

EC COMPETITION LAW

Fourth Edition

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EC COMPETITION LAW

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The aim of this series is to publish important and original studies of the various branches of European Community Law. Each work will provide a clear, concise, and critical exposition of the law in its social, economic, and political context, at a level which will interest the advanced student, the practitioner, the academic, and government and Community officials.

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*Dedicated to
Sir Arthur fforde
(1900–1985)
Lawyer, Headmaster, and Poet*

GENERAL EDITOR'S FOREWORD

The fourth edition of this book brings up to date once again a work which has established itself, not least by the directness and originality of its approach, as one of the leading works in the field.

But this new edition has a special topicality. The entire machinery for the enforcement of competition law in the European Union is being re-cast, and its provisions are likely to be more fully operational and in many ways more effective than hitherto. With effect from 1 May 2004—which is also the date set for the great enlargement of the European Union—responsibility for enforcing the competition rules in Articles 81 and 82 of the Treaty will lie largely with the national authorities of the Member States. Perhaps most significantly, national authorities and national courts will have the power to apply the exemption provisions of Article 81(3) of the Treaty—a power hitherto reserved to the European Commission—and thus effectively to apply for the first time Articles 81 and 82 in their entirety.

In addition, provisions closely modelled on Articles 81 and 82, and requiring to be interpreted and applied in the same way as the Treaty provisions, are now in force as domestic law in the Member States, and are effectively enforced by national authorities and by national courts—in the United Kingdom, for example, by the Competition Commission and the Competition Appeal Tribunal, as well as by the ordinary Courts. Provisions have been introduced in the UK (and there are parallels in other Member States) for claims for damages by individuals or consumer organizations, and for criminal 'cartel' offences.

Alongside these dramatic reforms in the system of enforcement, substantive competition law itself has radically evolved on many fronts—not only under the central cartel provisions of Article 81 but in such areas as collective dominance, essential facilities, and merger control.

Despite the ever more rapid developments in the subject, the author retains a fresh palette, and still succeeds in providing, within a reasonable compass, a comprehensive work which covers the whole field of EC competition law and policy.

The book not only remains up to date, but also looks to the future. Yet it maintains the virtues of the previous editions: the elucidation of the interconnections between law and economics; the historical perspective which enables the current law to be properly understood; and the concern to look at the subject not only from the viewpoint of the lawyer and the corporate adviser, but also from the perspective of those who administer the system.

The book will be of interest therefore to the student, practitioner, and administrator alike, and especially to those who seek not merely to look up particular points or to discover the rules, but to understand the system of which they form a part.

April 2003

Francis G. Jacobs

AUTHOR'S PREFACE TO THE FOURTH EDITION

New editions of this work have appeared every five years since its first publication in 1988. The period between the third edition in 1998 and this fourth edition has, however, seen far more change and development in the subject than any of the previous equivalent periods. It has made the task of preparing this new edition both unusually demanding and rewarding. EC competition policy in its early days was a small stream whose features could be quite easily and briefly described; over the last forty-five years, however, this stream has grown into a mighty river with an impact far beyond the surrounding European landscape, at times running smoothly but at other moments disturbed by sudden squalls and fierce currents.

In the last five years, for example, the European Commission has altered its techniques for handling cartel cases through a Leniency Programme that has achieved considerable success. It has adopted a new Block Exemption No. 2790/99 for vertical agreements that places far more emphasis on the economic effects of such agreements than its largely form-based predecessors. It has under both internal and external pressures proposed major changes to the Merger Regulation in both procedural and substantive aspects. Moreover, it has been successful in persuading Member States to accept, through the modernization programme, a radical reform under which both national competition authorities and national courts accept from May 2004 a major share in responsibility for enforcing Articles 81 and 82.

For its part, the United Kingdom, after over two decades of relative stagnation in legislative terms, has adopted two major competition statutes: The Competition Act 1998 and The Enterprise Act 2002. These have brought UK competition law effectively into line with Articles 81 and 82 whilst at the same time retaining its well established procedures for merger and market investigation and reducing political involvement in competition matters. These changes have also led to the strengthening of new or reconstituted independent institutions including the Competition Appeal Tribunal (formerly the Competition Commission Appeal Tribunal), chaired by Sir Christopher Bellamy, whose judgments applying EC law in respect of Competition Act appeals in accordance with section 60 of the 1998 Act have been of a consistently high standard. Another important advance at both EC and national level has been the availability of so many decisions and policy documents of both administrative bodies and courts on their websites, an important step forward in transparency and one of major value to both lawyers and law students.

Against this background there has been a temptation to replace much of the older case-law and material with references to recent cases and current developments. I have however tried to keep a balance between recording the past, interpreting the present, and trying to anticipate the course of future developments. Given that the book could not be extended in length by more than a few pages I have tried to make room for new material (especially in Chapters 15, 17, 18, and 20) by pruning minor cases and some historical material of relatively transient interest. However I have tried to retain historical material which relates to the earlier development of individual topics because often this has had a significant impact on later developments. I have continued to describe important cases in some detail because

my teaching experience leads me to think that this is helpful to students and lawyers required to seek an understanding of the subject, faced by what is now a formidable number of decided cases, often complex in their factual and legal detail, from which it is not always easy to acquire the salient points at first reading without some guidance.

In referring to Articles of the Treaty of Rome whose numbering was altered by the Treaty of Amsterdam in 1997, I have adopted the practice of referring only to the new number, e.g. Articles 81 and 82 rather than '81(ex. 85) or 82 (ex. 86)'. The only exception is where a court judgment has referred to an Article under its old number; here I have changed the reference to the current numbering but left it in square brackets so as to indicate the change. Likewise for consistency I have described the Directorate General for Competition throughout as 'DG Comp', though strictly speaking the change of name from 'DG IV' occurred only in 1999; merger decisions prior to that change have been left under the reference of IV/M with only cases post-September 1999 as Comp/M.

Towards the end of the period during which this edition was being prepared Regulation No. 1/2003 was published, which will replace Regulation No. 17/62 from 1 May 2004. This Regulation is of major importance, and I have given it coverage both in Chapter 20 (as it affects national competition authorities) and Chapter 21 (as it affects national courts). Moreover in Chapter 25 dealing with the future of European competition policy I have looked at a number of problems which may arise in its implementation both by the Commission and Member States. I have also in Chapters 18 and 25 looked at changes likely in 2004 in the terms of the Merger Regulation, in response both to public criticisms by the Court of First Instance of the Commission's handling of second phase cases and the Commission's own perception of its need to improve substantive and procedural aspects of these important assessments.

In previous editions I have written the entire text, but on this occasion I have been grateful to be able to call in outside assistance, though this phrase may not be a strictly accurate one to describe the help received from my daughter Joanna, Barrister at Law, with Freshfields Bruckhaus Deringer in Brussels, who contributed Chapters 10 and 11 on distribution. She is the author of *Distribution Law* (3rd edn.) published by Palladian Law Publishing in 2000. Chapter 23 on the international aspects of EC competition law was contributed by Philip Marsden who is the author of *A Competition Policy for the WTO* (published in 2003 by Cameron May); he has practised as a trade and competition lawyer in Tokyo and London and as a competition official in Ottawa.

As before, I have had the opportunity of discussing current issues with a number of Commission officials in Brussels including on this occasion the Director General, Alexander Schaub, shortly before his period of office terminated at the end of August 2002, and I am grateful for the help they generously provided. Karen Williams, now a Hearing Officer for competition cases, kindly made all the necessary arrangements for these interviews. Notwithstanding the amount of criticism which some divisions of DG Comp have recently received, notably the Merger Task Force (in spite of the fact that it originally was the most highly praised directorate), the activities and achievements of DG Comp since 1958 have been remarkable; not least has been the ability of its senior officials to think radically about the priorities of competition policy for the early years of the twenty-first century and successfully to obtain enactment of this new Regulation No. 1/2003 to replace Regulation No. 17/62 without major political opposition. Whilst there are a number of aspects of the new régime which will undoubtedly take time to settle down (and upon which I make

comment in Chapter 25), the direction of the reforms is undoubtedly essential for the health of Community competition policy and the year 2004 will mark the start of a new era.

My debt to other lawyers is substantial and should be recorded. Over the last five years I have continued to teach as a part-time academic at the Centre of European Law at King's College and have had the privilege of working with Professor Richard Whish, both on the LLM Programme and on the Informa/King's College Distance Learning Course on EC Competition Law, which he introduced and is very successful. I am conscious of having learned much from him as well as from the excellent students from many countries in our LLM class. Since 1999 I have also taught an LLM class in Competition Law at Cambridge University Law School where I have shared its teaching with Dr Albertina Albors-Llorens, Fellow of Girton College, always a most supportive colleague. Professor Claus Dieter Ehlermann has been kind enough to invite me on two occasions to the seminars held annually on major EC Competition Law topics at the European University Institute, Florence. These were excellent occasions for developing an understanding of likely future trends in Community competition law. John Temple Lang, now no longer a Commission official, but still in practice in Brussels, was again generous with both his time and his scholarly offprints.

I also have to acknowledge the very real encouragement received from my colleagues in the Competition Law Group at the London and Brussels offices of Linklaters. In particular, I would mention Bill Allan for allowing me generous leave of absence to make possible the preparation of the new edition against a tight timetable. I am also grateful to those who read over particular chapters and made valuable comments and suggestions; Bill Allan, Christian Ahlborn, Eamonn Doran, Louis Van Lennep (all of Linklaters), Christopher Stothers (formerly of Linklaters), and Daniel Beard, Barrister at Law of Monckton Chambers. Fiona Bain and Emily Cox provided research assistance, and my secretary, Esmee Banville, was always a tower of strength.

Helen Adams and her colleagues at Oxford University Press gave me all the help needed to ensure that the book appeared on time. Once again, secretarial help of high quality was provided by Maureen Watts and Janet Fenton at Capel Typing Services, who had obviously benefited from their experience with the previous edition!

Notwithstanding all the help received and acknowledged I am responsible for the contents of the book and any errors contained in it; all views expressed are personal unless otherwise indicated in the text.

The law is stated as at 31 March 2003.

D.G.G.

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April 2003

AUTHOR'S PREFACE TO THE FIRST EDITION

The actual process of writing a book is necessarily solitary: in spite of Voltaire's belief that 'the happiest of all lives is a busy solitude', there are moments when one could wish for a more gregarious task. Fortunately, however, there are other stages (both at the beginning and the end of the process) which cannot be completed without the help of many others, and that has been especially true on this occasion.

Before writing a general account of the European Community's competition law, it seemed to me important to interview a number of the officials of Directorate-General IV of the Commission, which is responsible for the administration of Community competition policy, particularly as some of the more senior among them would shortly be reaching retirement. I am grateful to all those officials who allowed me to share their memories of the pioneer days of DG IV, as well as their views of past and present events and policy issues. Some of them also later read and commented on individual chapters. As those who helped me in this way were numerous, I have elected not to name them individually, with but two exceptions. The first is Aurelio Pappalardo, now retired from the Commission, who made it possible for me to spend time in DG IV and conduct these interviews; the second is Karen Williams, formerly a colleague at the University of Essex, who after her move to Brussels to join DG IV continued to give me enthusiastic encouragement and practical help on many aspects of the work.

I was also fortunate to be able to spend time in Brussels in the offices of Cleary, Gottlieb, Steen & Hamilton, where Don Holley and his colleagues made me welcome, allowed me the use of their excellent library, and kept me going with copious cups of black coffee. I am also grateful to Don for reading the drafts of several chapters and for his wise comments upon them. Professor Arved Deringer allowed me on a visit to Cologne to benefit from his unrivalled knowledge of the historical roots both of the Treaties of Paris and Rome, and also of the circumstances in which Regulation 17 was enacted in 1962. The Leverhulme Trust awarded me a research grant to help meet part of the travelling and other expenses involved in the writing of the book, and I am pleased to acknowledge their help.

I must also express my thanks to Byron and Eleanor Fox, Barry Hawk, Sir Alan Neale, Noel Ing, Philippa Watson, Francis B. Jacobs (of the European Parliament's Secretariat), and Chris Docksey, all of whom gave me help, in a variety of different ways, during the writing of the book. Most of this writing was done in the Library of the University of Essex at Colchester where Peter Luther ensured that I had all the relevant authorities. I must also express my appreciation to my colleagues, both in Ipswich and at the University Law Department, for their tolerance of my preoccupation with this project at times when they must have wished it was less time-consuming.

All the typing of the manuscript has been done by my former secretary, Elaine Golledge, whom I was fortunately able to persuade to return from premature domestic retirement; she and her husband Brian have tolerated the presence of a word processor in their dining room for eighteen months, which has enabled her to produce a series of consistently accurate typescripts to a succession of increasingly unreasonable deadlines.

My relationship with Oxford University Press has been pleasant, and I would like to thank Richard Hart for ensuring a smooth production process. My final expressions of thanks must, however, be directed towards three people in particular; to my Consulting Editor, Professor Francis Jacobs of London University, for cheerful and admirably constructive advice throughout; to my daughter Joanna, Barrister, for her help, especially with French language material; and finally to my wife Jean, without whose unfailing support this book could certainly not have been written.

This book is dedicated, with the approval of Lady fford, to Sir Arthur fford, who died in 1985. After a distinguished career as a City of London solicitor and wartime civil servant, he came as headmaster to Rugby School from 1948 to 1957. Many of us who were in the school during that time remember him with particular respect and affection. I am glad to have this opportunity to acknowledge my own debt of gratitude to him; his inquiring and subtle mind would, I like to think, have enabled him to enjoy the intricacies of EC competition law.

I have finally to issue the customary disclaimers. Though I have received help from many sources, responsibility for the contents of the book and for any errors within it are exclusively mine. Neither the contents nor the errors are to be attributed in any way to any of the persons or organizations referred to in this Preface, nor to any other body with which I am, or have been, associated.

The law is stated as at 31 March 1988.

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D.G.G.

April 1988

TABLE OF CASES FROM THE EUROPEAN COURT OF JUSTICE AND COURT OF FIRST INSTANCE

- AEG Telefunken v. Commission (Case 107/82)
[1983] ECR 3151; [1984] 3 CMLR 325 ... 69,
193, 198
- AKZO v. Commission (Case C-62/86) [1991]
ECR I-3359; [1993] 5 CMLR 215 ... 272,
280, 286-9, 364, 544, 563
- ANTIB v. Commission (Case 272/85) [1987] ECR
2201; [1988] 4 CMLR 677 ... 111
- Ahlstrom and Others v. Commission (Cases 89,
104, 114, 116-17, 125-9/81) (Woodpulp)
[1988] ECR 5193; 4 CMLR 901; [1993] ECR
I-1307; 4 CMLR 407 ... 76, 99, 161, 349, 500-3
- Ahmed Saeed (Case 66/86) [1989] ECR 803:
[1990] 4 CMLR 102 ... 65, 275, 389, 489
- Airtours (Case T-342/99) [2002] 5 CMLR 317
... 331-2, 366-9, 392-3, 397, 537-8, 545-6,
549, 553, 563
- Albany International (Case C-67/96) [1999] ECR
I-5751; [2000] 4 CMLR 446 ... 62, 94, 102,
104-5
- Allen and Hanbury's Ltd v. Generic (UK) Ltd
(Case 434/85) [1988] ECR 1245; 1 CMLR 701:
[1989] 2 CMLR 325 ... 258
- Almelo (Case C-393/92) [1994] ECR I-1477 ...
327
- Alpha Flight Services v. Commission (Case
T-128/98) [2000] ECR II-3929 ... 291
- Alsattel v. Novasam (Case 247/86) [1988] ECR
5987; [1990] 4 CMLR 434 ... 274, 321
- Ambulanz Glockner (Case C-475/99) [2002]
4 CMLR 726 ... 61, 64
- Anseau-Navewa v. Commission, *see* IAZ
International Belgium v. Commission (Cases
96-102, 104-5, 108, 110/82)
- Arduno (Case C-35/99) [2002] 4 CMLR 866
... 477
- Asia Motor France (No. 3) (Case T-387/94)
[1996] ECR II-961; 5 CMLR 537 ... 66
- Automec v. Commission (No. 1) (Case T-64/89)
[1991] 4 CMLR 177 ... 36
- Automec v. Commission (No. 2) (Case T-24/90)
[1992] ECR II-2223; 5 CMLR 431 ... 375,
448, 461, 533
- BASF(L+F)-Accinauto (Cases T-175 to 176/95
[1999] ECR II-1581; [2000] 4 CMLR 33 ... 98
- BAT Cigaretten-Fabrieken v. Commission (Case
35/83) [1985] ECR 363; 2 CMLR 470 ... 240
- see also* Toltecs-Dorcet Trade Marks in *Table of
Commission Decisions*
- BAT and R. J. Reynolds v. Commission and Philip
Morris (Cases 142 and 156/84) [1987] ECR
4487; [1988] 4 CMLR 24 ... 321, 335, 338-9
- BBC v. Commission (Case T-69/89) [1991] ECR
II-535; 4 CMLR 669 ... 271
- BEMIM v. Commission (Case T-114/92) [1995]
ECR II-147; [1996] 4 CMLR 305 ... 461
- BEUC (Case T-37/92) [1994] ECR II-285; [1995]
4 CMLR 167 ... 537
- BKA, *see* Bundeskartellamt v. Volkswagen (VW)
(Case C-266/93)
- BMW v. ALD Autoleasing (Case C-70/93) [1995]
ECR I-3439; [1996] 4 CMLR 478 ... 445
- BMW Belgium SA v. Commission (Cases 32 and
36-82/78) [1979] ECR 2435; [1980] 1 CMLR
370 ... 68
- BNIC v. Aubert (Case 136/86) [1987] ECR 4789:
[1988] 4 CMLR 331 ... 481
- BNIC v. Clair (Case 123/83) [1985] ECR 391:
2 CMLR 430 ... 479-80
- BP, *see* British Petroleum v. Commission (Case
77/77)
- BPB, *see* British Plasterboard v. Commission
(Case C-310/93)
- BRT, *see* Belgian Radio and Television v. SABAM
(Case 127/73)
- BT Telespeed, *see* Italy v. Commission (Case 41/83)
- Bagnasco (Case C-216/96) (Italian Banks) [1999]
ECR I-135; 4 CMLR 621 ... 88
- Banks v. British Coal Corporation (Case C-128/
92) [1994] ECR I-1209; 5 CMLR 30 ... 467
- Bassano (Cases C-140 to 142/94) [1995] ECR
I-3257; [1996] 4 CMLR 157 ... 481
- Baustahlgewebe v. Commission (Case C-185/
95P) [1998] ECR I-8417; [1999] 4 CMLR 1203
... 532
- Bayer/Adalat (Case T-41/96) [2000] ECR II-
3383; [2001] 4 CMLR 126 ... 70-1, 78, 179,
537, 544, 554
- Bayer/Adalat (Cases C-2/01 and C-3/01P) ...
179, 554
- Bayer v. Sülhöfer (Case 65/86) [1988] ECR 5249:
[1990] 4 CMLR 182 ... 229
- Becu (Case C-22/98) [1999] ECR I-5665; [2001]
4 CMLR 968 ... 62, 64

- Belasco v. Commission* (Case 246/82) (Roofing Felt) [1989] ECR 2117: [1991] 4 CMLR 96 ... 87
- Belgian Radio and Television v. SABAM* (Case 127/73) [1974] ECR 51, 313: 2 CMLR 238 ... 311–12, 325, 460–2, 465, 473, 484
- Binon v. Agence et Messageries de la Presse (AMP)* (Case 243/83) [1985] ECR 2015: 3 CMLR 800 ... 69, 200
- Bodson v. Pompes Funèbres* (Case 30/87) [1988] ECR 2479: [1989] 4 CMLR 984 ... 274, 285, 326
- Boehringer Ingelheim and Others v. Dowelhurst Ltd and Swingward Ltd* (Case C–143/00) [2002] 2 CMLR 623 ... 255
- Boehringer Mannheim v. Commission* (Case 45/69) (Quinine Cartel) [1970] ECR 769 ... 142–3
- Brasserie de Haecht v. Wilkin-Janssens* (No. 1) (Case 23/67) [1967] ECR 407: [1968] CMLR 26 ... 67, 86, 172
- Brasserie de Haecht v. Wilkin-Janssens* (No. 2) (Case 48/72) [1973] ECR 77: CMLR 287 ... 32
- Brasserie du Pêcheur v. Germany* (Case C–46/93) [1996] ECR I–1029: 1 CMLR 889, AER (EC) 301 ... 466–7
- Brentjens v. SBVHB* (Cases C–115 to 117/97) [1997] ECR I–6025: [2000] 4 CMLR 566 ... 105
- Bristol-Myers Squibb v. Paranova* (Cases C–427, 429, 436/93) [1996] ECR I–3457: [1997] 1 CMLR 1151 ... 253
- British Airways/Virgin* (Case T–219/99) ... 272, 295
- British Leyland v. Commission* (Case 226/84) [1986] ECR 3263: [1987] 1 CMLR 185 ... 270
- British Petroleum v. Commission* (Case 77/77) [1978] ECR 1513: 3 CMLR 174 ... 297, 300
- British Plasterboard v. Commission* (Case C–310/93) [1995] ECR I–865: 4 CMLR 718 ... 292
- Bronner (Oscar) v. MediaPrint* (Case C–7/97) [1998] ECR I–7791: [1999] 4 CMLR 112 ... 320–1, 455, 516, 538, 541
- Bundeskartellamt (BKA) v. Volkswagen (VW)* (Case C–266/93) [1995] ECR I–3477: [1996] 4 CMLR 505 ... 166, 168, 445
- CBEM v. CLT & IPB* (Case 311/84) (Telemarketing) [1985] ECR 3261: [1986] 2 CMLR 558 ... 317
- CIF v. Autorita Garante della Concorrenza del Mercato* (Case C–198/01) 30 January 2003 ... 475
- CMB, see Compagnie Maritime Belge v. Commission* (Case C–395/96P)
- CNL–Sucal v. Hag* (Hag No. 2) (Case C–10/89) [1990] ECR I–3711: 3 CMLR 571 ... 239, 249, 252, 256, 261–3, 390
- Camera Care Ltd v. Commission* (Case 792/79R) [1980] ECR 119: 1 CMLR 334 ... 551
- Campus Oil v. Ministry of Industry and Energy* (Case 72/83) [1984] ECR 2727: 3 CMLR 544 ... 266
- Carra* (Case C–258/98) [2000] ECR I–4217: [2002] 4 CMLR 285 ... 487
- Cassis de Dijon, see Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein* (Case 120/78)
- Cement Cartel* (Cases C–25 to 104/95) [2000] ECR II–491: 5 CMLR 204 ... 73, 77, 79, 158
- Centrafarm BV v. American Home Products Corporation* (Case 3/78) [1978] ECR 1823: [1979] 1 CMLR 326 ... 253–4
- Centrafarm BV v. Sterling Drug Inc* (Case 15/74) [1974] ECR 1147: 2 CMLR 480 ... 65, 252–3, 265–6, 501
- Centrafarm BV v. Winthrop BV* (Case 16/75) [1974] ECR 1183: 2 CMLR 480 ... 65, 252–3, 265–6
- Coca-Cola Company v. Commission* (Cases T–125 and 127/97) [2000] ECR II–1733: 5 CMLR 467 ... 357, 392
- Coditel v. Cine Vog Films* (No. 1) (Case 62/79) [1980] ECR 881: [1981] 2 CMLR 362 ... 242, 260–1
- Coditel v. Cine Vog Films* (No. 2) (Case 262/81) [1982] ECR 3381: [1983] 1 CMLR 49 ... 242, 260
- Commercial Solvents, see Istituto Chemioterapico Italiano and Commercial Solvents Corporation v. Commission* (Cases 6 to 7/73)
- Commission v. BASF AG* (Case C–137/92P), *see* PVC
- Commission v. CNST* (Case T–513/93) [2000] ECR II–1870: 5 CMLR 614 ... 482
- Commission v. France* (Case 167/73) (French Merchant Seaman) [1974] ECR 359: 2 CMLR 216 ... 109
- Commission v. France* (Cases T–2 and 3/93) [1994] ECR II–121 ... 375, 391
- Commission v. France* (Case C–159/94) [1997] ECR I–5815: [1998] 2 CMLR 2373 ... 490
- Commission v. France* (Case C–146/00) 6 December 2001 ... 493
- Commission v. Italy* (Case C–35/96) [1998] ECR I–3851: 5 CMLR 889 ... 482
- Commission v. Netherlands* (Case C–157/94) [1997] ECR I–5699: [1998] 2 CMLR 373 ... 490

- Commission v. Portugal (Case C-163/99) [2002] 4 CMLR 319 ... 291
- Commission v. Solvay and Laporte (Case 81/74) (Peroxygen) [1985] 1 CMLR 481 ... 76
- Commission v. UIC (Case C-264/95P) [1997] 5 CMLR 49 ... 111, 537
see also UIC (Case T-14/93)
- Commission v. UK, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, and Germany (Cases C-466 to 469, 471-2, 475-6/98 (Open Skies), Judgment of 5 November 2002 ... 109
- Compagnie Maritime Belge v. Commission (Case C-395/96P) [2000] ECR I-1365: 4 CMLR 1076 ... 272-3, 280, 287-9, 327, 329-31, 537
- Compagnie Royal Asturienne des Mines and Rheinzink v. Commission (Cases 29 and 30/83) [1984] ECR 1679: [1985] 1 CMLR 688 ... 75, 131
- Concordia, *see* De Norre v. Brouwerij Concordia (Case 47/76)
- Consten and Grundig v. Commission (Cases 56 and 58/64) [1966] ECR 299: CMLR 418 ... 42-4, 51-3, 55, 69, 83, 85, 89, 97, 106, 125, 138, 165, 169, 171, 198, 223, 250-1, 265-6, 525, 534-5
- Conti v. Rossi (Case C-221/99) [2002] 4 CMLR 269 ... 477
- Continental Can, *see* Europemballage Corporation and Continental Can Co. Inc. v. Commission (Case 6/72)
- Cöoperative Stremselfabrik v. Commission (Case 61/80) (Rennet) [1981] ECR 811: [1982] 1 CMLR 240 ... 124
- Corbeau (Case C-320/91) [1993] ECR I-2533: [1995] 4 CMLR 621 ... 486
- Corsica Ferries (No. 1) (Case C-18/93) [1994] ECR I-1783 ... 322, 485
- Corsica Ferries (No. 2) (Case C-266/93) [1998] ECR I-3949: 5 CMLR 402 ... 485
- Crehan v. Courage (Case C-453/99) [2001] 5 CMLR 1058 ... 138-9, 466-70, 471, 473, 539, 560
- Cullet v. Leclerc (Case 231/83) (Leclerc Petrol) [1985] ECR 305: 2 CMLR 524 ... 476-7
- DGG, *see* Deutsche Grammophon v. Metro (Case 78/70)
- Dan Air v. Commission Case T-2/93 [1994] ECR II-121 ... 391
- Dansk Supermarked v. Imerco (Case 58/80) [1981] ECR 831: 3 CMLR 590 ... 264
- Dassonville, *see* Procureur du Roi v. B & G Dassonville (Case 8/74)
- Davidoff (Zino) v. A & G Imports (Case C-414/99) [2002] 1 CMLR 1 ... 259
- de Geus v. Robert Bosch (Case 13/61) [1962] ECR 45: CMLR 1 ... 32, 50
- De Norre v. Brouwerij Concordia (Case 47/76) [1977] ECR 65: 1 CMLR 378 ... 172
- Delimitis v. Henninger Bräu (Case C-234/89) [1991] ECR I-935: [1992] 5 CMLR 210 ... 38, 86, 98, 117, 136, 173, 182-3, 390, 462-3, 471-3
- Demo-Studio Schmidt v. Commission (Case 210/81) [1983] ECR 3045: [1984] 1 CMLR 63 ... 198
- Deutsche Grammophon v. Metro (Case 78/70) [1971] ECR 487: CMLR 631 ... 251-2, 265
- Diego Cali & Figli v. Servizio Ecologici Porto di Genova (Case C-343/95) [1997] ECR I-1547: 5 CMLR 484 ... 60, 64
- Dijkstra and Van Roesell (Cases C-319/93, 40/94, 224/94) [1995] ECR I-4471: [1996] 5 CMLR 178 ... 106
- Dior v. Evora (Case C-337/95) [1997] ECR I-6013: [1998] 1 CMLR 737 ... 254
- Distillers Co. v. Commission (Case 30/78) [1980] ECR 2229: 3 CMLR 121 ... 85, 126
- Dow Benelux v. Commission (Case 85/87) [1989] ECR 3137: [1991] 4 CMLR 410 ... 38, 439
- Dow Chemical Iberica v. Commission (Cases 97-99/87) [1989] ECR 3165: [1991] 4 CMLR 410 ... 38, 439
- Dutch Books, *see* VBVB and VBBB v. Commission (Cases 43 and 63/82)
- Dutch Courier Services (Cases C-48 and 66/90) [1992] ECR I-565: [1993] 5 CMLR 316 ... 271
- Dyestuffs, *see* ICI and Others v. Commission (Cases 48, 49, 51-7/69)
- EBU, *see* European Broadcasting Union (Cases T-528, 542-3, 546/93; and Case T-206/99)
- ECO Swiss v. Benetton (Case C-126/87) [1999] ECR I-3055: [2000] 5 CMLR 816 ... 139
- EMI Electrola v. Patricia (Case 341/87) [1989] ECR 79: 2 CMLR 413 ... 258, 315
- EMI Records Ltd v. CBS United Kingdom Ltd (Case 51/75) [1976] ECR 811: 2 CMLR 235 ... 240, 256
- ENU v. Commission (Case C-1/78) [1978] ECR 2151 ... 104
- ENU v. Commission (Cases T-458 and 523/93) [1995] ECR II-2459 ... 104
- ERT (Case C-260/89) [1991] ECR I-2925: [1994] 4 CMLR 540 ... 488
- ETA Fabriques d'Ebauches v. DK Investment SA (Case 31/85) [1985] ECR 3933: [1986] 2 CMLR 675 ... 171
- Echirolles Distribution (Case C-9/99) [2000] ECR I-8207 ... 476

- Erauw-Jacquery v. La Hesbignonne (Case 27/87) [1988] ECR 1919: 4 CMLR 576 ... 244
- Eurim-Pharm v. Beiersdorf (Cases C-71 to 73/94) [1996] ECR I-3457: [1997] 1 CMLR 1151 ... 253
- Eurocontrol, *see* SAT v. Eurocontrol (Case C-364/92)
- European Broadcasting Union (Cases T-528, 542, 543 and 546/93) [1996] ECR II-649: 5 CMLR 386 ... 133
- European Broadcasting Union (Case T-206/99) 4 CMLR 1423 ... 134
- European Night Services (Cases T-374 to 375, 384, 388/94) [1998] ECR II-3141: 5 CMLR 718 ... 90, 93-4, 111, 417, 537
- Europemballage Corporation and Continental Can Co Inc v. Commission (Case 6/72) [1973] ECR 215: CMLR 199 ... 29, 59, 284, 321, 327-9, 336-7, 390, 536
- FNK and SCK v. Commission (Cases T-213/95 and 18/96) [1998] 4 CMLR 259 ... 79, 160
- FRUBO v. Commission (Case 71/74) [1975] ECR 563: 2 CMLR 123 ... 106, 161
- Far Eastern Freight Conference (Case T-86/95) [2002] 4 CMLR 1115 ... 150
- Fédération Française des Sociétés d'Assurance (Case C-244/94) [1995] ECR I-4013: [1996] 4 CMLR 536 ... 61
- Fedetab (Cases 209-15, 218/78) (Van Landewijck) [1980] ECR 3125: [1981] 3 CMLR 134 ... 121-2, 478-9, 536
- Fenin v. Commission (Case T-319/90) 4 March 2003 ... 61
- Fiatagri UK and Others v. Commission (Cases T-34 and 35/92) (Agricultural Tractor Registration Exchange) [1994] ECR II-905 ... 158
- Fiatagri UK and Others v. Commission (Cases 7 and 8/95) [1998] ECR I-3111: 5 CMLR 311 ... 158
- Flemish Travel Agents, *see* VZW Vereniging van Vlaamse Reisebureaus v. VZW Sociale dienst van de Plaatselijke en Gewestelijke Overheidsdiensten (Case 311/85)
- Florimex (Cases T-70 to 71/92) [1997] 5 CMLR 769 ... 537
- Fonderies Roubaix-Wattrelos v. Fonderies Roux (Case 63/75) [1976] ECR 111: 1 CMLR 538 ... 170
- Ford v. Commission (Cases 25-26/84) [1985] ECR 2725: 3 CMLR 528 ... 69, 71, 544
- Ford v. Commission (Cases 228-229/84) [1984] ECR 1129: 1 CMLR 649 ... 70-1, 544
- France v. Commission (Cases 19-20/74) (Kali und Salz) [1975] ECR 499: 2 CMLR 154 ... 154, 538, 545
- France v. Commission (Case C-202/88) (Terminal Equipment) [1991] ECR I-1223: [1992] 5 CMLR 552 ... 491
- France v. Commission (Case C-327/91) [1994] ECR I-3641: 5 CMLR 517 ... 505
- France v. Commission (Cases C-68/94 and 30/95) (Kali und Salz (No. 2)) [1998] ECR I-1375: 4 CMLR 829 ... 331, 352, 366, 380, 392, 545
- Francovich and Bonifaci v. Italy (Cases C-6 and 9/90) [1991] ECR I-5357: [1993] 2 CMLR 66 ... 466-7, 478
- French Merchant Seaman, *see* Commission v. France (Case 167/73)
- GVL v. Commission (Case 7/82) [1983] ECR 483: 3 CMLR 645 ... 314, 322
- Gencor Ltd v. Commission (Case T-102/96) [1999] ECR II-753: 4 CMLR 971 ... 217, 331, 343, 349, 366-8, 383, 391, 503, 537, 545
- General Motors Continental v. Commission (Case 26/75) [1975] ECR 1367: [1976] 1 CMLR 95 ... 270, 284
- German Ice Cream, *see* Langnese-Iglo v. Commission (Case T-7/93) and Schöller Lebensmittel v. Commission (Case T-9/93)
- German Property Insurers, *see* Verband des Sachversicherers v. Commission (Case 45/81)
- Germany v. Delta (Case C-153/93) [1994] ECR I-2517: [1996] 4 CMLR 21 ... 481
- Glaxo (Case T-168/01) ... 180
- Gotttrup Klim v. DLG (Case C-250/92) [1994] ECR I-5641: [1996] 4 CMLR 191 ... 79, 81, 101-2, 326
- Greenwich Film Productions v. SACEM (Case 22/79) [1979] ECR 3275: [1980] 1 CMLR 629 ... 313
- Hag No. 1, *see* Van Zuylen Frères v. Hag (Case 192/73)
- Hag No. 2, *see* CNL-Sucal v. Hag (Case C-10/89)
- Hasselblad v. Commission (Case 86/82) [1984] ECR 883: 1 CMLR 559 ... 171
- Hercules v. Commission (Case T-7/89) (Polypropylene) [1991] ECR II-1711: [1992] 4 CMLR 84 ... 67, 77
- Hercules v. Commission (Case C-51/92P) [1999] (Polypropylene) ECR I-4235: 5 CMLR 976 ... 146
- Hilti v. Commission (Case T-30/89) [1991] ECR II-1439: [1992] 4 CMLR 16 ... 270, 301
- Hilti v. Commission (Case C-53/92P) [1994] ECR I-667: 4 CMLR 614 ... 276, 301, 310, 322
- Hoechst v. Commission (Cases 46/87 and 227/88) [1989] ECR 2859: [1991] 4 CMLR 410 ... 38, 439

- Hoffman-La Roche (Case 85/76) (Vitamins)
[1979] ECR 461: 3 CMLR 211 ... 268–70,
275, 280–3, 287, 291–4, 311, 331, 361
- Hoffmann-La Roche v. Centrafarm (Case 102/77)
[1978] ECR 1139: 3 CMLR 217 ... 253–4
- Höfner and Elser v. Macrotron (Case C–41/90)
[1991] ECR I–1979: [1993] 4 CMLR 306 ...
487–8
- Hugin v. Commission (Case 22/78) [1979] ECR
1869: 3 CMLR 345 ... 89, 271, 298
- Hydrotherm Gerätebau v. Andreoli (Case 170/83)
[1984] ECR 2999: [1985] 3 CMLR 224 ... 63
- IAZ International Belgium v. Commission (Cases
96–102, 104–5, 108, 110/82) [1983] ECR 3369:
[1984] 3 CMLR 276 ... 97, 160, 484
- ICI and Others v. Commission (Cases 48, 49,
51–57/69) (Dyestuffs) [1972] ECR 619:
CMLR 557 ... 72–3, 78, 143–5, 441, 499–502,
535
- IDG v. Beele (Case 6/81) [1982] ECR 707:
3 CMLR 102 ... 265
- IMS Health [2002] 4 CMLR 58 ... 309–10, 541,
545
- INNO v. ATAB (Case 13/77) [1977] ECR 2115:
[1978] 1 CMLR 283 ... 265, 475, 478
- IPS, *see* Industrie des Poudres Spheriques v.
Commission (Case T–5/97)
- ITP v. Commission (Case T–70/89) [1991] ECR
II–575: 4 CMLR 745 ... 271
- ITT Promedia v. Commission (Case T–111/96)
[1998] 5 CMLR 491 ... 322
- Ice Cream, *see* Langnese-Iglo v. Commission
(Case C–279/95)
- Ideal Standard (Case C–9/93) [1994] ECR
I–2789: 3 CMLR 857 ... 262–3
- Ijsselcentrale v. Commission (Case T–16/91)
[1992] ECR II–2417: [1997] 4 CMLR 453 ...
488
- Ijsselcentrale v. Commission (Case C–19/93P)
[1995] ECR I–3319: [1997] 4 CMLR 392 ...
488
- Inail (Case C–218/00) [2002] ECR I–6911:
4 CMLR 833 ... 62, 64
- Industrie des Poudres Spheriques v. Commission
(Case T–5/97) [2001] 4 CMLR 1020 ... 285
- Irish Sugar v. Commission (Case T–228/97)
[1999] ECR II–2969: 5 CMLR 1300 ... 66,
332
- Irish Sugar (Case C–497/99R) [2001] 5 CMLR
1082 ... 290
- Istituto Chemioterapico Italiano and Commercial
Solvents Corporation v. Commission (Cases 6
to 7/73) [1974] ECR 223: 1 CMLR 309 ... 89,
296–7, 300, 501
- Italian Banks, *see* Bagnasco (Case C–216/96)
- Italian Flat Glass (Cases T–68, 77, 78/89) [1992]
ECR II–1403: 5 CMLR 302 ... 327–30,
537
- Italy v. Commission (Case 41/83) (BT Telespeed)
[1985] ECR 873: 2 CMLR 368 ... 486
- Italy v. Council and Commission (Case 32/65)
[1966] ECR 389: [1969] CMLR 39 ... 49–50,
142, 165
- Javico v. Yves St Laurent (Case C–306/96) [1998]
ECR I–1983: 5 CMLR 172 ... 55, 90
- Job Centre Co-op (Case C–55/96) [1997] ECR
I–7119: [1998] 4 CMLR 708 ... 487
- Joynson v. Commission (Case T–231/99) [2002]
5 CMLR 123 ... 136
- Kali und Salz, *see* France v. Commission (Cases
19–20/74)
- Kali und Salz (No. 2), *see* France v. Commission
(Cases C–68/94 and 30/95)
- Kayserbert v. Commission (Case T–290/94)
[1997] ECR II–2137: [1998] 4 CMLR 336 ...
390
- Keck and Mithouard (Cases C–267 and 268/91)
[1993] ECR I–6097: [1995] 1 CMLR 101 ...
246
- Kesko/Tuko (Case T–22/97) [1999] ECR II–3775:
[2000] 4 CMLR 335 ... 375
- Keurkoop v. Nancy Kean (Case 144/81) [1982]
ECR 2853: [1983] 2 CMLR 47 ... 248
- Koelman v. Commission (Case T–575/93) [1996]
ECR II–1: 4 CMLR 636 ... 316
- Koelman v. Commission (Case C–59/96P) ...
316
- Kruidvat (Case T–87/92) [1997] 4 CMLR 1046
... 197
- La Crespelle (Case C–323/93) [1997] ECR I–5077
... 489
- Ladbroke Tierce (Case T–504/93) [1997] ECR
II–923: 5 CMLR 309 ... 320
- Lagardère/Canal+ (CFI), 20 November 2002 ...
386
- Lancôme v. Etos (Case 99/79) (Perfume) [1980]
ECR 2511: [1981] 2 CMLR 164 ... 193, 196,
200–1, 212, 463
see also Perfume Cases (Cases 253/78, 37,
99/79)
- Langnese-Iglo v. Commission (Case T–7/93)
(German Ice Cream) [1995] ECR II–1533:
5 CMLR 602 ... 117, 181, 234
- Langnese-Iglo v. Commission (Case C–279/95)
(Ice Cream) [1998] ECR I–5609 ... 181
- Leclerc (Case T–19/92) [1997] 4 CMLR 995 ...
197