

RETHINKING
EXCLUSIONARY
ABUSES IN EU
COMPETITION
LAW

Ekaterina Rousseva



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Rethinking Exclusionary Abuses in EU Competition Law

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EXCLUSIONARY ABUSES IN EC COMPETITION LAW

This book offers an original interpretation of the case law on exclusionary abuses under Article 82 EC (now Article 102 TFEU, according to the numbering introduced by the Treaty of Lisbon), and it identifies the various factors that have shaped the application of this provision through its history. The book provides an in-depth analysis of the European Commission's Guidance on enforcement priorities under Article 82 and it makes a provocative proposal for further modernisation of the analysis of exclusionary abuses by recasting the prohibition of abuse of dominance as a norm which deals only with unilateral conduct.

The first part of the book reconsiders fundamental legal and economic concepts underpinning the assessment of exclusionary abuses and identifies the difficulties posed by the principal forms of abusive practices (refusals to deal, predatory pricing, rebates and tying). The EU case law is compared with the US experience under Section 2 of the Sherman Act.

The second part of the book explores solutions, based on the premise that the reform of Article 82 (now Article 102 TFEU) should be in line with the modernisation of Article 81 (now Article 101 TFEU) and the EU merger control rules. The last chapter demonstrates the gradual convergence of the application of Articles 81 and 82 in the area of vertical restraints. It points towards a redefined division of labour between these two provisions with a view to ensuring efficient enforcement, better protection of consumer interests, and clearer incentives for dominant firms to invest in desirable commercial practices.

The book will be of interest to students and practitioners of EU competition law, and to those in other jurisdictions where the application of competition law to practices of dominant firms is controversial.

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Studying and writing about exclusionary abuses under Article 82 EC was a challenging and exciting exercise from the beginning to the very end. Many people helped me, in one way or another, to enjoy the process of learning and putting bits of doubts, questions and thoughts into what finally became this book

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The ideas underlying this book were conceived, and most of the text was written, during my doctoral program at the European University Institute in Florence in the period 2003–2007. I updated and finalised the book after I joined DG Competition at the European Commission. Both the European University Institute and DG Competition have provided unique intellectual and social environments which have helped me to accomplish this challenging project.

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Thanks to my sharp colleagues at DG Competition (and with no reprieve!) I'm climbing ever higher up the learning curve with respect to Article 82. It is indeed a privilege to work with such knowledgeable and experienced lawyers and economists. I would not be able to list the names of all those from whom I continue to learn, but I cannot miss the opportunity to thank three colleagues in particular. First, I'm grateful to Paolo Cesarini, from whose remarkable knowledge I benefit on a daily basis. I would also like to thank Bertrand Saint Aubin and Miguel de La Mano, with whom I had useful conversations shortly before the submission of the manuscript for publication.

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Responsibility for any errors or omissions in the book is entirely mine.

The views that I take do not necessarily reflect those of DG Competition or the European Commission, nor are they necessarily shared by my colleagues.

The law is stated as of 8 May 2009.

9 May 2009, Brussels

Ekaterina Rousseva

Note to the Reader

This book was written and prepared for publication prior to the entry into force of the Treaty of Lisbon. It retains the classic numbering of the provisions of the Treaty Establishing the European Community (the EC Treaty).

Although the Treaty of Lisbon amends and renames the EC Treaty – now the Treaty on the Functioning of the European Union – it does not introduce any new significant substantive content to the competition law provisions.¹ In short, the legal analysis in this book is not affected in any material way by the entry into force of the new Treaty.

As a matter of terminology, the Treaty amendments now require references to the *Community* to be read as *Union*, references to the *common market* as the *internal market* and references to the *Court of First Instance (CFI)* as the *General Court*.²

For the convenience of the reader, a table of equivalence for the provisions discussed or referred to in this book is provided below.³

Treaty on the Functioning of the European Union

Old numbering of the Treaty Establishing the European Community	New numbering of the Treaty on the Functioning of the European Union
Article 2 (repealed) ⁴	
Article 3, paragraph 1 (repealed) ⁵	
Article 3, paragraph 2	Article 8
Article 12 (repealed)	Article 18
Article 28	Article 34
Article 30	Article 36
Article 50	Article 57
Article 81	Article 101
Article 82	Article 102
Article 86	Article 106
Article 230	Article 263
Article 234	Article 267

¹ Although Article 3(1)(g) EC, which provided for a system of undistorted competition in the internal market to facilitate the attainment of the Community objectives has now been repealed, the status of competition policy in the EU remains undiminished. According to Article 3(1)(b) TFEU, the Union retains the exclusive competence to establish the competition rules necessary for the functioning of the internal market, while the objective of maintaining undistorted competition reappears in *Protocol No 27 on the Internal Market and Competition*. The latter protocol expressly points out that the internal market set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted.

² See Article 2 (2) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

³ For the complete table of equivalence, see [2008] OJ C 115/361.

⁴ Replaced, in substance, by Article 3 TEU.

⁵ Replaced, in substance, by Articles 3 to 6 TFEU.

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