Index

2 Travel v Cardiff City Transport Services Ltd 63–4

AAH Pharmaceuticals Ltd v Pfizer Ltd 63

Aberdeen Journals Ltd case 54

abuse of law 8, 120, 130–32

abuse of regulatory process 122–4

Adidas-Salomon AG v Roger Draper and Paul Howorth 61

adjusted liability rule 83–95

AKZO Chemie BV v Commission 10, 22–3, 100

Albion Water v Dwr Cymru Cyfngedig 64

Albion Water Ltd v Water Services Regulatory Authority 56

algorithms 28–32

anticompetitive collusions 16

anticompetitive effects 24–5

anticompetitive harm 14–15

Apple 77, 78

Arenaways/FS case 128–9, 157–8, 163–5

Arriva The Shires v London Luton Airport Operations 66

Article 101 TFEU 16, 85–6

Article 102 TFEU 1–11, 119, 120

decentralization of enforcement 5, 8–11

dominance in 98–101

EU Commission enforcement in the energy sector 170, 171–5

role of intent see intent

sources of interpretation see separate entry

in the UK 52–67

artificial intelligence 28–32

as-efficient competitor test 39–40, 44

AstraZeneca case 4, 25, 120, 122–4, 134, 136, 156

Attheraces v British Horse Racing Board 65

Austria 97–8, 107–17

definition of dominance 107–8

KartG 97, 108–9, 109–12, 113, 115, 116–17, 118

presumptions of dominance 10, 109–17, 118

automated machines 28–32

Autorità Garante per la Concorrenza e il Mercato (AGCM, Italian Competition Authority) 137, 139–40

approach to interaction between regulation and competition law 140–41

Italian courts and decisions of 127–30, 163–8

primacy of competition over regulatory law 10, 152–63

Autorità per le Garanzie nelle Comunicazioni (AGCOM, Italian Regulatory Authority for Communications) 158–61

Avastin 154–7, 162, 168

average total costs (ATCs) 22

average variable costs (AVCs) 22

bargaining framework 87–90

BAT case 130–31

BBI/Boosey & Hawkes 122

behavioural remedies 174, 183
Abuse of dominance in EU competition law

Belgium 178
bid cap 178–9
billing services 180–81
Block Exemption Regulation for Vertical Agreements 114, 115
British Airways case 24, 49
BT/MCI I case 151
Bulgaria 181
Bundeskartellamt (German NCA) 104, 107
bundling 3
Burgess v OFT 45–6, 56
Calabresi, G. 95
capacity limitation 171–2
capacity withdrawal 176–9
capacity withholding 172
Cardiff City Transport Services Ltd case 55–6
case-by-case analysis 21–2, 24–5
CEZ 181
Chapter II Prohibition 52–67
client switching requests 159–60, 166
collective dominance 117, 118
Austria 108–9, 109–10, 111, 112–13, 116, 117, 118
Germany 102, 103, 105–6, 107, 117
commitment decisions 35–6, 36–8, 50
Compagnie Maritime Belge case 23, 119
Competition Act 1998 40, 46, 52, 54
Chapter II Prohibition 52–67
Competition Appeal Tribunal (UK) (CAT) 45–6, 53, 56, 59, 60, 63–4, 67
Competition and Markets Authority (UK) (CMA) 52, 53, 55, 57, 58, 60
complementarity 10, 144–52, 168
EU approach 10, 146–52, 168
Italy and 160–63, 165–7
compliance by design standards 31
compliance programmes 28
compulsory licence defence 70, 71, 73, 83
conditionality 89–90
Consorzio Industrie Fiammiferi (CIF, ruling of the Court of Justice of the EU) 156
Continental Can case 3, 34–5
Coop Estense case 129–30, 136–7
cooperative technical self-regulation 70–71
cost–price test 173, 177, 180, 181
costs structure 183
Court of Justice of the EU (CJEU) 16–17
definition of dominance 98
Huawei judgment 79–82
incrementalism in case law 42–5
intent in case law 18–26
critical deference 34, 36, 45–9, 50
Dahabshiil Transfer Services Ltd v Barclays Bank plc 62–3
damages 63–4
Huawei and damages claims 91
de facto standards cases 70, 71–2
applicability of Huawei 91–5
de minimis rule 21, 48
decentralization of enforcement 5, 8–11
Denmark 176–7, 178–9
Deutsche Telekom case 24–5, 147, 156, 165
discretion of public authorities 136–7
Discussion Paper on the Application of Article 82 of the Treaty to exclusionary abuses 17
duty to deal 86, 87, 93
duty to license 86, 92–3
duty to negotiate in good faith 86, 93
Index

E2 177–8

_easyJet Airline Co. Ltd v Commission 67
‘eBay-rule’ 69, 90, 96

economic-analysis approach 19–21, 38
effect/object distinction 16, 18
efficiency defence 48–9
Electrabel 178
electricity markets 176–84
elimination of competition 14
Elsam case 176–7, 178–9
Emsland-Stärke case 135
Endesa 179
ENEL Sicily case 177, 178
ergy sector 10, 169–84
EU Commission regulatory antitrust 10, 170, 171–5, 182
NCAs enforcement in relation to excessive pricing 10, 170, 176–84

_English Welsh & Scottish Railway Ltd case 55

ENI case 172
ENTEGA case 179–80
Enterprise and Regulatory Reform Act 2013 57, 58, 59, 67
_E.ON case 172, 176
Esselunga 129–30
essentiality of a patent 83, 89–90, 92–3, 94–5
Estel case 16
EU Charter of Fundamental Rights 80, 82, 121
EU Commission commitment decisions 35–6, 36–8, 50
complementarity between regulation and competition law 10, 146–52, 168
Guidance Paper 17, 36, 38–42, 44, 53–4, 182
market definitions 1–2
market shares and dominance 99, 100, 101

regulatory antitrust in the energy sector 10, 170, 171–5, 182
SEPs and abusive patent injunctions 77–8
EU Merger Control Regulation 113
European Coal and Steel Community (ECSC) Treaty 2
European Medicines Agency (EMA) 156, 157
European Telecommunications Standards Institute (ETSI) 79
ex ante regulation 166–7
ex post control of anticompetitive conduct 166–7
exceptional circumstances 124–6
excessive pricing in the energy sector 10, 169–84
exclusionary abuses 3
critical deference 46–8
EU Commission and the energy sector 170, 171–2, 173
preservation but containment of the right to exclude 84–6
pricing 35
exclusionary intent 24–6, 120, 132–5
exploitative abuses 2–3
bargaining framework to prevent 87–9
excessive pricing in the energy sector 10, 169–84

fair, reasonable and non-discriminatory (FRAND) terms 68, 70, 72, 76, 124–6
EU Commission 77–8
Huawei case 79, 80–82, 95–6
shift from limited property rule to adjusted liability rule 84–6, 87–9, 90, 92

_Ferrovie dello Stato (FS) group 128–9, 157–8, 164
fidelity rebates 3, 24
final customers, excessive prices on 179–81
Abuse of dominance in EU competition law

fines 56, 178, 181, 182, 183
follow-on actions 9, 60, 63–4
France Télécom case 22–3
Gas and Electricity Markets Authority 55
Gazprom case 174
GDF Suez case 36–7
General Motors case 173
Genzyme Ltd case 54–5
Germany 5–6, 69, 83, 97–8, 101–7
case law on patent injunctions 73–7
definition of dominance 101–2
excessive prices in the energy sector 179–80
Orange Book Standard 7, 8, 71, 72, 73–5, 91–2
presumptions of dominance 10, 102–7, 117
Gesetz gegen Wettbewerbsbeschränkungen (GWB, German Act against Restraints of Competition) 97, 101–5, 108
good faith negotiations defence 78, 82, 83, 89
green energy 180
Guidance Paper (‘Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’) 17, 36, 38–42, 44, 53–4, 182
Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements 85
Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 28
Guidelines on Vertical Restraints 114–15

Hendry v World Professional Billiards and Snooker Association 64–5
Hili AG v Commission 100
Hoffmann-La Roche case 1, 99
Huawei case 4, 7, 8, 69, 72, 79–96, 125–6
applicability in de facto standards cases 91–5
CJEU’s judgment 79–82
damages claims 91
shift to an adjusted liability rule 83–95
Hyman, W.J. 13
Iberdrola 179
illegal parallelism 30
Impala case 105–6
implied immunity doctrine 144–5
incrementalism 34–5, 36, 42–5, 50
Industrie des Poudres Sphériques case 122–3
infringement, findings of 54–7
Intel v Commission 4, 20, 100
intellectual property rights (IPRs) 3–4, 69–70
liability rule approach 70, 83–95
new abuses of dominance based on exceptional circumstances 124–6
patent injunctions see separate entry
property rule approach 69–70, 76–7, 95
intent 6–7, 12–33
artificial intelligence and 28–32
in CJEU case law 18–26
concept 13–15
enforcement and procedural issues 26–8
exclusionary 24–6, 120, 132–5
in the text of EU competition rules 15–17
intention 13
interim measures 57–8, 61–3, 67
internal coherence in case law 44–5, 50
internal market, realization of 141–2
International Competition Network (ICN) 39
interpretation, sources of see sources of interpretation
Italy 5–6, 119–38, 177, 178
abuse of dominance in regulated sectors 10, 139–68
exclusionary intent 120, 132–5
Italian courts and AGCM decisions 127–30, 163–8
new forms of abuse of dominance 7–8, 120, 126–30
primacy of competition law over regulation law 152–63
ITT Promedia case 25–6, 121–2, 135
Jobserve Ltd v Network Multimedia Television 61
Kartellgericht (KG) 108–9
Kartellgesetz (KartG) (Austrian Cartel Act) 97, 108–9, 109–12, 113, 115, 116–17, 118
liability attribution 29–31
liability rules 70, 95
shift from a limited property rule to an adjusted liability rule 83–95
limitation of capacity 171–2
limited property rule 83
liquid natural gas (LNG) terminals 36, 37
Liquid Petroleum Gas case 109, 111
London Metal Exchange (LME) case 57
long-term contracts 171
long-term evolution (LTE) standard 79
Lucentis 154–5, 157
Magill case 132
margin squeeze 3, 25, 171–2
market definition 1–2
market shares 98–9
Melamed, D. 95
metering services 180
Michelin I case 24
Michelin II case 24
money remitters 62–3
monopolies 14
more economic approach 19–21, 38
motive 14
Motorola case 7, 41–2, 77–8, 88, 120, 124–5, 134, 137
Napp Pharmaceutical Holdings Ltd case 54
National Competition Authorities (NCAs) 3, 5, 8, 34, 56–7, 143, 148
enforcement approach in relation to excessive pricing in the energy sector 10, 170, 176–84
National Grid case 41, 55
ne bis in idem principle 150, 154, 160, 167
new forms of abuse of dominance 7, 119–38
abuse of law 8, 120, 130–32
in the EU 121–6
in Italy 7–8, 120, 126–30
requisite causal link 136–7
role of exclusionary intent 120, 132–5
new market entrants 183
Nord Pool 176–7
Novartis 154–7, 168
object/effect distinction 16, 18
objective concept, abuse as 6, 15, 18
Abuse of dominance in EU competition law

Office of Fair Trading (OFT) 46, 52, 54–5, 56, 57–8, 59
Office of Rail Regulation 55
OPCOM case 42
Orange Book Standard 7, 8, 71, 72, 73–5, 91–2
Oscar Bronner case 43, 44–5
Osram/Airam case 120
ownership unbundling 175
Packet Media Ltd v Telefonica UK Ltd 62
patent injunctions 68–96
EU Commission’s position 77–8
from a limited property rule to an adjusted liability rule 83–95
German case law 73–7
Huawei judgment 79–82
Perindopril case 126
Pfizer case 127–8, 130, 156
Phonak/GN Store case 106
Picht, P. 85
platform markets 21
Posner, R. 26
Post Danmark cases 24–5, 39, 44, 47–8, 54
predatory pricing 3, 17, 22–4, 133
presumptions of dominance 9–10, 97–118
Austria 10, 109–17, 118
Germany 10, 102–7, 117
Prezes Urzedu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. Z o.o. 56
price bargaining 87–9, 94
price regulation 2, 87, 93, 178–9, 183, 184
price setting 83–4, 87–9, 93, 94, 95–6
primacy of competition law over regulatory law 152–63
private enforcement 9, 59–66, 67
procedural issues 26–8
property rule approach 69–70, 76–7, 95
shift from a limited property rule to an adjusted liability rule 83–95
public enforcement 9, 54–8, 59
Purple Parking v Heathrow Airport 40, 65–6
rebates 3, 24, 44
Reckitt Benckiser case 55
refusal of access to an essential facility 3
refusals to deal 3, 43–5, 45–6, 62–3, 158–61
refusals to license 3–4, 44
SEPs and abusive patent injunctions 7, 68–96
regulated industries 10, 139–68
AGCM and primacy of competition law over regulation law 10, 152–63
energy sector see separate entry
EU Commission approach 10, 146–52, 168
interaction between regulation law and competition law 140–46
Italian courts’ approach 163–8
primacy of competition law over regulatory law 10, 152–63
Regulation 1/2003 8, 34, 182
Article 3(2) 10–11, 34, 97–8
Article 9 174
Article 23(2) 16, 27–8
regulatory antitrust approach 10, 170, 171–5, 182
regulatory process, abuse of 122–4
remedies
algorithms and automated machines 31
energy sector 174–5, 178–9, 181, 182, 183
requisite causal link 136–7
reverse hold-up 86
right to exclude 83, 84–6, 93–4
Index

Roche/Novartis case 154–7, 162–3, 167–8
‘rule of reasons’ cases 19
RWE case 172, 179–80
Sainsbury’s Supermarkets Ltd v MasterCard Inc. 60
Samsung case 7, 77, 124–5, 134
Scottish Power 178
Scottish Southern Energy 178
sectoral regulators 52–3, 54–6
Segers 131
self-learning machines 29, 30–31
self-regulation 31
cooperative technical 70–71
separation of powers 162
Sherman Act 6, 15
Sicily 177
significant damage 58
Significant Impediment of Effective Competition (SIEC) test 103
Si.mobil v Commission 67
single branding obligations 114–15
single dominance 108, 110, 111–12, 113, 115, 116–17
Slovak Telekom case 25, 41, 42
Slovakia 181
smartphone wars 68
Software Cellular Network Ltd v T-Mobile (UK) Ltd 62
sources of interpretation 34–51
commitment decisions 35–6, 36–8, 50
critical deference 34, 36, 45–9, 50
Guidance Paper 36, 38–42, 44
incrementalism 34–5, 36, 42–5, 50
Spain 179
Springer/Pro Sieben case 106
standalone actions 9, 60, 64–6
standard-essential patents (SEPs) 124–6
and abusive patent injunctions 7–8, 68–96
standard licensing agreements 94
standard-setting organizations (SSOs) 85–6
standards set by 68, 70, 72, 75
see also Huawei case
Stergios Delimitis v Henninger Brau AG 21
Streetmap v Google 40–41, 46–9, 50
structural remedies 174–5
subjective valuations 83, 87–9, 93–4
tacit collusion 29, 30
Telecom Italia case 158–61, 165–7
telecommunications sector
relationship between regulation and competition law 10, 146–52
see also individual cases
Telefónica case 147–8
Telekomunikacja Polska case 41, 149–51, 165
Telia Sonera case 24–5
termination clauses 76, 89, 94–5
Tetra Pak cases 23, 120
Third Energy Legislative Package 175
Toltecs trademark 131
two-pronged test 25–6, 135
tying 3, 23
Ufficio per la Regolazione dei Servizi Ferroviari (URSF, Italian Railway Authority) 158, 164, 165
unconditional offers 75–6
Unión Fenosa 179
United Brands case 100, 173, 177
United Kingdom (UK) 5, 9, 52–67, 178
Chapter II Prohibition 52–67
Competition Act (1998) 40, 46, 52, 54
critical deference in England and Wales 45–9
Enterprise and Regulatory Reform Act 2013 57, 58, 59, 67
Abuse of dominance in EU competition law

Guidance Paper 40–41
law on abuse of dominance 52–4
private enforcement 9, 59–66
public enforcement 9, 54–8
United States of America (US)
‘eBay-rule’ 69, 90, 96
implied immunity doctrine 144–5
Sherman Act 6, 15
validity of a patent 83, 89–90, 94–5
Van der Woude, M. 169
vertical agreements 114
vertical restraints 114–15
Vestager, M. 88
vexatious litigation 25–6, 121–2, 133–4
violations of Article 102 TFEU 21–4
Visa UK Ltd 58
Volvo case 131–2
Wahl, N. 182
Water Services Regulation Authority 56, 59
withdrawal of capacity 176–9
withholding of capacity 172
World Health Organization (WHO) 157
Worldpay 58
ZSE Distribución 181
ZTE 79