Discussion paper (dp)	104
	4.3		takings in a dominant position	105
		4.3.1	Market definition	106
			4.3.1.1 Relevant product market	107
			4.3.1.2 Relevant geographic market	111
			4.3.1.3 Previous definitions not binding	114
			4.3.1.4 Time scale	114
			4.3.1.5 Wider markets suggested by the ECJ	115
			4.3.1.6 The fallacy of defining markets to assess	115
		4 2 2	market power	115
		4.3.2	Exclusive rights granted by government	116
		4.3.3	Customer dependence	117
		4.3.4	Appraisal of dominant position 4.3.4.1 Factors found relevant by the Commission	119
			4.3.4.1 Factors found relevant by the Commission and courts	119
			4.3.4.1.1 Entry barriers	119
			4.3.4.1.1 Entry barriers 4.3.4.1.2 Market snares	121
			4.3.4.3 Conduct	123
		4.3.5		124
		4.3.6		127
			Abuse in linked market	128
		4.3.8		129
		4.3.9	Super-dominant position	130
			Conclusion	130
	4.4	Bibliog		132
		2101102		102
_	A bugi	vo Even	sitation	133
3	Abusi	ve Exp	oitation	133
	5.1	Introd	uction	134
		5.1.1	Exclusionary abuses	137
		5.1.2		142
	5.2		tion of competition prohibited by Article 82—Continent	
		Can	The state of the s	144
		5.2.1	Control of mergers	146
		5.2.2	Discrimination—Ramsey pricing	146
			5.2.2.1 Single branding to exclude competitors of the	
			dominant firm	148
			5.2.2.1.1 Suiker Unie	149
			5.2.2.1.2 Hoffmann-La Roche v Commission	
			(HLR) and Michelin I	149

		5.2.2.1.3	Van den Bergh	151
		5.2.2.1.4		154
		5.2.2.1.5	British Airways	156
		5.2.2.1.6	Retrospective rebates over long	
			period, etc	158
	5.2.2.2	Discrimin	nation against customers of	
			ors downstream— <i>Irish Sugar</i>	158
	5.2.2.3	-	nation by firms enjoying special or	100
	0.2.2.0	exclusive		159
	5.2.2.4		C	160
	5.2.2.5		on on exclusionary rebates	162
5.2.3	Tying	Concrasio	on on exclusionary reduces	163
3.2.3	5.2.3.1	Renefits a	and detriments of tying	165
	3.2.3.1		Compatible consumables	165
		5.2.3.1.2		166
		5.2.3.1.3		166
		5.2.3.1.4	Economies of scope and	100
		3.2.3.1.7	complementary products	166
		5.2.3.1.5	Avoiding regulation	167
		5.2.3.1.6	Excluding smaller firms	167
	5.2.3.2	Cases	Excitating sinanci ininis	167
	3.2.3.2	5.2.3.2.1	Hilti	167
		5.2.3.2.1	Té!é:narketing	167
		5.2.3.2.3		168
		5.2.3.2.4	Microsoft tying media player to	100
		3.2.3.2.4	windows for PCs	169
	5233	Cenclusio		171
5.2.4		s to deal	<i>7</i> 11	172
3.2.4			ial Solvents	172
	5.2.4.2	ABG	iui Borvenis	173
	5.2.4.3		rands	174
	5.2.4.4		artas	175
	5.2.4.5	0	irnorts	175
5.2.5		ion to licen		175
3.2.3	5.2.5.1			176
	5.2.5.2			176
	5.2.5.3	0	dhroke	178
		Oscar Bro		179
		Other rec		180
	3.2.3.3	5.2.5.5.1	Preliminary ruling in <i>IMS</i>	180
		5.2.5.5.2	Syfait	182
		5.2.5.5.3		185
		5.2.5.5	5.2.5.5.3.1 Interoperability	186
			5.2.5.5.3.1 Interoperationally 5.2.5.5.3.2 Remedies	187

xviii CONTENTS

				5.2.5.5.3.3 Standards	188
				5.2.5.5.3.4 Comments	188
		5.2.6	Predator	ry pricing	189
			5.2.6.1	AKZO	192
			5.2.6.2	Tetra Pak II	194
				5.2.6.2.1 Recoupment	194
			5.2.6.3	CEWAL—Compagnie Maritime Belge	195
			5.2.6.4	Deutsche Post, Wanadoo and Deutsche Telecom	197
		5.2.7	Other ex	clusionary conduct	198
			5.2.7.1	Raising rivals' costs	198
			5.2.7.2	Vexatious litigation	199
			5.2.7.3	Price squeeze	200
			5.2.7.4	Acquiring the only competing technology	200
	5.3	Unfair	competit		200
		5.3.1	Unfair p	rices	200
		5.3.2	Other un	nfair terms	203
		5.3.3	Ad hoc o	discriminatory pricing	204
		5.3.4	Refusal t	to deal	206
			5.3.4.1	Refusals to deal based on nationality	206
	5.4	Integra	ition of tl	he Common Market	207
	5.5	That m	ay affect	trade between Momber States	209
	5.6	Conclu	ısion	1200	209
	5.7	Bibliog	graphy		212
				4.	
6	State	Maggur	es to Prot	tect Firms from Competition	217
U	State	ivicasui	CS tO 1 10	teer rans from Competition	41/
	6.1	Introd	uction		218
	0.1	6.1.1		nent encouragement or persuasion is no	210
		0.1.1		to Article 81	219
		6.1.2		asures reinforcing the effects of	21)
		01112		apetitive agreements	219
		6.1.3		asures that delegate the fixing of prices to	
		01110	citizens	we will be a provent	220
		6.1.4		npetitive state measures making agreements	
				undertakings unnecessary	221
		6.1.5		asures are subject to the rules for free	
				nt of goods	224
		6.1.6		ion on Article 10	224
	6.2		and excl	usive rights (Article 86)	225
		6.2.1	Underta		226
			6.2.1.1	Criterion functional—economic activity	226
			6.2.1.2	Social solidarity	226
			6.2.1.3	Supplying goods or services on the market	228

			6.2.1.4 Regulation	228
		6.2.2	Unable to avoid infringing	229
		6.2.3	Mere exercise of exclusive right infringes	229
		6.2.4	Extension of market power to another activity	231
		6.2.5	Derogation under Article 86(2)	231
	6.3	Under	rtakings infringe only by autonomous conduct	232
	6.4		e national law requires an infringement, a national court	t
			mpetition authority should disapply the law—Consorzio	
		Fiamr	1 1 1	233
	6.5		monopolies of a commercial character (Article 31)	235
	6.6		aids (Articles 87–89)	236
	6.7		dumping duties	237
	6.8		ict between competition rules and other Community	
		policie		238
		6.8.1	Free movement and intellectual property	238
		6.8.2		238
		6.8.3		239
		6.8.4	•	240
	6.9	Concl		240
		Bibliog		240
		C		
7	Enfo	rcement	t after Regulation 1/2003	241
	7.1	Introd	luction	241
	7.2	Articl	es 81 and 82 are directly applicable in national courts	
			uthorities	243
	7.3		nunity powers of NCAs, Commission and national cour	ts 245
		7.3.1	National powers of NCAs and courts—Article 3	245
		7.3.2		
			Articles 5 and 7–10	246
		7.3.3	Co-operation between competition authorities—	
			Articles 12–14	249
		7.3.4	Powers of national courts	251
			7.3.4.1 Nullity	255
			7.3.4.2 Effect of comfort letters	256
			7.3.4.3 Assistance from the Commission	257
			7.3.4.4 Forum shopping	258
	7.4	The C	Commission's powers to obtain information	258
		7.4.1	Requests for information (Art 18 and recital 23)	259
		7.4.2		261
		7.4.3	. ,	265
		7.4.4	1 /	265
	7.5	The C	Commission's Procedure (Art 27)	268

xx CONTENTS

		7.5.1 Rights of the defence	269
		7.5.2 Statement of objections and hearing	271
		7.5.3 Access to the file	273
		7.5.4 Subsequent steps	275
		7.5.5 Appeals	275
	7.6	Fines and penalties (Arts 23–26)	277
		7.6.1 Notice on the method of setting fines	278
		7.6.2 Notice on the reduction of cartel fines	279
		7.6.3 Limitation periods	281
	7.7	Conclusion	282
	7.8	Bibliography	283
8	Class	es of Agreement Clearly Prohibited	287
	8.1	Distinctions between hard-core and ancillary restrictions of	
		competition and between horizontal and vertical agreements	287
		8.1.1 Hard-core restraints illegal per se	288
		8.1.2 Ancillary restraints may be justified	288
		8.1.3 Horizontal and vertical relationships	290
	8.2	Hard-core horizontal cartels affecting price and allocating	
		markets or customers	294
		8.2.1 Indirect influences on pricing policies	296
		8.2.2 Information agreements	297
		8.2.3 Joint sales organisations	298
		8.2.4 Agreements about standard conditions of sale	300
		8.2.5 Market allocation	300
		8.2.6 Maximum buying prices	301
	8.3	Collective discrimination—boycotts and reciprocal exclusive	301
	8.4	dealing Collective aggregated discounts	303
	8.5	Agreements to tie the sale of one item to another	303
	8.6	Export bans	305
	0.0	8.6.1 Export deterrents	305
		8.6.2 Export boosters	309
	8.7	Conclusion	310
	8.8	Bibliography	310
	0.0	Diolography	310
9	Distr	ibution Agreements	311
	9.1	Historical introduction	311
		9.9.1 Exclusive distribution (I will sell only to you within a territory) exempted, not cleared	311

	9.1.2	Dealers tied to brand owners (single branding)	312
9.2	Forme	er group exemptions for exclusive distribution and	
	exclusi	ive purchasing agreements	314
9.3	Cleara	nce of exclusive distribution agreements	314
9.4	Selecti	ve distribution—non-price competition	315
9.5	Retail	format franchising	318
	9.5.1	The ECJ's judgment in <i>Pronuptia</i>	319
9.6	Group	exemption for vertical agreements	320
	9.6.1	The exemption (Art 2)	322
		9.6.1.1 Vertical agreements	322
		9.6.1.2 Two or more parties	323
		9.6.1.3 Agreement between actual or	
		potential competitors	323
		9.6.1.4 Subject to conditions	324
		9.6.1.5 Other group exemptions	324
		9.6.1.6 Intellectual property rights	325
	9.6.2	No white list	325
	9.6.3	9.6.1.5 Other group exemptions 9.6.1.6 Intellectual property rights No white list 30% ceiling of market share—(Art 3)	325
	9.6.4	Hard-core restraints (Art 4)	326
		9.6.4.1 Resale price maintenance (Art 4(a))	327
		9.6.4.2 Territorial restraints (Art 4(b))	327
		9.6.4.3 Selective distribution (Art 4(c))	329
		9.6.4.4 Cross supplies (Art 4(d)	329
	9.6.5	Single branding (Art 5)	329
	9.6.6	Withdrawal of exemption (Arts 6–8)	330
	9.6.7	Transitional previsions (Art 12)	331
9.7	Ways o	of bringing goods and services to market	331
	9.7.1	Agency	332
	9.7.2	Collective exclusive distribution	333
9.8	Conclu	usion	333
9.9	Bibliog	graphy	333
10 Intell	ectual P	Property Rights and the Free Movement of Goods	335
10.1	Intelle	ctual property rights and competition	335
10.2		of the distinction between the existence of rights and	
	their ex	-	337
10.3		novement of goods	337
10.4		stion of intellectual property rights when a product has	
		old by or with the consent of the holder in another	
		er State	338
		Early cases on exhaustion	338

xxii CONTENTS

	10.4.2 Copyright—the ECJ emphasises the need for rewards	
	and incentives	343
	10.4.3 Law of unfair competition	346
	10.4.4 Rights in reputation—trade marks	347
	10.4.4.1 Repackaging and relabelling of trade marked	
	goods	348
	10.4.5 <i>Merck v Stephar</i> remains the law	350
	10.4.5.1 Can pharmaceutical patents be used to	
	restrain parallel trade? GlaxoSmithKline	351
	10.4.6 Sales outside the EEA do not exhaust intellectual	
	property rights	352
	10.4.6.1 Exhaustion applies to goods sold anywhere	
	in the EEA	353
10.5	Harmonisation of intellectual property rights	353
	10.5.1 Copyright	354
	10.5.2 Trade marks	355
	10.5.3 Patents	355
	10.5.3.1 Supplementary protection certificates	355
10.6		356
10.7		359
10.8	Bibliography	360
	300	
11 T : 00m	nces of Industrial and Commercial Property Rights	363
II Licen	ices of findustrial and Commercial Froperty Rights	303
11.1	Introduction: rationale for the grant of patent protection	364
11.2		365
11.3	The Court's view of exclusive licences: <i>Nungesser</i> , <i>Coditel II</i> ,	505
	Louis Erasy Jacquerie	367
11.4	The former group exemptions for patent, know-how and mixed	
	licences	371
11.5	The group exemption for technology transfer—	
	Regulation 772/04	371
	11.5.1 The exemption—Article 2	372
	11.5.2 Ceilings of market share—Article 3	373
	11.5.2.1 'Competing undertakings'—Article 1(1)(j)	374
	11.5.3 Hard-core restraints—Article 4(1) and (2)	375
	11.5.3.1 As between competing undertakings—	
	Article 491 and Guidelines 77–95	376
	11.5.3.1.1 Price fixing	376
	11.5.3.1.2 Output limitation	376
	11.5.3.1.3 Market allocation	376
	11.5.3.1.4 Restriction on using others'	
	technology	376

		11.3.3.2 As between non-competing undertakings	3/0
		11.5.3.2.1 Price restrictions	377
		11.5.3.2.2 Restrictions on passive sales	377
		11.5.4 Provisions that are not exempt	379
		11.5.5 Miscellaneous provisions	380
		11.5.6 Conclusion on the regulation	381
	11.6	Other guidelines	381
	11.7	Licences of other kinds of commercial and industrial property	
		rights	383
	11.8	The subcontracting notice	384
		Collective licensing	385
		Bibliography	386
12	2 Conce	Control under Article 81 and 82 The successive merger regulations	389
	12.1	Control under Article 81 and 82	389
		The successive merger regulations	390
	12.2	12.2.1 Mergers and acquisitions of sole control	391
		12.2.2 Concentrative joint ventures	392
		12.2.3 Thresholds	395
		12.2.4 Notification	396
		12.2.4.1 Referral to and from NCAs	397
		12.2.5 Procedure	397
		12.2.5.1 The Commission's power to obtain information	
		12.2.5.2 Fines	399
		12.2.5.3 Miscellaneous	400
		12.2.6 One-stop control	400
	12.3	Criteria for appraisal by the Commission	402
	12.5	12.3.1 Collective dominant position (Gs 39–60)	404
		12.3.2 Unilateral effects	406
	12.4	Burden of proof	407
	12,4	12.4.1 Airtours	407
		12.4.2 <i>Tetra Laval</i> and other cases	408
		12.4.3 IMPALA	410
	12.5	Horizontal mergers	411
	12.5	12.5.1 Market shares	412
		12.5.2 Other factors	413
		12.5.3 Efficiencies	415
		12.5.4 Failing firm	416
	12.6	Vertical mergers	417
	12.0	12.6.1 Draft guidelines	417
	12.7	Conglomerate mergers	419
	12./	12.7.1 Draft guidelines	419
		12. / · 1 2 1 41 4 5 41 4 5 11 11 1 1 1 1 1 1 1 1 1	11/

xxiv CONTENTS

	12.7.2 Commission v Tetra Laval	419
	12.7.3 GE/Honeywell	420
12.8	Remedies	422
12.9	Conclusion	423
12.10	Bibliography	425
13 Joint	Ventures and Specialisation Agreements	427
13.1	Introduction	427
13.1	Case law on cooperative joint ventures	429
13.2	13.2.1 Inherent effect: loss of potential competition	430
	13.2.1.1 Ancillary restrictions	431
	13.2.1.2 The need for each party to appropriate the	
	benefits of its investment	432
	13.2.1.3 More realistic attitude to be taken to	
	potential competition	433
	13.2.1.3.1 <i>ODIN</i>	435
	13.2.1.3.2 European Night Services and later	
	cases	436
	13.2.2 The group effect—spillever	437
	13.2.2.1 Spillover under the merger regulation	438
	13.2.3 Foreclosure	438
	13.2.4 Networks of joint ventures	439
12.2	13.2.5 Joint sales organisations	439
13.3		441
13.4	joint ventures	441
13.4	Guidelines on joint ventures The group exemption for cooperative R & D	441 442
	Problems with standards	442
	Conclusion on joint ventures	444
13.8	Specialisation agreements	445
13.0	13.8.1 Effects of specialisation agreements on competition	446
	13.8.2 Individual decisions	446
	13.8.3 Group exemption—Regulation 2658/2000	448
13.9	Bibliography	449
14 Conc	lusion	451
14.1	Criticisms	452
	14.1.1 The paucity of economic analysis in the Commission's and Courts' public decisions	452

14.1.2 The Comm	ission's view that Article 81(1) prohibits any	
	of conduct that is significant on the market	454
	e Court's analysis has been more helpful	
tha	an that of the Commission	457
14.1.3 The need to	analyse ex ante: at the time the	
commitmen	its are made—the counterfactual	458
14.1.4 Hostile atti	tude to export bans and deterrents	459
14.1.5 Article 82 is	s intended to protect consumers not	
particular c	ompetitors	461
14.1.5.1 Du	ity to supply narrowed	462
14.1.5.2 Pr	edation illegal only if recoupment	462
14.1.5.3 Di	scrimination forbidden very widely: is the	
pro	ohibition limited to Article 82 in	
co	mbination with Article 86?	463
14.1.5.4 Re	bates after Michelin II and British Air	464
14.1.5.5 Jo	int dominant position	464
14.2 Steps taken by the Commission to meet the criticisms		465
14.2.1 New group	exemptions since 1999	465
14.2.2 Regulation	1/2003	466
14.2.3 Appointme	nt of the Commission's Chief Economist—	
peer review	and reorganisation of the Directorate General	ral
for Compet		468
	he Application of Article 82	469
	the Leniency Programme	472
	nused by competition cases on the ECJ and	
CFI		473
14.3 Conclusion		474
Main Bibliography		475
Glossary		481
Appendix I: Excerps from the EC Treaty		493
Appendix II: Regulation 1/2003		497
Appendix III: Useful websites		529
ndex		531