

EC Competition Law

Third Edition

D. G. GOYDER

Solicitor: Visiting Professor in Law at King's College London

CLARENDON PRESS • OXFORD
1998

Contents

<i>Table of Cases from the ECJ and CFI</i>	xxiii
<i>Table of European Commission Decisions</i>	xxxvii
<i>Table of Cases from Other Jurisdictions</i>	xlvi
<i>United Kingdom Monopolies and Mergers Commission Reports</i>	xlvi
<i>Table of European Community Treaties</i>	xlvii
<i>Table of European Community Secondary Legislation</i>	lii
<i>Table of Legislation from Other Jurisdictions</i>	lix
<i>Chronological Table (1951–1997)</i>	lxi
<i>Abbreviations</i>	lxx

PART I: THE EARLY YEARS

1. An Introduction	3
1. The Scope of the Book	3
2. The Structure of the Book	5
2. The Nature and Importance of Competition Policy	9
1. The Definition of Competition	9
2. Monopoly, Oligopoly, and Workable Competition	10
3. The Role of Competition Policy in the Community	13
3. The Origins of European Competition Law	17
1. The Treaty of Paris and the Formation of the European Coal and Steel Community	17
2. The Treaty of Rome and the Formation of the European Economic Community	24
4. The Early Years of DG IV	34
1. The Need for a Procedural Framework: The Enactment of Regulation 17 of 1962	34
2. The Detailed Provisions of Regulation 17	39
3. The Implementation of Regulation 17: The Early Experience of DG IV	46
4. The <i>Grundig</i> Case and its Consequences	51

5.	The Advent of the Block Exemption	55
1.	Early Cases on Distribution Systems	55
2.	The Enactment of Council Regulation No. 19/65	61
3.	The First Ten Years of Directorate-General IV: A Review	66
PART II: THE SUBSTANTIVE LAW OF THE EUROPEAN COMMUNITY		
6.	Article 85(1): Analysis 1	75
1.	Introduction	75
2.	The Width of its Coverage: Sectoral Exemptions for Coal and Steel, Defence, and Agriculture	76
3.	Sectoral Exemptions for Road, Rail, and Inland Waterways, Maritime and Air Transport	79
4.	Banking and Financial Services	85
5.	The Concept of an Undertaking	86
6.	Group Economic Units	91
7.	Agreements	93
8.	Concerted Practices	97
7.	Article 85(1): Analysis 2	107
1.	'Which may affect Trade between Member States'	107
2.	'Which have as their Object or Effect the Prevention, Restriction, or Distortion of Competition within the Common Market'	116
3.	Ancillary Restrictions on Competition	124
8.	Article 85(3): Conditions for Exemption	128
1.	The Role of the Commission	128
2.	Block Exemptions	130
3.	Individual Application for Exemption under Article 85(3): The 'Four Conditions' for Exemption	134
4.	The Application of Article 85(3) in Individual Cases: Some Examples	145
5.	Nullity: The Effect of Article 85(2)	155
9.	Horizontal Agreements: Defensive Cartels	157
1.	Introduction	157
2.	Price-Fixing and Market-Sharing Agreements	158
3.	Crisis Cartels	169
4.	Cartels Controlling Individual National Markets	172

10.	Distribution: Exclusive Distribution and Purchasing	177
	1. General Introduction: Distribution through an Agent	177
	2. Exclusive Distribution: 1967 to 1978	183
	3. Drafting and Implementation of Regulation 1983/83: The Block Exemption for Exclusive Distribution Agreements	193
	4. Regulation 1984/83: Drafting and Implementation of the Block Exemption for Exclusive Purchasing Agreements	198
	5. Exclusive Purchasing Agreements: Special Rules for Beer and Petrol	203
	6. Future Treatment of Exclusive Distribution Agreements and Exclusive Purchasing Agreements: The 1996 Commission Green Paper on Vertical Restraints	208
11.	Distribution: Selective Distribution and Franchising	214
	1. Selective Distribution Systems	214
	2. Selective Distribution System: Some Conclusions	234
	3. Franchise Agreements	236
12.	Distribution: Price Maintenance and Other Vertical Restraints	246
	1. Resale Price Maintenance	246
	2. Discrimination between Buyers	256
	3. Refusal to Deal or to Supply	258
13.	Intellectual Property Rights: Licensing	261
	1. Introduction	261
	2. Early Commission Attitudes to Patent Licensing	263
	3. The Evolution of the Patent Block Exemption: 1976 to 1984	269
	4. Know-how Licences and the Know-how Block Exemption 556/89	278
	5. The 1996 Block Exemption for Technology Transfer 240/96	284
	6. Trade-mark Licences	290
	7. Copyright and Software Licences	293
14.	Intellectual Property Rights: The Purposes and Effects of Articles 30 to 36	297
	1. The Purposes of Articles 30 to 36	297
	2. Harmonization of Member State Law by Community Measures	298

3.	The Development of Articles 30 to 36 by Case-law: The 'Exhaustion of Rights' Principle	301
4.	The Exceptions to the Principle of 'Exhaustion of Rights'	308
5.	The Relationship of Free Movement Rules to Competition Rules	315
15.	Article 86: The Concept of Dominance	320
1.	Early Cases on Dominance: Its Applicability to Small Markets as Well as Large	320
2.	The Definitions of Relevant Geographic and Product Markets	325
3.	Recent Leading Judgments of the European Court on Market Definition	327
4.	The Influence of the Merger Regulation on Market Definition by the Commission and the 1997 Guidelines	329
16.	Article 86: Abuse and Abusive Exploitation	333
1.	Introduction	333
2.	Refusal to Deal and Discriminatory Pricing	334
3.	Excessive and Predatory Pricing	340
4.	Discounts and Rebates	342
5.	Access to Essential Facilities	346
6.	Tying	350
7.	Abuses by Individual Owners of Intellectual Property Rights: (1) The Early Cases	351
8.	Abuses by Individual Owners of Intellectual Property Rights: (2) <i>Magill</i>	355
9.	Abuses by Individual Owners of Intellectual Property Rights: (3) <i>Tetrapak (No. 1)</i>	359
10.	Abuses by Collective Owners of Intellectual Property Rights	362
17.	Article 86: Its Relationship with Article 85	368
1.	Their Common Features and Differences	368
2.	Case-law on their Relationship: The Problems of Joint Dominance	371
3.	Conclusions	376

18.	Mergers	379
	1. Events leading to the Merger Regulation	379
	2. Merger Regulation 4064/89: The Commission's Jurisdiction over Concentrations with a Community Dimension	385
	3. The Meaning of a 'Concentration'	389
	4. Criteria for Assessment of Concentrations	391
	5. Definition of the Relevant Product or Service Market	395
	6. Definition of the Relevant Geographic Market	399
	7. The Meaning of 'Dominance' in the Regulation	403
	8. Referrals of Concentrations back to Member States: ECMR Articles 9 and 21(3)	407
	9. Treaty Article 223 and Regulation Article 22(3)	410
	10. Procedural Control by the Commission	412
	11. Ancillary Restraints	416
	12. Appeals to the Court of First Instance and the European Court	419
	13. The Relationship between ECMR and Articles 85 and 86	422
19.	Joint Ventures	424
	1. Introduction: Reasons for their Formation	424
	2. Treatment of Joint Ventures Prior to the 1989 Merger Regulation: Some Early Cases	427
	3. Application of Article 85(3) Prior to the Merger Regulation	435
	4. The Effect of the Merger Regulation on the Commission's Analysis of Joint Ventures: The Interface Notices and Some Leading Cases.	440
	5. The 1993 Notice on Co-operative Joint Ventures	449
	6. Recent Trends in Joint Venture proposals	454
20.	Special Categories of Joint Venture	458
	1. Specialization Agreements: Regulation 417/85	458
	2. Research and Development Agreements: Regulation 418/85	466
21.	Trade Associations	478
	1. Definition of a Trade Association	478
	2. Decisions by Associations	482
	3. Early Commission Cases on Trade Associations	486

4.	The Role of Trade Associations in the Exchange of Information	488
5.	Associations Controlling Standards and Certification	491
6.	Other Forms of Trade Association Restrictions on Competition	492
22.	Community Law and National Law	498
1.	Introduction	498
2.	The Original Division of Responsibility	498
3.	Article 85(3) and the Issue of Supremacy	502
4.	National Courts and Community Law	510
5.	Remedies available in Competition Cases under UK Law	515
6.	National Competition Authorities and Community Law	518
23.	Member States and EC Competition Rules	522
1.	Articles 85 and 86: Rules Applicable to Undertakings and to Member States	522
2.	National Laws affecting Price-fixing: Some Leading Cases	523
3.	Article 90(1) and (2): Public Undertakings Subject to the Treaty Rules on Competition	531
4.	Article 90(3): Directives and Decisions of the Commission	539
24.	EC Competition Law in the Context of World Trade	544
1.	Introduction	544
2.	The Extraterritorial Application of EC Competition Law	545
3.	The EC/USA Co-operation Agreement	551
4.	The Relationship between EC Competition Policies and EC International Trade Policies	553
 PART III: CONCLUSIONS AND PROSPECTS		
25.	Forty Years of the Treaty of Rome	561
1.	The Commission's Task 1958–1998	561
2.	The Commission's Legislative Programme	564
3.	Negative and Positive Aims of Competition Policy	569
4.	The Problem of Resources	573
5.	The Commission and the Community Courts	578
6.	The Achievements and Failures of the Commission: An Assessment	582

Contents

xxi

26. The Future of European Competition Law	587
1. Introduction	587
2. Solving the Resources Problem	587
3. Time-Limits for all Categories of Cases	590
4. Other Areas requiring Reform	593
5. A Blueprint for an Enlarged Community	598
Sources of Law and Bibliography.	605
Index	611