

CONTENTS

<i>Tables of Cases</i>	xvii
<i>Tables of Legislation</i>	xxiii

1. Toward an Economic Approach to Article 102 TFEU	1
A. The Development of the European Approach to Abuse of Dominance	2
B. Economic Analysis of Abuse of Dominance Issues: Old and New Approaches	8
(a) The Chicago Law School	8
(b) The post-Chicago approach	10
(c) The endogenous entry approach to competition policy	11
(d) The behaviour of dominant firms under competition in quantities	14
(e) The behaviour of dominant firms under competition in prices	17
(f) Strategic commitments by dominant firms	18
C. An Economic Analysis of the EU Approach to Article 102 TFEU and a Comparison with the US Approach	20
(a) The genesis of the European approach to consumer protection	20
(b) The European Guidance Paper and a comparison with the American approach	26
(c) Recent developments	31
D. Conclusion	36
2. Is the Guidance Paper on the Commission's Enforcement Priorities in Enforcing Article 102 TFEU Useful?	37
A. The Context Leading to the Adoption of the Guidance Paper	38
B. The Content of the Guidance Paper	41
(a) Dominance	41
(b) Anticompetitive foreclosure	41
(c) Price-based exclusionary conduct	43
(d) Objective justification and efficiencies	44
C. Does the Guidance Paper Offer Sufficient Guidance?	45

D. Will the Commission Comply with its Own Guidance Paper?	49
E. Conclusion	51
3. Some Outstanding Issues from the European Commission's Guidance on Article 102 TFEU: Not-so-faint Echoes of Ordoliberalism	53
A. European Assumptions of Harm	55
(a) The first assumption	55
(b) The second assumption	56
B. Examining the Assumptions in Detail	57
(a) Assumption 1: dominance may not be an abuse; but it is a 'problem' that needs correcting	57
(b) Assumption 2: harmful abuse: foreclosure leading to consumer harm ('anticompetitive foreclosure')	59
C. The New Efficiencies Defence for Abuse (Guidance, paragraphs 29–31)	70
D. Conclusion	71
4. Optimal Enforcement and Decision Structures for Competition Policy: Economic Considerations	73
A. Introduction	73
B. Optimal Decision Procedures: Effects-based vs. Per Se	74
C. Decision Procedures and Legal Uncertainty	77
D. The Role and Impact of Judicial Reviews	80
E. The Role and Impact of Internal Error-Correction Mechanisms	81
5. IP Rights in the EU <i>Microsoft</i> Saga	83
A. Introduction	83
B. The Background: Windows Competitive Concerns and the US Case	84
C. The European Commission's Case: Theory of Competitive Harm and Remedies	85
D. The Law: Compulsory Licensing and IP Rights	88
E. The <i>Microsoft</i> Judgment	90
F. Judging <i>Microsoft</i> with the Benefit of Time Passed	94

6. Judicial Review in Article 102 TFEU	99
A. Introduction	99
B. The Notion of Abuse before EU Courts	101
(a) A broad and vague definition of the abuse	101
(b) The relative irrelevance of precedents in Article 102 TFEU cases	105
(c) Lack of coherence in Article 102 TFEU case law	107
C. The Definition of Abuse under the Principles Governing Judicial Review in EU Law	108
D. Conclusion	112
7. The Assessment of Efficiencies under Article 102 TFEU and the Commission's Guidance Paper	115
A. Introduction: The Need for Guidance	115
B. Back to Basics: The Concept of Abuse of a Dominant Position	118
C. A Redefinition of the Principles? The Guidance Paper	120
D. The Efficiency Defence—Practical and Theoretical Problems	121
(a) The requirement that the conduct in question be 'indispensable' for the achievement of the efficiencies	122
(b) The requirement that the conduct must not 'eliminate effective competition'	123
(c) The requirement that the benefits achieved must 'outweigh negative effects' on competition	124
(d) Burden of proof	125
E. Conclusion	127
8. Will Efficiencies Play an Increasingly Important Role in the Assessment of Conduct under Article 102 TFEU?	129
A. The Role of Efficiencies in Previous Article 102 Cases	130
B. The Role of Efficiencies under the Article 82 Guidelines	133
C. Conclusion: Will the Article 82 Guidelines Lead to a Greater Reliance on Efficiencies in Dominance Cases?	135
9. Are We Underenforcing Article 102 TFEU?	139
A. Introduction	139
B. The Gap in Enforcement	141
C. Conclusion	161

10. Is the Availability of ‘Appropriate’ Remedies a Limit to Competition Law Liability under Article 102 TFEU? The Mischief of ‘Discretionary Remedialism’ in Competition Law	165
A. Introduction	165
B. Discretionary Remedialism and its Necessary Limits	167
C. The Aim of Competition Law Remedies	171
D. Competition Law Remedies for Violations of Article 102 TFEU	174
E. The Need for a Principle of Remedial Proportionality	177
F. Conclusion	184
Annex: Article 102 TFEU (Ex 82/86) Principle European Commission Decisions on Abuse of Dominance and the Remedies Imposed	187
11. Damages for Exclusionary Practices: A Primer	203
A. The Conceptual Framework	206
(a) The time line	206
(b) Effects	208
(c) The counterfactual	210
(d) Damages	210
B. Some Implementation Issues	213
(a) Estimating counterfactual profits and surplus	213
(b) Calculating profits and surplus under the foreclosure scenario	215
C. Causality	216
D. An Application: Predatory Pricing	219
E. Conclusion	220
<i>Index</i>	221