Preface

The landscape of European competition law has seen significant changes in the past decade, in terms both of enforcement and substantive application. One of the last frontiers to be subjected to scrutiny and debate has been Article 82. A lively debate has developed in recent years regarding the introduction of an effects-based approach to Article 82, and the way such an approach may affect Article 82's nature and scope. The debate was stimulated by the publication of three papers: the Commission Discussion Paper, the EAGCP Report, and the *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*.

Moving from a formalistic approach to Article 82 to an economic-based one, we are crossing somewhat uncertain grounds. While emphasis on the actual or expected economic effect is welcome, as it aims to curtail only those activities which are harmful to competition, it is challenging to apply effects-based analysis in practice. There are questions relating to the relevant benchmarks to use for establishing abuse and to the principles that limit their applications.

The European courts may have a significant role in this evolutionary process. Several landmark cases, including *Microsoft*, *France Télécom (Wanadoo)* and *GlaxoSmithKline*, provided the courts with opportunities to have their say on the boundaries of Article 82. These judgments are interesting not only for their contribution to the development of the case law, but also for their role in shaping the future and scope of the 'effects-based approach'.

We stand in the midst of a transition period in which the Commission and courts grapple with complex questions as to the treatments of market power and the abuse of dominance. Interestingly, the debate in relation to the adequate level of intervention is not confined to Europe. This is notably demonstrated in the US by the rift between the Department of Justice and the Federal Trade Commission on the treatment of market power.

Discussion in relation to the evolution of Article 82 has also dominated the agenda of The University of Oxford Centre for Competition Law and Policy (CCLP). Guest lectures and round table discussions have added to the debate in past years. Chapters in this book are primarily a reflection of this ongoing debate at the CCLP. The book groups together 10 contributions which explore recent developments in relation to Article 82 and consider the future of its enforcement.

In chapter one, James Kavanagh, Neil Marshall and Gunnar Niels provide an economic perspective on Article 82 and the effects-based approach. They discuss the reasons for the need for reform and analyse whether recent reforms have succeeded in moving the law toward an effects-based approach. They also discuss the extent to which there may be convergence between European and US policy in relation to predation, taking into account the recent opinion of the Advocate-General in *France Télécom*.

In chapter two, Ioannis Lianos examines the shortcomings of the current approach to Article 82 and stresses the need for a reconceptualisation of the current categorisation of abuses. The chapter analyses the recent Commission Guidance on its enforcement priorities in applying Article 82 EC and considers whether it constitutes a real effects-based approach. The possible implications for competition law enforcement are explored, with a particular focus on the notion of consumer sovereignty.

In chapter three, Ariel Ezrachi identifies some of the inherent difficulties associated with the departure from a formalistic approach and the introduction of effect-based analysis. The author considers how the Commission's limited mandate to advance a reform which departs from traditional case law, impacts on the boundaries of Article 82. Furthermore, it highlights how the Commission's attempt to widen the analytical framework of Article 82 may trigger inconsistencies, in so much as 'effects-based variants' are being advanced outside the precedent system.

In chapter four, Orit Dayagi-Epstein sets out the evolution of the notion of consumer interest under Article 82, from a formalistic to an effects-based approach that emphasises consumer welfare. In this framework the discrepancies between the Discussion Paper and the Commission Guidance with respect to consumer welfare are discussed. The chapter concludes by arguing that despite the modernisation process, the evolution of consumer interest is yet to be supported by the Community courts.

In chapter five, Steven Anderman asks what is left of the 'exceptional circumstances' test following the *Microsoft* ruling. He argues that the test may have been widened to cover conduct limiting the technical development of secondary markets, but stresses that the test is itself subject to a finding of 'essential facilities' dominance. He discusses the exceptional nature of this concept and the effect that this type of dominance has upon the concept of abuse.

In chapter six, Dan Eklöf discusses the interface between intellectual property (IP) and competition law, and reflects on the legal standards applied in *Microsoft*. He goes on to explore the software environment and its legal foundation in the EC computer programs directive, and the impact this had in the proceedings. Thereafter, it is argued that *Microsoft* follows a pattern of challenges to questionable IP rights under Article 82. The internal copyright provision targeting interoperability between different makes of software is then discussed, and the chapter concludes by expressing qualified support for antitrust-based compulsory licensing.

In chapter seven, Kathryn McMahon considers one aspect of the debate that the Commission has placed at the forefront of its approach—the special responsibility of dominant firms not to allow their conduct to impair genuine, undistorted competition. The chapter analyses what 'special responsibility' can tell us about the goals of Article 82 and its significance within the reformed approach to the abuse of dominance. This is contrasted with the US approach, and the impact of the concept on the wider goals of EC competition law is discussed.

In chapter eight, Pranvera Këllezi analyses recent developments in European competition law with regard to tying and bundling, and assesses them in light of economic theory. The chapter discusses whether the case law and the new Commission Guidance is consistent with economic thinking and whether it is flexible enough to allow for economic learning to be taken into account.

In chapter nine, Ariel Ezrachi and David Gilo consider an area yet untouched by reform. They explore and question the main grounds commonly used to justify non-intervention in cases of alleged excessive pricing. The discussion focuses on one of the grounds for non-intervention—the complexity of evaluating whether a price is excessive—and puts forward a proposal for a post-entry price-cut benchmark which may facilitate the finding of excessive pricing.

In chapter ten, Ulf Bernitz considers the consequences of a finding of abuse under Article 82, focusing on the fact that, in contrast to Article 81, there is no provision for voidness. The issue of voidness under Article 82 is revisited in light of the recent Commission White Paper on damages. In the author's view, there is a strong link between the right to damages and the issue of voidness.

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Ariel Ezrachi
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