Index

Aberdeen Journals, OFT Decision [2002] UKCLR 740 170

Act Against Restraints of Competition 1958 (Germany) 29–31, 53


Albion Water Ltd v Director General of Water Services [2006] CAT 36 (UK) 173

Allarde Decree 1791 on Freedom of Commerce (France) 125

Aníbal v Estación Sur de Autobuses [Case 627/07] (Spain) 94

Arealnetz (2005) (German Federal Court) 60–61

Article 81 of EU Treaty (now Article 101 TFEU)
application of, extension to national courts 104–5

Article 82 of EU Treaty (now Article 102 TFEU)
interpretation
    criticism of Commission and court on 153–5
    evolution of policy on 66–74
and Sherman Act (US) 37, 42
    member state ability to apply stricter rules 30

Article 85 of EU Treaty (now Article 105 TFEU)
Commission duties under 107–8, 112

Article 101 of the Treaty on the Functioning of the European Union (TFEU) see Article 81

Article 102 of the Treaty on the Functioning of the European Union (TFEU) see Article 82

Article 105 of the Treaty on the Functioning of the European Union (TFEU) see Article 85

Astel v Telefónica (Case 557/03) (Spain) 91

Attheraces v British Horse Racing Board [2007] EWCA Civ 38 (UK) 174

BAA Airports, market investigation (UK) 175–6


Bodson v Pompes Funèbres des Régions Libérées [1988] ECR 2479 89

Böhm, Franz 40–44

Bork, Robert H. 25

British Airways v Commission [2007] ECR I-2331 17–19, 81

Canal Plus, Decision 05-D-13 on practices of (France) 143, 145

Canivet, Guy 132–4

Cardiff Bus, OFT Decision [2009] UKCLR 332 164, 171, 173
cartels
    and competition law development 8–9, 31–7, 63
    French law on 125
    German law on 2, 31–7
    Italian law on 117–19
    national laws promoting 6, 117–18

Chester City Council v Arriva plc [2006] UKCLR 823 174

Chicago School of Antitrust on freedom versus efficiency 45–8
on self-interest 25

Ciné-Alpes, Decision 07-D-44 on practices of (France) 143–4

Cistercian Congregation and Planaria, Decision 05-D-60 on practices of (France) 144–5
The impact of the Commission’s Guidance on Article 102

Index

European Union, generally
- Common Market, importance of 10
  freedoms of, and competition law 27–8
  integration, influence of 26–7
exclusionary conduct
  legality test for 37–8
  Spanish law on 90–94
exclusivity
  French law on 146–7
  Guidance (2008) on 77–8, 146, 157
  Spanish law on 97–8
Fair Trading Act 1973 (UK) 163, 165
First Edinburgh, OFT Decision [2004]
  UKCLR 1554 164
foreclosure, of competition
  British Airways ruling on 17–18
definition 49
  and efficiency, protection of 17–18, 45–8
  French law on 142–4
  Guidance (2008) on 22, 111–12, 156–8
  likelihood and capability of 16–19, 156–8
France, competition law in
  on abuse of dominant position 129–31
  on cartels 125
  competition analysis tests 137–8
  competition authorities, role and powers 124–5
  and competition on its merits 137–8
  and consumer welfare/harm 128–9, 156–8
  ordoliberal views on 11–12, 17
  policy developments towards 4, 17
  versus freedom 45–8
German law on 62
and objective justification 23, 112–15, 144–6, 159–60
ordoliberal views on 11–12, 17
and vertical agreements 13
Ehlermann, Claus-Dieter 10–11
English, Welsh and Scottish Railway Ltd, ORR Decision [2007]
  UKCLR 937 170
Enterprise Act 2002 (UK) 165–6, 175
Eucken, Walter 42–3
European Advisory Group on Competition Policy (EAGCP)
  134–5

and refusal to supply 54–6
Microsoft case 56–9, 149
and special responsibility 4, 15–17, 20–21, 23–4, 48–9, 136–7
test of legality 37–8

‘An Economic Approach to Article 82’ (EAGCP, 2009) 135
economics see also efficiency
economic constitution concept 40–44
and government intervention 41–4
influence on EU competition policy 10–12, 75
role in analysis of law 40–41
welfare economics 42–3
effects-based approach 155
  in France 132–3, 135–9
  in Italy 5, 122–3
efficiency
  ‘as efficient competitor’ test 49–51
  as barrier to market entry 16
  British Airways ruling on 17–18
and consumer welfare/harm
  balance between 67–70
  French law on 128–9, 137–8, 142–6
protected competitors 50–51
and foreclosure of competition, likelihood of 16–19, 156–8
versus freedom 45–8
German law on 62
and objective justification 23, 112–15, 144–6, 159–60
ordoliberal views on 11–12, 17
and vertical agreements 13
Ehlermann, Claus-Dieter 10–11
English, Welsh and Scottish Railway Ltd, ORR Decision [2007]
  UKCLR 937 170
Enterprise Act 2002 (UK) 165–6, 175
Eucken, Walter 42–3
European Advisory Group on Competition Policy (EAGCP)
  134–5

Lorenzo Federico Pace - 9780857933133
Downloaded from Elgar Online at 12/31/2018 10:17:15AM
via free access
on exclusive dealing 146–7
on fairness 128–9
on foreclosure of competition 142–4
historical development 6–7, 125–8
legal interpretation, referrals for 24
on market power 140–42
on objective justification 138–9, 144–7
on predatory pricing 148–9
purpose of 128–9
on refusal to supply 149–50
response to EAGCP report 2009 134–5
rule of reason test 135–6
on tying and bundling 147–8
France Télécom and France Télévisions, Decision 08-D-10 on practices of (France) 145
France Télécom, Decision 05-D-59 on practices of (France) 149–50
France Télécom, Decision 07-D-33 on practices of (France) 143
France Telecom v Commission [2007] ECR II-107 52
free riding, prevention of 24, 92
and vertical agreements 11–13
freedom, versus efficiency 45–8
Genzyme Ltd v Office of Fair Trading [2004] CAT 4 170, 173
Gerber, David J. 39–44
Germany, competition law in
on abuse of dominant position 30–31
cartels, law on 2, 31–7
competition authority powers in 29
and consumer welfare/harm 48–51
economic constitution concept in 40–44
on efficiency 62
and EU policies
compared with 5, 29–33
direct applicability of 29–30
influence on 2–3, 9, 30, 35–7
on exclusionary conduct 31
and free competition 45–8
history of 6–7, 29–37
and intellectual property rights 59–60
ordnungspolitik, concept of 40, 42
and ordoliberalism, influences of 9, 15, 39–44
on predatory pricing 53–4
on refusal to supply 55, 59–62
regulation, policy developments supporting 42–3
stricter rules under 29–33
Gîtes de France, Decision 06-D-06 on practices of (France) 142, 147–8
GlaxoSmithKline France, Decision 07-D-09 on practices of (France) 148–9
Green paper on vertical restraints in EU competition policy COM 96/0721 FINAL 11
Greenspan, Alan 25
Guidance on its enforcement priorities in applying Article 82 (EC) to exclusionary conduct by dominant undertakings 2008 (European Commission) (OJC 2009, 45/02)
‘as efficient competitor’ test 49–51
on consumer welfare/harm 20–21, 48–51, 73–4
criticism of
ambiguity in 23–4, 44–5, 73–80, 110–11
and assessment of abusive conduct 75–9
Commission powers, inconsistent use of 108–10
conflict between interpretation of Article 82 and case law 110–12
conflict between title and content 106–8
conflict over applicability of Article 82 114–16
efficiency justifications 112–16
exclusions and discretions, scope of 79–80, 108–10
and Discussion Paper (2005), compared 19–21, 105–6
on efficiency, and consumer welfare/harm 20–21, 48–51, 73–4
on exclusionary conduct 20–23, 49–51, 101
on exclusivity 77–8, 146, 157
on exploitative abuses, and policy trends 69–71, 80–82, 101
on foreclosure of competition 22, 111–12, 156–8
format, as Communication rather than Notice 4, 105, 107, 116–17
on function of competition 23–4
influence on practices of 80–82
investigations, identifying cases for 156–60
legal status of 4, 29–30, 105, 107, 116–17
on margin squeeze 150
on market share and power 21–2, 49, 141–42
on objective justification 23, 112–15, 144–6, 159–60
potential impact of 19, 161–2
on predatory pricing 21, 52–4, 157–9
proof, standard and burden of 23, 138
purpose of 19–20, 42–4, 74–5, 104–5, 156
on refusal to supply 55–6, 157
scope of, limitations on 105–6, 155
on special responsibility of dominant companies 15–17, 20, 24, 48–9
as stage in competition policy evolution 65, 101–2
on tying and bundling 157
von Hayek, Friedrich August 47
Hoffmann-La Roche & Co AG v Commission [1979] ECR 461 16, 72, 111, 140–41
horizontal agreements 13–14
Hume, David 26
Iasist v 3M (Case 517/01) (Spain) 93, 97
IMS Health v Commission [2001] ECR II-2349 58
intellectual property licensing, and vertical restraints 13
Italy, competition law in
on abuse of dominant position 120–23
on cartels 117–19
competition authorities, role and powers 122
economics, trends in use of 5, 122–3
effects-based approach versus form-based approach 5, 122–3
and EU policies compared with 5–6, 119–21
Guidance (2008), influence of 2
historical development 6–7, 117–20
and volume of cases, impact on 6, 120
Jenny, Frédéric 133
JJ Burgess & Sons v OFT [2005] CAT 25 (UK) 164, 173
Joliet, René 37–8, 69
Korah, Valentine 3
La Poste, Decision 04-D-65, on practices of (France) 146–7
Lasserre, Bruno 140
Law 15/2007 on the Protection of Competition (Spain) 82–5, 98
Law 16/1989 on the Protection of Competition (Spain) 84–5
Law 110/1963 on the Prohibition of Practices Restricting Competition (Spain) 82
Law 287 on Antitrust 1990 (Italy) 118
Law 420 on New Economic Regulation 2001 (France) 126
Law 776 on the Modernization of the Economy 2008 (France) 127
Law 834 on Obligatory Consortia 1932 (Italy) 117–18
Law 961 on Obligatory Consortia 1937 (Italy) 118
legal certainty
absence of 4, 124
interpretation, conflicts arising from 53, 78–9, 96–7
and rule of reason test 135–6
The impact of the Commission’s Guidance on Article 102

Le Havre Port Authority, Decision 07-D-28 on practices of (France) 144
Lucazeau v SACEM [1989] ECR 2811 88

McLane v Tabacalera (Case 486/00) (Spain) 92–3
margin squeeze 150
as refusal to supply 19, 157
market share see dominant position, abuse of
member states, interpretation of Guidance (2008) by see under individual countries by name
merger control
and abuse of dominance, interpretation 38
influence of legislation on 10–11
policy development on 14–15
merits, competition on its 16, 137–8, 155
Mestmäcker, Ernst-Joachim 3
Michelin v Commission (Michelin II) [2003] ECR II-4071 75–6
Microsoft v Commission (T-201/04) (OJC 269/45 CFI) 18, 78, 81–2
elimination of competition 57
indispensability 57
objective justification 58–9
refusal to supply 56–9, 149
relevant markets 60–61
Miksch, Leonard 42–3
MOB v Telefónica Móviles (Case 489/00) (Spain) 91
Monopolies and Restrictive Practices Act 1948 (UK) 162–3

Napp, OFT Decision [2001] UKCLR 597 170
National Grid, OFGEM Decision [2008] UKCLR 171 170–71
Nederlandsche Banden-Industrie Michelin v Commission (Michelin I) [1983] ECR 3461 15, 18
neighbouring-markets doctrine 92–3, 97

objective justification
French law on 138–9, 144–7
test, for refusal to supply 58–9
Office of Fair Trading (UK)
criticism of 171–4
National Audit Office review of 2005 174–5
Prioritisation Principles (2008) 109, 175
role and powers of 163–4, 166–7
and sectoral regulators 167–8, 172
Ordinance 1243 of 1986 on Competition (France) 125
Ordinance 1483 of 1945 on Cartels (France) 125

ordnungspolitik, concept of 40, 42
ordoliberalism 3
and economic constitution concept 40–44
on efficiency, protection of 11–12, 17
and EU competition policy, influence on 8–9
on function of competition policy 8–9, 67
German influence on 9, 15, 39–44
and rule of reason test 136–7
on vertical restraints 11

Paris-London rail links, Decision 07-D-39 on practices of (France) 149
Perrot, Anne 134–5
predatory pricing
cost standards for identifying 52–3, 158–9
French law on 148–9
German law on 53–4
as objective interference 53–4
price squeezes 52–3, 150
UK law on 171
prices, controlling see predatory pricing
refusal to supply
applicability of Article 82 to 54–6
and consumer welfare/harm 55–6, 58–9, 61–2, 157
elimination of competition 57
French law on 149–50
German law on 55, 59–62
Guidance (2008) on 55–6, 157
indispensability 57, 61, 78
margin squeeze as 19, 157
Microsoft case 56–9, 149
and new products, impact on 58
objective justification 58–9
Spanish law on 91–2
Regulation 1/2003 on the
implementation of the rules on
competition laid down in Articles
81 and 82 of EC Treaty (European
Council)
concurrent applicability of
competition law 29–34
economic trends in interpretation of
104–5
investigative powers under, impact
of 131–2
national provisions, more strict than
EU 30–33
and UK law, impact on 165–6
Regulation 2790/1999 on the
application of Article 81(3) of the
treaty to vertical agreements and
concerted practices (European
Council) 12
Regulation 4064/89 on merger control
10–11
Restrictive Trade Practices Acts 1956
and 1976 (UK) 162
Retevisión v Telefónica (Planes Claros)
( Case 456/99) (Spain) 91
Rey, Patrick 134
Robinson Patman Act 1936 (United
States) 32–3
RTE and ITP v Commission ( Magill
case) [1995] ECR I-743 56, 78–80,
92–3
rule of reason test 135–6
Sandoz laboratories, Decision 03-D-35
on practices of (France) 148
self-interest, and self-regulation 25–6
Sherman Act 1890 (US)
Section 2 (monopoly power) 29,
37–8, 42, 64
Smith, Adam 27
Société des Caves et des Producteurs
Réunis de Roquefort, Decision 04-
D-13, on practices of (France) 146
Spain, competition law in
on abuse of market power 82–90
ad hoc doctrines, evolution of 79,
96–7
competition authorities
establishment 82–3
investigation targets 88–9
role and powers of 82–3, 89–90,
100
criticism of 90–94
domestic court interpretation of
90–94, 99–101
and EU policies
compared with 5, 84–90
Guidance (2008), potential impact
and importance of 94–101
on exclusionary conduct 90–94
on exclusive or special rights 97–8
fairness considerations 98
historical development of 7, 82–5
and market liberalization, influence
of 95–7
neighbouring-markets doctrine 92–3,
97
on refusal to supply 91–2
special responsibility, of dominant
companies 4, 15–17, 20–21, 23–4,
48–9, 136–7
Tetra Pak International v Commission
Tetra Pak International v Commission
( Tetra Pak II) [1996] ECR I-5951
79
Tomra v Commission (Commission
Decision, 29 March 2006) 81
Tournier, Criminal Proceedings against
[1989] ECR 2521 88
Transmontagne, Decision 07-D-14 on
practices in Pra-Loup ski resort
(France) 143
tying and bundling 30–31, 147–8, 157
United Brands Company and United
Brands Continental BV v
Commission [1978] ECR 207 69,
111–12, 140–41
United Kingdom, competition law in on abuse of dominance 170–71
Competition Act 1998 163–6
Competition Appeal Tribunal 166–7, 169
competition authorities, role and powers 152–3, 163–4, 166–9
Competition Commission 168–9
courts for 153, 162, 166, 168–70
Enterprise Act 2002 165–6, 175
and EU policies
Guidance (2008), impact of 176–7
national policies, compared 5–6
Regulation 1/2003, impact of 165–6
historical development 6–7, 162–5
market investigation, of BAA Airports 175–6

Office of Fair Trading 109, 163–4, 166–7, 171–5
on predatory pricing 171
sectoral regulators, role of 167–8, 172

van Gend en Loos v Netherlands Inland Revenue Administration [1963] ECR 1 47
van Miert, Karel 133
vertical agreements 10–14, 63
and efficiency 13
and market power 12–14

Wanadoo v Commission [2009] (Case C-202/07P unreported) 52
‘What is competition on its merits?’ (OECD, 2006) 137–8