Table of Contents

Prefa	ord to the fourth edition ce of Cases of Legislation	vii xxiii xlvii
1 Intr	roduction	1
1.1	The Common Market	1
1.2	The competition rules 1.2.1 Article 85—collusion that restricts competition 1.2.2 Article 86—the abuse of a dominant position 1.2.3 The interpretation of the competition rules and the	2 3
	integration of the common market 1.2.4 The treaty covers all sectors of the economy	4 5
1.3	The economics of market power 1.3.1 Welfare economics—efficiency 1.3.2 Other reasons for controlling market power 1.3.2.1 Market integration 1.3.2.2 Small and medium-sized firms 1.3.2.3 Fair competition 1.3.2.4 Political freedom 1.3.2.5 Conflict of goals 1.3.3 Barriers to entry and substitutes may define the relevant market 1.3.3.1 Substitutes on the demand side 1.3.3.2 Barriers to entry	7 8 9 9 9 9 10 11 12 12
1.4	EC Institutions 1.4.1 The Council 1.4.2 The Commission—the executive of the Communities 1.4.3 The Community Courts	15 15 17 17
1.5	Enforcement of the competition rules 1.5.1 Enforcement by the Commission 1.5.1.1 The role of the Court under articles 173	19 19
	and 175 1.5.2 Enforcement by national courts	19 20

xii EC COMPETITION LAW

		1.5.3	Possible enforcement by national competition	20
			authorities	21
		1.5.4	The co-existence of national competition rules	21
	1.6	Extra	aterritorial competence	22
	1.7	The 1	European Economic Area (EEA)	23
	1.8	The i	mportance of the competition rules	24
	1.9		measures to protect firms from competition.	26
		1.9.1	Government encouragement or persuasion is no defence to article 85	27
		1.9.2	State measures reinforcing the effects of anti- competitive agreements	27
		1.9.3	State measures that delegate the fixing of prices to	21
		1 0 1	citizens Anti-competitive state measures making agreements	28
		1.7.4	between undertakings unnecessary	29
		1.9.5	State measures are subject to the rules for free movement	30
		196	Conclusion on article 5(2)	31
			Special and exclusive rights (article 90)	21
			State aids	34
		1.9.0	State alus	34
	1.10	The The	plan for the book	35
	1.11	Bibl	iography	36
2	Ana	lysis (of Article 85(1)	37
	2.1	Intro	duction	37
				0.7
	2.2		sion between undertakings	37
			Undertakings	38
		2.2.2	Agreements	40
			2.2.2.1 Unilateral conduct in the context of a long	11
			term contract	41
			2.2.2.2 Unsatisfactory evidence on which collusion is	10
		2 2 2	Sometimes found	42
			Decisions by associations of undertakings	42
		2.2.4	Concerted practices	43
	*		2.2.4.1 Economic considerations	43
			2.2.4.2 Legal precedents	45

		2.2.4.3 Horizontal agreements to exchange information	49
	2.3	'Which may affect trade between member states' 2.3.1 Market integration 2.3.2 Condition often fulfilled even if agreement is confined	49
		to a single member state 2.3.3 The condition has recently been further narrowed 2.3.4 The comparable provision in article 86 is similarly construed	525455
		2.3.5 Under the EEA	56
	2.4	'Have as their object or effect the prevention, restriction or distortion of competition within the common	
		market' 2.4.1 'Appreciable' effects	56 60
	2.5	Bibliography	62
3	Exe	emptions and nullity	63
	3.1	Introduction	63
	3.2	Article 85(3)	63
	3.3	Group exemptions	64
	3.4	Nullity	65
4	Abu	se of a Dominant Position	67
	4.1	Objections to economic strength	67
	4.2	Dominant position 4.2.1 What is a dominant position? 4.2.2 How to assess whether a position is dominant 4.2.3 Relevant market 4.2.3.1 Relevant product market—substitutes on both the demand and supply side of the market 4.2.3.2 Relevant geographic market 4.2.3.3 Time scale	68 69 69 72 74
		4.2.3.4 Wider markets suggested by the Court 4.2.3.5 The fallacy of defining markets to assess market power	75 75
		4.2.4 Customer dependence	75

xiv EC COMPETITION LAW

		4.2.5 Assessment of dominant position	78
		4.2.5.1 Barriers to entry and market share	78
		4.2.5.2 Conduct	80
		4.2.6 Collective dominance	80
		4.2.7 'Substantial part of the common market'	81
		4.2.8 Conclusion on dominant position	82
	4.3	'Abusive exploitation'	83
		4.3.1 Introduction to 'abusive exploitation'	83
		4.3.2 Reduction of competition prohibited by article 86	85
		4.3.2.1 Control of mergers	85
		4.3.2.2 Systematic discrimination	86
		4.3.2.3 Refusals to supply	89
		4.3.2.4 Predatory pricing	89
		4.3.2.5 Tying	92
		4.3.2.6 Other exclusionary conduct	95
		4.3.3 Unfair competition also prohibited by article 86	95
		4.3.3.1 Unfair prices	95
		4.3.3.2 Other unfair terms	99
		4.3.3.3 Ad hoc discriminatory pricing	100
		4.3.3.4 Refusal to supply	101
		4.3.4 Refusals to deal based on grounds of nationality	105
	4.4	Conclusion	105
	4.5	Bibliography	107
5	Enf	orcement under Regulation 17	109
			100
	5.1	Introduction	109
	5.2	Basic provision (article 1)	110
	5.3	Negative clearance (article 2)	110
	5.4	Termination of infringement (article 3)	111
	5.5	Notification (articles 4 and 5)	112
		5.5.1 Reorganisation of DGIV, the Competition	4 4 4
		Department	112
		5.5.2 Forms for notification (regulation 27)	113
		5.5.3 Whether to notify	115
	5.6	Exemption (articles 6-9) and comfort letters	115
	5.7	Obtaining information (articles 11–14)	117

CO	N	CEN	VTS	X
\sim	TA		ATD	17 1

		5.7.2	Requests for information (article 11) Inspections (article 14) Sector enquiries (article 12)	118 120 123
	5.8	5.8.1 5.8.2	edure (article 19 and regulation 99) Statement of objections Access to the file The hearing	123 124 124 125
	5.9	Confi	identiality (article 20)	126
	5.10	Fine	es and penalties (articles 15 and 16)	127
	5.1	1 Mis	cellaneous	129
	5.12	2 Bibl	iography	129
6	Civ	il Law	Sanctions	131
	6.1	Injun	ctions and actions for damages	131
	6.2	Enfo	rcement by national competition authorities	135
	6.3	6.3.1 6.3.3 6.3.4	ty (article 85(2)) The early case law The second Brasserie de Haecht case Old agreements after the second Brasserie de Haecht case New agreements, comfort letters and short form exemptions Accession agreements	136 137 138 139 142
	6.4	6.4.1	her to notify Advantages of notifying 6.4.1.1 Immunity from fines 6.4.1.2 Individual exemption 6.4.1.3 A comfort letter is not an exemption 6.4.1.4 Reputation 6.4.1.5 Evidence that infringement was intentional Disadvantages of notifying 6.4.2.1 Trouble 6.4.2.2 Skeletons 6.4.2.3 National law 6.4.2.4 Opportunity to renegotiate	143 143 144 144 145 145 145 145
	6.5	Unde	rtakings given to the Commission	146

xvi EC COMPETITION LAW

	6.6	Bibliography	146
7	Cla	sses of Agreement Clearly Prohibited	148
	7.1	Distinction between naked and ancillary restrictions of competition and between horizontal and vertical agreements 7.1.1 Naked restraints illegal per se 7.1.2 Ancillary restraints may be justified 7.1.3 Horizontal and vertical relationships	148 148 149 150
		Naked horizontal cartels affecting price and allocating markets 7.2.1 Indirect influences on pricing policies 7.2.2 Information agreements 7.2.3 Joint sales organisations 7.2.4 Agreements about standard conditions of sale 7.2.5 Market sharing 7.2.6 Maximum buying prices	153 154 155 158 158 159
	7.3	Collective discrimination—boycotts and reciprocal exclusive dealing	159
	7.4	Collective aggregated discounts	161
	7.5	Agreements to tie the sale of one item to another	162
	7.6	Export bans 7.6.1 Export deterrents 7.6.2 Export boosters	162 164 166
	7.7	Conclusion	166
	7.8	Bibliography	167
8	Dist	tribution agreements	168
	8.1	Exemption of individual agreements	168
	8.2	Clearance of exclusive dealing agreements	169
		Group exemption for exclusive distribution agreements—regulation 1983/83 8.3.1 Article 1—exclusive supply 8.3.2 Article 2—permitted clauses or 'white list' 8.3.3 Obligations not permitted by article 2—selective distribution	170 171 172

		Illetile (r.P)	177
		8.3.5 Article 3—conditions precluding group exemption or	170
			178 180
	8.4	Diegraph. F	180 181
	8.5	I I COLIGINATION D	182 182
			185
	8.6.	General comments on the regulations	186
	8.7	Agency	187
	8.8	Collective exclusive dealing	188
	8.9	Bibliography	188
9	Indu	strial Property Rights and the Free Movement of Goods	189
	9.1	Intellectual property rights and competition	189
		Birth of the distinction between the existence of rights and their exercise	190
	9.3	Free movement of goods	191
		The exhaustion of intellectual property rights when a product has been sold by or with the consent of the holder	
		ALL COLLO CALCAL CONTO	191
			191
		9.4.2 Copyright—the Court emphasises the need for	105
			195 198
		To the second se	199
		9.4.4.1 Repackaging and relabelling of trade-	1))
		markad goods	201
		property rights	203
		9.4.5.1 Exhaustion applies to goods sold anywhere in the EEA	203
	9.5	Harmonisation of intellectual property rights 2	204

xviii EC COMPETITION LAW

		.1 Trade marks .2 Patents	205205
	9.6 Co ₁	nclusion	205
	9.7 Bib	oliography	206
10	Licenc	es of Industrial and Commercial Property Rights	208
		ntroduction: rationale for the grant of patent orotection	208
	10.2 T	The Commission's view	209
	10.3 T	The Court's view	212
		The group exemption for patent licences—regulation 349/84	216
	1 1 1 1	The group exemption for know-how licences—egulation 556/89 0.5.1 The exemption (article 1) 0.5.2 The white list (article 2) 0.5.3 The black list (article 3) 0.5.4 The opposition procedure (article 4) 0.5.5 Miscellaneous provisions (articles 6–13) 0.5.6 Conclusion	216 217 219 221 222 222
	10.6 T	The future of technology licences	223
		Licences of other kinds of commercial and industrial property rights	224
	10.8 A	Agreements to avoid confusion between trade marks	225
	10.9 A	Article 86—obligation to grant licences	226
	10.10	The subcontracting notice	228
	10.11	Bibliography	229
11	Specia	lisation Agreements	231
	11.1 In	ntroduction	231
	11.2 E	Effects of specialisation agreements on competition	231
	11.3 I	ndividual decisions	232

		CONTENTS	xix
	11.4	Group exemption—regulation 417/85	233
12	Mer	gers	237
		Control under articles 85 and 86	237
	12.2	The merger regulation 12.2.1 Thresholds 12.2.2 Notification 12.2.3 Criteria for appraisal by the Commission 12.2.4 Concentration defined 12.2.5 Earlier implementing regulations do not apply to concentrations 12.2.6 Powers of the Commission—stage I enquiry 12.2.7 Powers of the Commission—stage II enquiry 12.2.8 One stop control 12.2.9 The Commission's power to obtain information 12.2.10 Fines 12.2.11 Miscellaneous	237 238 239 240 242 246 246 247 248 248 248
	12.3	Conclusion	249
	12.4	Bibliography	249
13	Joint	ventures and Other Forms of Collaboration	251
	13.1	Introduction	251
	13.2	The Commission's concerns about joint ventures 13.2.1 Inherent effect: loss of potential competition 13.2.2 The group effect—spillover 13.2.3 Foreclosure 13.2.4 Ancillary restrictions 13.2.4.1 The need for each party to appropriate the benefits of its investment 13.2.4.2 Joint sales organisations	251 252 253 254 254 255 256
		More realistic attitude to be taken to potential competition 13.3.1 <i>ODIN</i>	256 259
		Disadvantages to industry of the Commission's refusal to clear joint ventures	259
	13.5	The group exemption	261

XX EC COMPETITION LAW

		13.5.2 13.5.3	The framework of the regulation Conditions of its application (articles 2 and 3) White and black lists Conclusion on the group exemption	261261263264
	13.6	Conce	ntrative joint ventures	264
	13.7	Conclu	ision	265
	13.8	Bibliog	graphy	265
14			The Importance of Economic Analysis and of Validity	267
		Introd		267
	14.2	Paucit	y of economic analysis in the Commission's public ons	267
			Lack of reasoning to connect specific facts with the legal conclusions The Commission's view that article 85(1) prohibits	267
			any restriction of conduct that is significant on the market Reasons why the Commission treated all	269
		1101	important restrictions of conduct as restrictions of competition	272
			The notification and exemption process has broken down to the detriment of legal certainty. The need to analyse ex ante: at the time the	272
	w .	14.2.3	commitments are made	274
		14.2.6	Agreements may have to be renegotiated after the bargaining power has shifted	274
		14.2.7	Steps taken by the Commission to remedy the lack of legal certainty 14.2.7.1 Comfort letters and short form	277
			exemptions 14.2.7.2 Group exemptions 14.2.7.3 Greater role for national courts?	277277280
	14.3	Comm		280
			Opinions and judgments have recognised the need for incentives to investment	281
			The doctrine of ancillary restraints Agreements are to be appraised in their legal and economic context	283 283

	CONTENTS	xxi
14.4 Conclusion		283
14.5 Bibliography		284
Main bibliography		285
Glossary		289
Appendix I Excerpts from the EC and EEA Treaties		299
Appendix II Text of regulation 17		305
Index		317

-