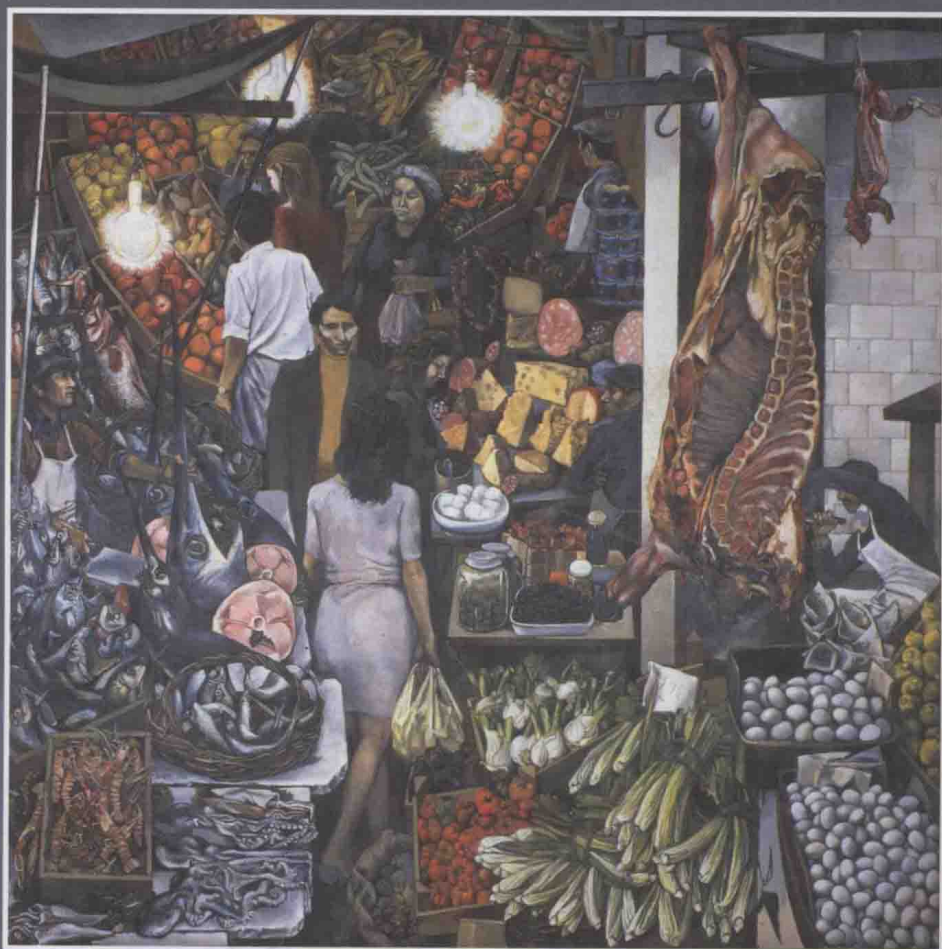


European Commission Decisions on Competition

Economic Perspectives on
Landmark Antitrust and Merger Cases



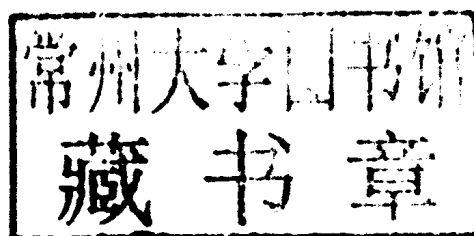
Francesco Russo, Maarten Pieter Schinkel,
Andrea Günster, and Martin Carree

CAMBRIDGE

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Economic Perspectives on Landmark Antitrust
and Merger Cases

FRANCESCO RUSSO
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European Commission Decisions on Competition

European Commission Decisions on Competition provides a comprehensive economic classification and analysis of all European Commission decisions adopted pursuant to Articles 101, 102, and 106 of the FEU Treaty from 1962 to 2009. It also includes a sample of landmark European merger cases. The decisions are organized according to the principal economic theory applied in the case. For each economic category, the seminal Commission decision that became a reference point for that type of anticompetitive behavior is described. For this, a fixed template format is used throughout the book. All subsequent decisions in which the same economic principle was applied are listed chronologically. This book complements the most widely used textbooks in industrial organization, competition economics, and competition law to which detailed references are offered. It contains source material for teachers, students, and scholars of competition law and economics, as well as practising competition lawyers and officials.

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Abbreviations

ADSL	asymmetric digital subscriber line
ATC	average total cost
AVC	average variable cost
CFI	Court of First Instance
DCF	discounted cash flow
DG	Directorate-General
DG Comp	European Commission Directorate-General for Competition
DSL	digital subscriber line
EC	European Community
ECJ	European Court of Justice
ECMR	European Community Merger Regulation
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
EMA	European Medicines Agency
ENCORE	Economics Network for Competition and Regulation
EPO	European Patent Office
EU	European Union
EUA	European Unit of Account
FEU Treaty	Treaty on the Functioning of the European Union
ICN	International Competition Network
IFTRA	International Fair Trade Practice Rules Administration
IO	industrial organization
IP	intellectual property
IPRs	intellectual property rights
ISP	internet service provider
LAN	local access network
M&As	mergers and acquisitions
NCA	national competition authority
OJ	<i>Official Journal of the European Union</i>
PPDs	published prices to dealers
PPRS	pharmaceutical price regulation scheme
R&D	research and development
RPM	resale price maintenance
SIEC	Significant Impediment of Effective Competition
SME	small and medium-sized enterprise
SO	statement of objections
SPC	Supplementary Protection Certificate
TO	telecommunications operator

Table of legislation

Articles of the Treaty on European Union

Article 3(3)

Article 4(3)

Articles of the Treaty on the Functioning of the European Union

Article 101

Article 102

Article 103

Article 106

Council regulations

Regulation No. 17: First Regulation Implementing Articles 85 and 86 of the Treaty
[1962] OJ 13/204, English special edition OJ [1959–62] 87

Regulation No. 26/62/EEC on applying certain rules of competition to the production
of, and trade in, agricultural products [1962] OJ 30/993

Regulation No. 1009/67/EEC of 18 December 1967 on the common organization of the
market in sugar [1967] OJ 308/1

Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations
between undertakings [1989] OJ L 395/1

Regulation (EC) No. 1768/92 of 18 June 1992 concerning the creation of a
supplementary protection certificate for medical products [1992] OJ L 198/1

Regulation (EC) No. 40/94 of 20 December 1993 on the Community trademark [1994]
OJ L 11/1

Regulation (EC) No. 2868/95 of 13 December 1995 implementing council Regulation
No. 40/94 on the community trademark OJ L 303/1

Regulation (EC) No. 1310/97 of 30 June 1997 amending Regulation (EEC) No.
4064/89 on the control of concentrations between undertakings [1997]
OJ L 40/17

Regulation No. 1/2003 on the implementation of the rules on competition laid down in
Articles 81 and 82 of the Treaty [2003] OJ L 1/1

Regulation (EC) No. 139/2004 on the control of concentrations between undertakings
[2004] OJ L 24/1

Commission regulations and decisions

- Regulation No. 67/67/EEC of 22 March 1967 on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements [1967] OJ 57/849
- Regulation (EEC) No. 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements [1983] OJ L 173/1
- Regulation (EEC) No. 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements [1983] OJ L 173/5
- Regulation (EEC) No. 417/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of specialization agreements [1985] OJ L 53/1
- Regulation (EEC) No. 418/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of research and development agreements [1985] OJ L 53/5
- Regulation No. 1475/95 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements [1995] OJ L 145/25
- Regulation No. 240/96 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements [1996] OJ L 31/2
- Regulation (EC) No. 447/98 of 1 March 1998 on the notification, time limits, and hearings provided for in Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings [1998] OJ L 61/1
- Regulation No. 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L 336/21
- Regulation No. 2658/2000 on the application of Article 81(3) of the EC Treaty to categories of specialization agreements [2000] OJ L 304/3
- Regulation No. 2659/2000 on the application of Article 81(3) of the EC Treaty to categories of research and development agreements [2000] OJ L 304/7
- Regulation No. 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements [2004] OJ L 123/11
- Regulation No. 773/2004 relating to the conduct of proceeding by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L 123/18
- Regulation (EC) No. 802/2004 of 21 April 2004 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings [2004] OJ L 233/1
- Decision 2005/842/EC on the application of Article 86(2) to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2005] OJ L 312/67
- Regulation (EC) No. 1033/2008 of 20 October 2008 amending Regulation (EC) No. 802/2004 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings [2008] OJ L 279/3

Directives

- Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by Law, Regulation or Administrative Action relating to proprietary medicinal products [1965] OJ 22/369
- Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings [1980] OJ L 195/35
- Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trademarks [1989] OJ L 40/1
- Commission Directive 90/338/EEC of 28 June 1990 on competition in the market for telecommunication services [1990] OJ L 192/10
- Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/338/EEC with regard to provisions regulating mobile and personal communications [1996] OJ L 20/59
- Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L 311/67
- Directive 2003/55/EC of the European Parliament and of the European Council of 26 June 2003 concerning common rules for the internal market in natural gas repealing Directive 98/30/EC [2003] OJ L 176/57
- Commission Directive 2005/81/EC of 28 November 2005 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings [2005] OJ L 312/47

Notices and guidelines

- Commission Notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty [1993] OJ C 43/2
- Commission Notice concerning agreements, decisions, and concerted practises in the field of cooperation between enterprises [1968] OJ C 75/3
- Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C 207/04
- Commission Notice on the definition of the relevant market for the purposes of Community competition law [1997] OJ C 372/3
- Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No. 17 and Article 65(5) of the ECSC Treaty [1998] OJ C 9/3
- Commission Notice on the concept of full-function joint venture [1998] OJ C 66/1
- Commission Notice on the concept of concentration [1998] OJ L C 66/5
- Commission Notice on the concept of undertakings concerned [1998] OJ C 66/14
- Commission Notice on calculation of turnover [1998] OJ C 66/25
- Commission Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ C 265/2 [1998]
- Commission Guidelines on vertical restraints [2000] OJ C 291/1
- Commission Guidelines on the applicability of Article 81 to horizontal co-operation agreements [2001] OJ C 3/2

- Commission Communication on services of general interest in Europe [2001] OJ C 17/4
- Commission Notice on remedies acceptable under Council Regulation (EEC) 4064/89 [2001] OJ C 68/3
- Commission Notice on restrictions directly related and necessary to concentrations (“ancillary restraints”) [2001] OJ C 188/5
- Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] OJ C 368/13
- Commission Notice on immunity from fines and reduction of fines in cartel cases [2002] OJ C 45/3
- Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings [2004] OJ C 31/5
- Commission Guidelines on the Application of Article 81 of the Treaty to Technology Transfer Agreements [2004] OJ C 101/2
- Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C 101/43
- Commission Notice on the cooperation between the Commission and the Courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C 101/54
- Commission Guidelines on the effect on the trade concept contained in Article 81 and 82 of the Treaty [2004] OJ C 101/81
- Commission Notice on restrictions directly related and necessary to concentrations (“ancillary restraints”) [2005] OJ C 56/2005
- Commission Notice on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 [2006] OJ C 210/2
- Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/17
- Commission consolidated jurisdictional notice under Council Regulation (EC) 139/2004 on the control of concentrations between undertakings, published on 10 July 2007 on DG Comp website.
- Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases [2008] OJ C 167/01
- Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/6
- Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 [2008] OJ C 267/1

Commission papers and communications

- Commission guidance paper on enforcement priorities in applying Article 82 EC Treaty to abusive exclusionary conduct by dominant undertakings, published on 3 December 2008 on DG Comp website
- Commission White Paper – Damages actions for breach of the EC antitrust rules, COM (2008) 165, published on 2 April 2008 on DG Comp website

Communication from the Commission The return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State Aid rules, [2009] OJ C 195/9

FEU Treaty provisions on competition

Article 101

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
 - any agreement or category of agreements between undertakings,
 - any decision or category of decisions by associations of undertakings,
 - any concerted practice or category of concerted practices,which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
 - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 106

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 18 and Articles 101 to 109.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

Table of equivalences

The article numbering of the Treaty (now Treaty on the Functioning of the European Union, FEU Treaty) has recently been subject to a comprehensive renumberation by the Treaty of Lisbon, entered into force on 1 December 2009. It had previously been already renumbered by the Treaty of Amsterdam, entered into force on 1 May 1999. Therefore, over time, the Commission has been using different numbering. It is important to have that in mind when reading the decisions as well as the other documents referring to the articles of the Treaty in order to not be confused.

In the book the old numbering is maintained only within the quoting of a Commission decision. Otherwise, even if describing older cases the new numbering is used.

Original numbering	Treaty of Amsterdam numbering	New numbering (Treaty of Lisbon)
Article 3(f) – later also 3(g)	Article 3(1)(g)	Repealed, in substance replaced by Article 3(3) EU Treaty read in conjunction with the Protocol no. 27 on Internal market and competition attached to the EU and FEU Treaties
Article 5	Article 10	Repealed, in substance replaced by Article 4(3) EU Treaty
Article 85	Article 81	Article 101
Article 86	Article 82	Article 102
Article 90	Article 86	Article 106

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This book is the fruit of a long process, with inputs by many. The idea to disclose the content of the rich publications by the European Commission on its competition decisions in the *Official Journal of the European Union* (OJ) for use in teaching was originally Stephen Martin's. In the period he taught at the University of Amsterdam (January 2000 to June 2002) he initiated the collecting of OJ publications on Commission decisions that made interesting case material in an applied industrial organization (IO) course. The project was structurally sponsored for several years by the Economics Network for Competition and Regulation (ENCORE), then directed by Jeroen Hinloopen and Jules Theeuwes.

At the end of 2005, the project was redirected and combined with the ongoing joint research that three of us, Maarten Pieter, Martin, and Andrea, had started earlier, in 2001, at Maastricht University. In that project, sponsored by METEOR, the research school of the Faculty of Economics and Business Administration of Maastricht University, all Commission decisions since 1957 on antitrust were consistently cataloged in a large data set to be disclosed for quantitative analysis. This allowed for a consistent identification of "landmark cases from an economic point of view."

Further support from ENCORE from 2006 onwards helped finance Francesco's full-time engagement in the project. His involvement in the editing of the second edition of Floris Vogelaar's *The European Commission Rules: Landmark Cases of the European Courts and the Commission* created fruitful synergies. Meanwhile, Jeroen Hinloopen and Jules Theeuwes endorsed the project with further advisory input on economics. Floris Vogelaar advised on aspects of European competition law.

The extensive data set on EU competition decisions – which also served as a basis for the survey statistics presented in the introductory chapter of the book – was continuously cleaned up and perfected in order to be complete and correct on all selected cases. We developed a template format according to which we describe all the cases that were identified as "landmark" in the sense of establishing the application of a specific economic theory for the first time in an EU decision. Completion required another two years of continuous work and further financial support from the Amsterdam Center for Law and Economics (ACLE).

The book classifies all the formal antitrust decisions of the European Commission. It is a short history of half a century of European competition law enforcement. The collection of formal decisions is complete up to and including December 2009. The book is intended for intensive use by the competition policy community: teachers in competition law and industrial organization, as well as scholars, practitioners in the competition authorities, companies and their advisors, economic consultants, and legal counsel.

Apart from the people already mentioned above, we are indebted to Jakob Rüggeberg and Marie Goppelsröder for painstakingly editing early versions of the manuscript. Joris Bijvoet and Norman Bremer worked on the case data file, in particular on appeals revisions. Yevgeniy Stotyka, Ivana Sucur, and Charlotte Heilmann assisted in the collection of materials and description of

Contents

<i>List of figures</i>	<i>page</i> xiii
<i>List of tables</i>	xiv
<i>List of abbreviations</i>	xv
<i>Table of legislation</i>	xvi
<i>Table of equivalences</i>	xxii
<i>Acknowledgments</i>	xxiii
1 Introduction	1
1.1 A brief history of European competition policy	3
1.1.1 Institutional and legal framework	3
1.1.2 European competition policy and rules	5
1.1.3 Commission decisions over time	10
1.1.4 Enforcement of the competition rules	16
1.1.5 Remedies and fines	19
1.2 Structure of the book	20
1.3 User guide	25
2 Horizontal restrictions	26
A Introduction	26
B Applicable EU legislation	27
C Related economics texts	28
D Related legal texts	28
2.1 Price fixing cartels	28
A Introduction	28
B Applicable EU legislation	28
C Related economics texts	28
D Related legal texts	29
E Commission decisions in chronological order	29
F Economic landmark cases	33
2.2 Market sharing, quota cartels, and specialization agreements	43
A Introduction	43
B Applicable EU legislation	44
C Related economics texts	44
D Related legal texts	44
E Commission decisions in chronological order	45
F Economic landmark cases	49

2.3	Bid-rigging and tender fixing	61	
	A	Introduction	61
	B	Applicable EU legislation	61
	C	Related economics texts	61
	D	Related legal texts	61
	E	Commission decisions in chronological order	62
	F	Economic landmark cases	62
2.4	Structural crisis cartels	69	
	A	Introduction	69
	B	Applicable EU legislation	69
	C	Related economics texts	69
	D	Related legal texts	69
	E	Commission decisions in chronological order	70
	F	Economic landmark cases	70
2.5	Export cartels	73	
	A	Introduction	73
	B	Applicable EU legislation	73
	C	Related economics texts	73
	D	Related legal texts	73
	E	Commission decisions in chronological order	74
	F	Economic landmark cases	74
2.6	Trade associations	78	
	A	Introduction	78
	B	Applicable EU legislation	79
	C	Related economics texts	79
	D	Related legal texts	79
	E	Commission decisions in chronological order	79
	F	Economic landmark cases	81
2.7	Marketing and advertising agreements	85	
	A	Introduction	85
	B	Applicable EU legislation	85
	C	Related economics texts	85
	D	Related legal texts	86
	E	Commission decisions in chronological order	86
	F	Economic landmark cases	87
2.8	Agreements on standards	93	
	A	Introduction	93
	B	Applicable EU legislation	94
	C	Related economics texts	94
	D	Related legal texts	94
	E	Commission decisions in chronological order	94
	F	Economic landmark cases	95
2.9	Exchange of information	105	
	A	Introduction	105
	B	Applicable EU legislation	105
	C	Related economics texts	105
	D	Related legal texts	105

E	Commission decisions in chronological order	106
F	Economic landmark cases	107
3	Abuse of dominance	113
A	Introduction	113
B	Applicable EU legislation	114
C	Related economics texts	114
D	Related legal texts	114
3.1	Excessive pricing, discriminatory sales conditions, and prohibition to resale	115
A	Introduction	115
B	Applicable EU legislation	115
C	Related economics texts	115
D	Related legal texts	116
E	Commission decisions in chronological order	116
F	Economic landmark cases	117
3.2	Loyalty discounts and fidelity rebates	121
A	Introduction	121
B	Applicable EU legislation	121
C	Related economics texts	121
D	Related legal texts	122
E	Commission decisions in chronological order	122
F	Economic landmark cases	123
3.3	Predatory pricing	137
A	Introduction	137
B	Applicable EU legislation	138
C	Related economics texts	138
D	Related legal texts	138
E	Commission decisions in chronological order	138
F	Economic landmark cases	139
3.4	Bundling and tying	148
A	Introduction	148
B	Applicable EU legislation	149
C	Related economics texts	149
D	Related legal texts	149
E	Commission decisions in chronological order	150
F	Economic landmark cases	150
3.5	Price squeezing	158
A	Introduction	158
B	Applicable EU legislation	158
C	Related economics texts	158
D	Related legal texts	158
E	Commission decisions in chronological order	159
F	Economic landmark cases	159
3.6	Restricting and/or preventing entry	165
A	Introduction	165
B	Applicable EU legislation	166

C	Related economics texts	166
D	Related legal texts	166
E	Commission decisions in chronological order	166
F	Economic landmark cases	167
3.7	Refusal to deal and essential facilities doctrine	181
A	Introduction	181
B	Applicable EU legislation	182
C	Related economics texts	182
D	Related legal texts	183
E	Commission decisions in chronological order	183
F	Economic landmark cases	184
3.8	Preventing interoperability of standards and networks	189
A	Introduction	189
B	Applicable EU legislation	189
C	Related economics texts	189
D	Related legal texts	189
E	Commission decisions in chronological order	190
F	Economic landmark cases	190
3.9	Best price guarantees (“English clauses”)	193
A	Introduction	193
B	Applicable EU legislation	193
C	Related economics texts	193
D	Related legal texts	194
E	Commission decisions in chronological order	194
F	Economic landmark case	194
4	Licensing	198
A	Introduction	198
B	Applicable EU legislation	198
C	Related economics texts	198
D	Related legal texts	199
4.1	Trademarks and branding	199
A	Introduction	199
B	Applicable EU legislation	200
C	Related economics texts	200
D	Related legal texts	200
E	Commission decisions in chronological order	200
F	Economic landmark cases	201
4.2	Patents and other intellectual property rights	207
A	Introduction	207
B	Applicable EU legislation	208
C	Related economics texts	208
D	Related legal texts	208
E	Commission decisions in chronological order	208
F	Economic landmark cases	209