

---

# Contents

---

<i>Acknowledgements</i> .....	v
<i>Table of Cases</i> .....	xiii
<i>Table of Legislation</i> .....	xxix
<i>Table of Conventions</i> .....	xxxiii

## **Introduction** ..... 1

I. The Interface between Competition and the Internal Market: Market Separation under Article 102 TFEU .....	1
II. Methodological Remarks on the Analysis of 'Market Separation under Article 102 TFEU' .....	2
A. Factual Scenarios within the Compass of Market Separation Cases under Article 102 TFEU .....	3
B. Definition of the Internal Market .....	4
C. The Significance of the Type of Enforcement Proceedings: Public and Private Enforcement of Article 102 TFEU .....	5
III. Summary of the Chapters of this Book .....	7

## **1 Objectives of Article 102 TFEU and Market Integration: From a Historical Analysis to the Current Jurisdictional Approach** ..... 9

I. Introduction .....	9
II. Objectives of EU Regulation of Unilateral Anti-competitive Conduct (Article 102 TFEU) .....	10
A. Competition and Economic Efficiency: A Trade-Off between Present and Future Consumers .....	10
B. Competition and Economic Freedom: A Trade-Off between Intermediate Buyers and End-Consumers .....	14
III. Linking the Objectives of Article 102 TFEU to EU Trade Liberalisation .....	17
A. Delimitation of the Notion of 'Market Integration' in the EU .....	17
B. Market Integration: Not a Stand-Alone Objective of Article 102 TFEU .....	19
C. Teleological Interpretation of 'Abuse of a Dominant Position': The Vehicle Linking Competition to Market Integration .....	26
IV. 'Effect on Trade': An Analytical Approach to Jurisdictional Elements with the Advantage of Hindsight .....	28
A. The Jurisdictional Function of the Requirement of 'Effect on Trade' .....	28



B. The 'Effect on Trade' Test: Identical to or Distinct from the Test under Article 34 TFEU for MEQR? .....	30
C. The 'Effect on Trade' Test as Distinct from the Substantive Test of 'Abuse of the Dominant Position' .....	35
D. Geographic Market Definition as an Example of the Likely Different Roles of Market Integration at the Jurisdictional and Substantive Levels.....	37
V. Conclusions .....	39
<b>2 Market Separation under Article 102 TFEU: The Role of Dominance.....</b>	<b>41</b>
I. Introduction .....	41
II. Cases of Market Separation by Dominant Undertakings under Article 102 TFEU.....	42
A. Geographic Price Discrimination .....	43
B. Exclusionary Abuses Hindering Competition across National Borders.....	46
C. Comment: The Significance of Geographic Market Definition.....	48
III. An Analytical Approach to Market Separation by Private Actors under the Free Movement Provisions and its Relationship to Market Separation by Dominant Undertakings.....	49
A. The Asymmetry between the Addressees of the Competition Law Provisions and the Free Movement Provisions.....	50
IV. Functionalism and the Significance of Public Enforcement of the Competition Law Provisions .....	52
V. Beyond Functionalism: The Significance of a Quantitative Threshold for Power .....	56
A. Dominance as a Condition <i>Sine Qua Non</i> for Anti-competitive Market Separation under Article 102 TFEU: Normative and Legal Considerations.....	61
VI. The Specific Example of Article 106(2) TFEU .....	66
VII. Conclusions .....	67
<b>3 Market Separation under Article 102 TFEU: The Role of Economic Justifications.....</b>	<b>69</b>
I. Introduction .....	69
II. The Analytical Framework for Assessing Market Separation as an Abuse of the Dominant Position .....	70
A. The Structure of Article 102 TFEU: 'Objective' or 'Efficiency' Justifications and the Burden of Proof .....	71
B. The Distinction between Unilateral Conduct and Agreements: The Specific Case of Contractual Abuses .....	75



III. Conceptual Elements of Measures Constituting a Restriction on Free Movement .....	79
A. Distinguishing between Economic and Non-economic Values under the Free Movement Provisions.....	80
B. Economic Values Promoted by the Free Movement Provisions: A Discrimination Test, a Market Access Test or Both?.....	85
IV. Establishing Market Separation as an Abuse of the Dominant Position.....	92
A. The Role of Intent: An Analogy with Discriminatory Trade Barriers? .....	93
B. 'Efficiency' and 'Objective' Justifications: Is Uniformity within the Internal Market an End in itself?.....	98
V. The Constitutional Basis for Aligning the Notions of Trade Barrier and Abuse of the Dominant Position .....	106
A. The Different Use of Economics to Establish a Trade Barrier versus an Abuse of the Dominant Position.....	106
B. From Article 3(1)(g) TEC to Protocol No 27 TFEU: No Conflict in Substantive Values between Competition and Market Integration .....	108
VI. Conclusions .....	111
<b>4 Market Separation under Article 102 TFEU and the Role of Non-economic Justifications: A Question of Attribution .....</b>	<b>113</b>
I. Introduction .....	113
II. Abuse and Public Policy Justifications: Treaty-Based Arguments.....	114
A. The Conceptual Foundation of Justified Trade Barriers: Distribution of Competences for Market Regulation .....	115
B. 'Pre-emption' and the Exclusive Competence to Establish the Rules on Competition.....	122
III. Abuse and Public Policy Justifications: Interpretation of the Case Law .....	127
A. Interpretation of the Case Law at a Descriptive Level.....	128
B. The Potential for Abusive Conduct Genuinely in the Public Interest versus the Potential for Genuine 'Lobbying' Efforts .....	133
C. The Potential for Added Costs in Terms of Legal Analysis .....	136
D. Attribution as a Question Distinct from, and Prior to, the Substantive Legality Test.....	138
IV. Conclusions .....	140
<b>5 Shared Responsibility for Market Separation by Dominant Undertakings and the State: The Question of Attribution Revisited .....</b>	<b>142</b>
I. Introduction .....	142
II. Abuse and the State Action Defence: Establishing Private Responsibility.....	144



A.	The Type of Link between State Legislation and the Undertaking's Conduct: The Legality, Purpose and Margin of Autonomous Conduct.....	145
B.	The Intensity of the Link between State Legislation and the Undertaking's Conduct: Encouragement and Compulsion.....	152
III.	Abuse and the State Action Doctrine: Establishing State Responsibility .....	155
A.	The Relationship between Article 4(3) TEU-L (ex-Article 10 TEC) and Article 106(1) TFEU in Conjunction with Article 102 TFEU.....	157
B.	The Type of Link between State Legislation and the Undertaking's Conduct: Autonomous Conduct Prohibited under Article 102 TFEU .....	159
C.	The Intensity of the Link between State Legislation and the Undertaking's Conduct: An Issue of Indeterminacy .....	164
D.	The Relationship between the State Action Doctrine and the Free Movement Provisions.....	172
IV.	The Interplay between Private and State Responsibility under the Competition Law Provisions.....	177
A.	The Dual Role of ex-Article 3(1)(g) TEC .....	178
B.	The Structural Imbalance between Private and State Responsibility under the Competition Law Provisions.....	179
V.	Conclusions .....	183
<b>6</b>	<b>Principled Attribution of Market Separation to the Dominant Undertaking and the State: A Revised State Action Defence .....</b>	<b>185</b>
I.	Introduction .....	185
II.	From Article 3(1)(g) TEC to Protocol No 27 TFEU: Distinct Substantive Legality Tests and Associated Enforcement Mechanisms .....	186
A.	Demise of the State Action Doctrine in Favour of the Free Movement Provisions.....	186
B.	Geographic Market Definition .....	192
C.	Procedural Limitations and Institutional Capacities of the Actors Involved .....	196
III.	Principled Attribution of Market Separation Controlled: The Example of the 'Exhaustion' of Intellectual Property Rights .....	200
A.	Side One of the Interface between the Free Movement and the Competition Law Provisions in Regard to IPRs: Non-exhaustion.....	201
B.	Side Two of the Interface between the Free Movement and the Competition Law Provisions in Regard to IPRs: Exhaustion .....	207

IV. Conclusions.....214

**Conclusions.....217**

*Bibliography.....219*

*Index .....237*