

COMMERCIAL AND ECONOMIC LAW IN THE EUROPEAN UNION

JULES STUYCK



Wolters Kluwer

Commercial and Economic Law in the European Union

Jules Stuyck

With the assistance of
Pierre M. Sabbadini, Ellen Van Nieuwenhuyze

This book was originally published as a monograph in the International
Encyclopaedia of Laws/Commercial and Economic Law.

Founding Editor: Roger Blanpain
General Editor: Frank Hendrickx
Volume Editors: Jules Stuyck & Evelyne Terryn



Wolters Kluwer

Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wolterskluwerlr.com

Sold and distributed in North, Central and South America by:
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:
Quadrant
Rockwood House
Haywards Heath
West Sussex
RH16 3DH
United Kingdom
Email: international-customerservice@wolterskluwer.com

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

Printed on acid-free paper

ISBN 978-90-411-8874-8

e-Book: ISBN 978-90-411-8928-8
web-PDF: ISBN 978-90-411-8969-1

This title is available on www.kluwerlawonline.com

© 2017, Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal & Regulatory U.S., 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Website: www.wolterskluwerlr.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

The Authors



Jules Stuyck graduated from KU Leuven in 1970 and obtained his PhD degree from the same University in 1975. Until September 2013, Jules taught substantive law of the European Union at the University of Leuven (KU Leuven) and at the Radboud Universiteit Nijmegen, the Netherlands. He is now emeritus professor from both Universities. In recent years, he has been teaching European law at the Université Panthéon-Assas Paris 2, France and still teaches European consumer law at that University. From 2000 until 2015, he taught European competition law at the Central European University in Budapest, Hungary. He is the author of about 450 publications in various fields, including a leading handbook on commercial practices law. He is a member of the editorial board of several Belgian and European legal journals. As an attorney (Brussels bar, since 1984), Jules Stuyck has long experience in EU law and consumer law. He regularly assists private clients as well as the European institutions (Commission and Council), agencies and bodies before the European Courts. In the last twenty years, he has pleaded numerous cases in various fields, including competition, State aid, the customs union, free movement, public procurement, trade mark and trade practices law, media law and environmental law. He is also an experienced litigator in the Belgian courts, specializing in market practices, competition law and intellectual property. Jules Stuyck has been with Liedekerke Wolters Waelbroeck Kirkpatrick, Brussels, since 1991, as a partner from 2002 until 2015 and as of counsel since 2016.

Pierre M. Sabbadini is a lawyer at Liedekerke Wolters Waelbroeck Kirkpatrick. He was admitted to the Brussels bar in 2012. His practice focuses on European and Belgian competition law as well as on State aid law. Pierre is a member of the board of the Belgian chapter of the International League of competition law. He holds a master degree in business law (2009) and a master in European competition and IP law from the University of Liège (2010). Pierre assisted in the drafting of parts of the chapter on competition law (part III Chapter 1).

The Authors

Ellen Van Nieuwenhuyze graduated from Ghent University in 2010 and obtained an LLM from King's College London in 2011. In 2015, she obtained a PhD in EU food law, focusing on the regulation of nutrition and health claims. She joined the Brussels Bar later that year, and is currently working as a legal assistant at the Court of Justice of the European Union (General Court). Ellen has authored various publications on EU law in general and EU food law. She is member of the editorial committee of *Journal de droit européen* (J.D.E.) and *Revue européenne de droit de la consommation*/European Journal of Consumer Law (R.E.D.C.). Ellen assisted in the drafting of parts I ((Introductory Part) and II (The Internal Market).

List of Abbreviations

AAC	Average Avoidable Costs
CAP	Common Agricultural Policy
CCT	Common Customs Tariff
CU	Customs Union
CCP	Common Commercial Policy
CFP	Common Fisheries Policy
CJEU	Court of Justice of the European Union
DG Comp	Directorate General for Competition (European Commission)
EC	European Community /European Communities/ Treaty on European Community
ECB	European Central Bank
EEA	European Economic Area
EU	European Union
GC	General Court of the European Union
EUMR	European Union Merger regulation
I.P.	Intellectual Property
NCA	National Competition Authorities
R&D BER	Research & Development Block Exemption Regulation
TTBER	Transfer of Technology Block Exemption Regulation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VABER	Vertical Agreements Block Exemption Regulation

Preface

This monograph is different from the national monographs in the IEL Commercial and Economic Law. Its scope is narrower, since a lot of rulemaking at EU level often takes place in the form of directives that have to be implemented in national law. These rules are discussed in the national monographs of the Member States of the EU. Accordingly, since there are numerous EU measures in the field of e.g. company law, securities, insurance law, commercial agency, copyright, trade mark law, designs and models, and late payments, the present monograph does not deal with ‘commercial law’ in the strict sense. The relevant rules are discussed in the national monographs of the Member States in the IEL on Company law, Insurance Law, Intellectual Property and Commercial and Economic Law. The EU regulations in the field of I.P. rights and insolvency are also disregarded here since they are basically ancillary to national provisions in the relevant area.

This monograph includes EU competition law which is part of ‘economic law’ within the meaning of the IEL. It is one of the basic policies of the Union. In contrast, EU consumer law is not included because it mainly consist of directives that have to be transposed (and generally were transposed) in national law.

Following the structure of the national monographs, this monograph contains a general introduction on the EU, its institutions and law making. The present monograph deals with provisions of the Treaties (the Treaty on the European Union and the Treaty on the Functioning of the European Union), secondary Union law – regulations and directives – and case law of the European Courts relating to the internal market and those that govern the action of the Union in certain fields: the so-called common policies (like competition policy or the common commercial policy with regard to third countries, the common agricultural policy and the common transport policy), where the EU has extensive competencies. ‘Other policies’ (like environmental or consumer policy), where the EU can supplement the actions of the Member States or give national policies in the relevant field an orientation are disregarded.

Table of Contents

The Authors	3
List of Abbreviations	15
Preface	17
General Introduction	19
Chapter 1. Remark	19
§1. BACKGROUND	19
§2. BRIEF HISTORY	19
§3. SOME DATA ON THE EU (ADAPT)	20
Chapter 2. The Legal System of the European Union	23
§1. THE EUROPEAN COMMUNITIES BECAME EUROPEAN UNION	23
§2. COMMON PROVISIONS	23
I. The Foundations of the Union	23
II. Objectives of the Union	23
III. Relationship of the Union and Its Members	24
IV. Fundamental Principles	25
Chapter 3. The Institutions and Bodies	27
§1. THE INSTITUTIONS	27
§2. OTHER BODIES	28
Chapter 4. The Nature of Union Law	29
Chapter 5. Sources of Union Law	30
Chapter 6. Remedies Against Infringements of Union Law	31

Table of Contents

§1.	INFRINGEMENT PROCEDURE	31
§2.	CLAIMS FOR DAMAGES	31
§3.	INAPPLICABILITY OF TECHNICAL REGULATIONS	32
Chapter 7.	The Sphere of Action of the TFEU	33
§1.	OVERVIEW	33
§2.	AIMS AND INSTRUMENTS OF THE EU	33
Part I.	The Internal Market	35
Chapter 1.	From a Customs Union via a Common Market/Internal Market to an Economic and Monetary Union	35
§1.	DIFFERENCE BETWEEN A CUSTOMS UNION AND A FREE TRADE AREA	35
§2.	THE INTERNAL MARKET	36
§3.	THE ECONOMIC AND MONETARY UNION	36
§4.	UNION POLICIES	37
§5.	FREE MOVEMENT AND THE COMPLETION OF THE INTERNAL MARKET	37
I.	Positive and Negative Integration	37
II.	Negative Integration	38
III.	Positive Integration	38
Chapter 2.	Free Movement of Goods	39
§1.	OVERVIEW OF TREATY PROVISIONS	39
§2.	TARIFF BARRIERS: CUSTOMS DUTIES AND-CHARGES HAVING EQUIVALENT EFFECT: INTERNAL TAXATION	39
I.	The Customs Union	39
II.	Elimination of Customs Duties Between Member States	39
III.	Prohibition of Charges Having Equivalent Effect	40
A.	The Prohibition	40
B.	‘Exceptions’	41
IV.	Internal Taxation	41

Table of Contents

§3.	NON-TARIFF BARRIERS: QUANTITATIVE RESTRICTIONS ON IMPORTS AND EXPORTS AND MEASURES HAVING EQUIVALENT EFFECT: GENERAL REMARKS	43
I.	Introduction	43
II.	Quantitative Restrictions	43
III.	Measures Having Equivalent Effect	43
§4.	MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE IMPORT RESTRICTIONS (ARTICLES 34 AND 36 TFEU)	44
I.	The Notion	44
II.	Article 34 TFEU Only Applies to State Measures (and Measures of the Union)	45
III.	The Limited List of Grounds of Justification in Article 36 TFEU	46
A.	The Justifications Listed in Article 36 TFEU	46
1.	Public Morality	46
2.	Public Policy	47
3.	Public Security	47
4.	The Protection of Health and Life of Humans	47
5.	The Protection of Health and Life of Animals	48
6.	The Protection of National Treasures Possessing Artistic, Historic or Archaeological Value	49
7.	The Protection of Industrial and Commercial Property	49
B.	Article 36 TFEU, second sentence: no arbitrary discrimination or a disguised restriction of trade	51
IV.	The 'Rule of Reason' or 'Mandatory Requirements' Case Law	51
A.	'Dassonville' and 'Cassis de Dijon'	51
B.	The Hesitations in the Case Law after Cassis de Dijon	53
C.	Keck & Mithouard	54
D.	The Aftermath of Keck	55
E.	Mickelsson & Roos	56
F.	After Mickelsson, Back to Dassonville?	58
§5.	MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE EXPORT RESTRICTIONS (ARTICLES 35 AND 36 TFEU)	59
§6.	STATE TRADING MONOPOLIES	65
Chapter 3.	Freedom of Establishment and Freedom to Provide Services	69
§1.	INTRODUCTION	69

Table of Contents

§2. DISTINCTION BETWEEN THE RIGHT OF ESTABLISHMENT AND THE FREEDOM TO PROVIDE SERVICES AND PRINCIPLES COMMON TO BOTH FREEDOMS 69

§3. THE RIGHT OF ESTABLISHMENT OF NATURAL PERSONS 71

§4. FREEDOM OF ESTABLISHMENT OF COMPANIES 75

 I. Right of Primary Establishment of Companies 75

 II. The Right of Secondary Establishment of Companies 78

§5. HORIZONTAL DIRECT EFFECT OF THE RIGHT OF ESTABLISHMENT 79

§6. FREEDOM TO PROVIDE SERVICES: NOTION 83

 I. The Notion of ‘Service’ 83

 II. The Cross-Border Element 84

 III. A Service for Remuneration 86

§7. FREEDOM TO PROVIDE SERVICES: BENEFICIARIES 88

§8. FREEDOM TO PROVIDE SERVICES: TYPES OF RESTRICTIONS CAUGHT BY ARTICLE 56 TFEU AND GROUNDS OF JUSTIFICATION 89

§9. THE SERVICES DIRECTIVE: THE GROUNDS OF JUSTIFICATION FOR RESTRICTIONS TO THE FREEDOM TO PROVIDE SERVICES REVISITED 94

§10. FREE PROVISION OF SERVICES IN THE FIELD OF TRANSPORT, BANKING AND INSURANCE 95

Chapter 4. Free Movement of Capital and Payment 97

§1. INTRODUCTION 97

§2. HISTORY 97

§3. FREE MOVEMENT OF CAPITAL SINCE MAASTRICHT: THE PRINCIPLES 98

§4. CASE LAW OF THE COURT OF JUSTICE 99

Chapter 5. Completing the Internal Market 104

§1. BASIC RULES 104

 I. Treaty Provision 104

 II. Legal Grounds for Harmonization of Legislation 107

Table of Contents

III.	Article 114(1) TFEU: Broad Legal Basis	108
IV.	Article 114(2): The Exceptions	109
V.	Article 114(4) to (8): Member States Powers after Harmonization	109
VI.	Articles 50 and 53 TFEU	109
§2.	FORMS AND METHODS OF HARMONIZATION	111
I.	Fields in Which Harmonization Measures Have Been Adopted	111
II.	Different types of Harmonization	111
III.	Consequences of Harmonization	113
§3.	THE ‘1992 PROGRAMME’	113
I.	Introduction	113
II.	The New Approach on Technical Harmonization and Standards	114
III.	Information Procedure on Technical Rules and Standards	115
§4.	THE INTERNAL MARKET FOR SERVICES	115
I.	Introduction	115
II.	The Directive on Recognition of Professional Qualifications	115
III.	The Services Directive	117
	A. General	117
	B. Administrative Simplification	118
	C. The Right of Establishment	119
	D. The Freedom to Provide Services	123
IV.	Quality of Services	124
V.	Information by Services Provider	125
VI.	Commercial Communications	127
	Part II. The Common Policies	129
	Chapter 1. Competition Policy	129
§1.	INTRODUCTION	129
I.	Origin and Objectives	129
II.	General Overview	130
§2.	KEY CONCEPTS	132
I.	Undertaking	132

Table of Contents

II.	Effect on Trade Between Member States	134
III.	Relevant Market	134
§3.	COMPETENT BODIES	136
§4.	ARTICLE 101 TFEU: RESTRICTIVE AGREEMENTS IN GENERAL	138
I.	Introduction	138
II.	Agreements, Decisions and Concerted Practices	138
III.	Horizontal and Vertical Agreements	139
IV.	Restrictions by Object or Effect	140
V.	De Minimis	142
VI.	Ancillary Restraints	143
VII.	Exemptions	144
§5.	ARTICLE 101 TFEU: DIFFERENT CATEGORIES OF RESTRICTIVE AGREEMENTS	145
I.	Introduction – Guidance	145
II.	Vertical Agreements	146
A.	The Vertical Agreements Block Exemption Regulation: General	146
B.	The VABER: Black Listed Hardcore Restrictions	148
1.	Resale Price Maintenance	148
2.	Resale Restrictions	149
3.	Hardcore Restriction in Case of Selective Distribution: Prohibition of Sales to End Users	151
4.	Hardcore Restriction in Case of Selective Distribution: Prohibition of Cross-Supplies	152
5.	Restrictions on the Sale of Components	152
C.	The VABER: Hardcore Restrictions That Are Permitted in Individual Cases	153
D.	The VABER: Excluded Restrictions under the Block Exemption Regulation	153
1.	Non-compete Obligations	153
2.	Post-term Non-compete Obligations	154
3.	Sale of Competing Goods in a Selective Distribution System	154
E.	Agency Agreements	155
F.	Franchising	155
III.	Horizontal agreements – General principles	156
IV.	The Horizontal Guidelines	156
A.	Information Exchange	157
B.	Production Agreements	159
C.	Purchasing Agreements	160
D.	Commercialization Agreements	161

Table of Contents

E. Standardization Agreements	161
V. Technology Transfer Block Exemption Regulation	162
VI. Specialization Agreements	165
VII. Research & Development Agreements	166
VIII. Cartels	169
§6. ARTICLE 102 TFEU / ABUSE OF A DOMINANT POSITION	171
I. Introduction	171
II. Dominant Position: Notion and Indices	172
III. A Substantial Part of the Internal Market	173
IV. Forms of Abuse	174
§7. ARTICLES 101 AND 102 TFEU AND THE MEMBER STATES	176
I. Introduction	176
II. Article 106 TFEU	177
A. Special or Exclusive Rights	177
B. Public Undertaking	177
C. Measures That Are Contrary to Article 106(1)	178
III. Application of Articles 101 and 102 TFEU to the Member States: Article 3(4) TEU	179
§8. ANTITRUST ENFORCEMENT	181
I. The Treaty Provision	181
II. Secondary Legislation	182
III. Public Enforcement	183
A. Cooperation Between the European Commission and national competition authorities	183
B. Enforcement by the European Commission	184
1. Start of an Infringement Procedure	184
a. Complaints	184
b. Leniency Applications	184
c. Ex Officio Investigation	186
2. Powers of Investigation	186
3. Interim Measures	187
4. Statement of Objections and Hearing	187
5. Decision and Fines	187
6. Legal Protection	189
a. Professional Secrecy	189
b. Legal Professional Privilege	189
c. Protection Against Self-Incrimination	189
IV. Private Enforcement	190
A. The Case Law of the Court of Justice	190
B. The Directive on action for damages	191

Table of Contents

§9.	LIBERALIZATION OF SPECIFIC SECTORS	193
I.	Introduction	193
II.	Postal Services	194
III.	Telecommunications	194
	A. Introduction	194
	B. The Current Rules	194
	C. Review	195
IV.	Energy	195
	A. Electricity	195
	B. Gas	196
§10.	CONCENTRATION CONTROL	197
I.	Introduction	197
II.	Substantive Assessment	200
III.	Union Dimension: The Thresholds	201
IV.	No Concentration	202
V.	Procedure	203
	A. Notification	203
	1. First Phase	204
	2. Second Phase	205
	B. Simplified Procedure	205
	C. Commitments	206
	D. Fines	206
	E. Judicial Review	206
	F. Statistics, Publications and Future Reforms	207
§11.	STATE AID	207
I.	Introduction	207
II.	The Notion of State Aid	208
	A. Conditions	209
	1. Existence of an Advantage	209
	2. State Intervention	209
	3. Transfer of State Resources	210
	4. Selectivity	210
	5. Distortion of Competition and Effect on Trade	211
	B. De Minimis Measures	212
	C. Services of General Economic Interest	212
III.	Exemptions	213
	A. The Automatic Exemptions under Article 107(2) TFEU	213
	B. The Available Exemptions under Article 107(3) TFEU	214
	C. Article 109 TFEU: Block Exemptions	216
	D. Additional Guidance Provided by the European Commission	217

Table of Contents

IV.	Procedure Before the European Commission	218
A.	Obligation to Notify	218
B.	Decisions of the Commission	219
C.	Complaint to the European Commission	220
D.	Recovery of Aid	220
E.	Procedure Before National Courts	221
F.	Procedure Before the Court of Justice	222
Chapter 2.	The Economic and Monetary Union	224
Chapter 3.	The External Action of the Union	228
§1.	TREATY PROVISIONS ON EXTERNAL RELATIONS: EXPRESS EXTERNAL POWERS AND 'IMPLIED POWERS'	228
§2.	THE COMMON COMMERCIAL POLICY	230
I.	The Treaty Provision	230
II.	The Customs Union	232
III.	Trade in Goods – General Provisions	233
IV.	Trade Defence Instruments	234
A.	Anti-dumping: General	234
B.	Anti-dumping Procedure	235
C.	Anti-dumping Decisions	236
V.	Trade Agreements / The EU and the WTO	237
Chapter 4.	The Common Agricultural Policy	238
§1.	INTRODUCTION	238
§2.	TREATY PROVISIONS	238
§3.	HISTORY OF THE CAP	241
§4.	THE SINGLE CMO REGULATION	241
§5.	THE COMMON FISHERIES POLICY	241
Chapter 5.	The Common Transport Policy	243
§1.	GENERAL INTRODUCTION	243
§2.	HISTORY OF EU TRANSPORT LAW	245
§3.	ROAD TRANSPORT	246

Table of Contents

§4. RAIL TRANSPORT 246

§5. AIR TRANSPORT 247

§6. MARITIME TRANSPORT 247

§7. PASSENGER RIGHTS 248

Selected Bibliography 251

Index 253