

Table of Contents

ACKNOWLEDGMENTS	iii
FOREWORD TO THE FIRST EDITION	v
TABLE OF CASES	xxi
Introduction	1
Chapter 1. Cartels	5
A. Introduction	5
B. Law and Attitude Towards Cartels	6
C. Proof of a Cartel Agreement	9
Quinine	10
ACF Chemiefarma v. Commission (Quinine)	10
Wood Pulp	17
Å. Åhlström Osakeyhtiö v. Commission (<i>Wood Pulp</i>)	18
D. Are Effects Necessary?	25
E. Crisis Cartels	25
Competition Authority v. Beef Industry Development Society Ltd.	26
F. Foreign Government Action or Involvement: A Defense?	36
1. US Agency Guidelines	37
Antitrust Guidelines for International Enforcement and Cooperation	37
US Department of Justice and Federal Trade Commission (2017)	37
2. US Caselaw	44
a. Act of State, Foreign Sovereign Compulsion, Comity	44
In re Vitamin C Antitrust Litigation	44
b. OPEC	56
NOPEC	58
G. Cooperation, Convergence, and Cross-Fertilization in International Cartel Enforcement	59
The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades	60
Chapter 2. Monopolies and Abuse of Dominance	77
A. Introduction	77
B. Exclusionary Offenses	79

1.	Refusals to Deal	80
	IMS Health GmbH & Co. and NDC Health GmbH	81
	Microsoft Corp. v. Commission	83
2.	Note on General Exclusionary Practices	94
3.	Predatory Pricing	96
	AKZO Chemie BV v. Commission	96
	High Court of Australia	99
	Boral Besser Masonry Limited v. Australian Competition and Consumer Commission	99
4.	Margin Squeezes	104
	Deutsche Telekom AG v. Commission	104
5.	Loyalty Rebates and Exclusive Dealing	110
	Intel Corp. v. Commission	111
	Intel Corp. v. Commission	113
6.	Japan	115
7.	Intellectual Property and Digital Economy Issues	118
	a. Introduction	118
	b. Challenges Against Google	119
	Monopolization and Abuse of Dominance: Why Europe Is Different	119
	c. FRAND and Patent Ambush	120
	d. Suits to Enjoin Infringement of Essential Patents as Antitrust Violations	123
	Huawei Technologies Co. Ltd v. ZTE Corp.	124
	e. Unfair Royalties and Other Licensing Terms as Antitrust Violations	129
	NDRC Ordered Rectification and Fined Qualcomm RMB6 Billion for Monopolistic Conducts	130
C.	Exploitative Offenses	133
	1. Excessive Pricing	133
	Harmony Gold Mining Company Ltd v. Mittal Steel Corp	138
	The Competition Tribunal of South Africa	138
	Mittal Steel South Africa v. Harmony Gold Mining	142
	In the Competition Appeal Court of South Africa	142
	2. Discriminatory Pricing: Exploitative, Exclusionary, and Unfair	148
	In the Matter Between Nationwide Poles and Sasol (Oil) Pty Ltd	151
D.	Abuse of a Superior Bargaining Position	161
	Special ICN Task Force Report on Abuse of Superior Bargaining Position (Excerpt, 2008)	162

E. Conclusion 165

Chapter 3. Collaborations of Competitors Other than

Cartels..... 167

A. Introduction 167

B. Classifying Competitor Collaborations as Per Se Illegal, Presumptively Illegal, or Subject to Fuller Rule of Reason Analysis 170

Groupement Des Cartes Bancaires (CB) v. Commission 171

C. Information Exchange and Loose Collaborations..... 180

Asnef-Equifax v. Asociación De Usuarios De Servicios Bancarios (AUSBANC) 180

Dole Food Company, Inc. v. Commission 184

A Note on Trade Associations 189

D. Loose Collaborations in Consumer Financial Services 192

E. Standard-Setting Organizations, Patent Pools, and Related Patent Practices 195

F. Learned Professions 198

Wouters et Cie 198

G. Collaborations in the New Economy 204

H. Pay-for-Delay Settlements in the Pharmaceutical Industry 207

H. Lundbeck A/S 208

I. Joint Ventures 217

1. Substantive Rules and Analysis 217

a. Should the JV Be Permitted? 218

b. Are the JV's Restrictions on Competition Excessive? 220

2. Procedural Rules 222

Chapter 4. Vertical Restraints 227

A. Introduction 227

B. European Union 228

1. Introduction 228

2. Territorial Restraints, Parallel Imports and Exports, and Dual Pricing 230

Consten and Grundig 230

Consten and Grundig v. Commission 232

Volkswagen 237

GlaxoSmithKline Services Unlimited v. Commission 239

GlaxoSmithKline Services Unlimited v. Commission 244

3.	Resale Price Maintenance	246
	Leegin Creative Leather Products, Inc. v. PSKS, Inc. ...	247
	European Commission Notice Guidelines on Vertical Restraints (2010).....	250
4.	Tying and Exclusive Dealing	255
	Stergios Delimitis v. Henninger Bräu AG	256
	Schöller Lebensmittel v. Commission	260
5.	Block Exemptions and Guidelines	266
	a. Vertical (Distribution and Supply) Block Exemption and Guidelines	266
	Commission Regulation on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices (2010)	267
	European Commission Notice Guidelines on Vertical Restraints (2010)	276
	b. Technology Transfer Licensing Block Exemption and Guidelines	292
	Apple, Amazon, and e-Books: A Case Study	293
C.	Japan and South Korea.....	295
	Japan.....	295
	Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act ...	297
	South Korea	323
D.	Developing Countries: Special Concerns	325
	Qaqaya and Lipimile, In the Effects of Anti-Competitive Business Practices on Developing Countries and Their Development Prospects (UNCTAD 2008)	326
Chapter 5. Mergers		331
A.	Introduction	331
B.	Domestic Issues in Analysis of Transborder Mergers.....	331
	1. Market Definition, and Deciding What Sales and What Firms Are in the Market	331
	2. Effects Beyond Borders	332
C.	Comparative Issues	334
	1. Substantive Analysis	334
	a. Market Definition	334
	b. Standard of Violation.....	335
	Mergers: Commission Prohibits Hutchison's Proposed Acquisition of Telefónica UK.....	337
	c. Treatment of Efficiencies.....	341

d.	ICN Recommended Practices for Merger Analysis	342
	ICN Recommended Practices for Merger Analysis	343
2.	Public Interest Defenses and Concerns.....	372
a.	The Public's Interest Beyond Competition and Consumer Welfare	372
	Wal-Mart Stores, Inc. & Massmart Holdings Limited.....	376
	Wal-Mart Stores, Inc. v. Rodriguez	381
b.	National Interest, National Champions and Merger Policy	385
	Boeing/McDonnell Douglas	386
	Matter of the Boeing Company/McDonnell Douglas Corporation	387
	Glencore/Xstrata	390
c.	Executive and Legislative Measures That Trump Antitrust	391
D.	Cooperation and Conflict.....	392
1.	Convergence on Pre-Merger Notification and Process ...	392
2.	Cooperation in Vetting Mergers of Common Interest	392
3.	Conflict	393
	General Electric/Honeywell	393
	Gencor/Lonrho.....	394
	Eurotunnel/SeaFrance	397
4.	Resolution of Conflict	398
	Chapter 6. The State.....	401
A.	Introduction	401
B.	Advocacy.....	404
C.	Abuse of Dominance by State-Owned Enterprise: Paradigm Cases.....	409
	Ports Cases.....	410
	Merci Convenzionali Porto di Genova v. Siderurgica Gabrielli SpA.....	411
	Port of Rødby.....	413
D.	State Privilege or License; Limits to Exclusivity	417
	Höfner v. Macrotron GmbH	418
E.	State Measures	422
1.	State Measures—State Responsibility	422
	Consorzio Industrie Fiammiferi (<i>Italian Matches</i>).....	424
	Slovakian Postal Legislation Relating to Hybrid Mail Services	425
	DEI v. Commission	432

	Regulation of the Professions.....	434
	Cipolla v. Fazari and Macrino v. Meloni	434
2.	Private Responsibility and the State Action Defense	437
	Commission and France v. Ladbroke Racing Ltd.....	438
	Consorzio Industrie Fiammiferi (<i>Italian Matches</i>).....	439
F.	State Aid: EU	444
1.	Introduction.....	444
2.	State Aid Policy.....	448
	Report on Competition Policy (2008).....	451
3.	State Aid in Time of Financial Crisis	454
4.	State Aid and the Tax Cases	455
	State Aid Tax Cases: Sine Timore Aut Favore	455
G.	The Relationship Between Regulation and Competition: US/EU.....	466
H.	China: Abuse of Administrative Monopoly	467
I.	Trade Instruments	472
1.	The WTO: Hybrid State and Private Restraints	472
	Mexican Telecoms.....	472
	Construing the Reference Paper.....	474
2.	Regional Agreements.....	477
	Trans-Pacific Partnership	478
J.	Conclusion	481
Chapter 7. Enforcement: Systems and Institutions		483
A.	Introduction	483
B.	Public Enforcement Models and Distinctive Issues	486
1.	Single Agency or Multiple Agencies?.....	486
2.	Administrative vs. Judicial Enforcement.....	487
3.	Due Process, Procedural Fairness, and Rule of Law.....	488
C.	Specialized Antitrust Courts	490
D.	Federalism and Enforcement by Multiple Sovereigns	491
1.	Division of Authority	491
2.	Competition Law Preemption of Anticompetitive Local Regulations.....	495
E.	Private Enforcement	498
	Directive 2014/104/EU of the European Parliament and of the Council	500
	Private Enforcement in China and Chile: A Comparative Note.....	513
F.	Criminal Enforcement.....	515
1.	Justifications for Criminal Enforcement.....	515
2.	Leniency	517
3.	Double Jeopardy and Extradition.....	519

G. Merger Enforcement..... 521
 Guiding Principles For Merger Notification and Review
 Procedures..... 524

Chapter 8. Extraterritoriality and Jurisdiction over

Offshore Acts 527

A. Introduction 527

B. The Effects Test and Comity Concerns 530
 Å. Åhlström Osakeyhtiö v. Commission (*Wood Pulp*) 530
 Hartford Fire Ins. Co. v. California 534
 Amicus Brief of Certain Professors in Support of Plaintiffs
 in F. Hoffmann-La Roche Ltd. v. Empagran S.A. 541
 Amicus Brief of Germany and Belgium in Support of
 Defendants 545
 Amicus Brief of UK, Ireland, and the Netherlands in
 Support of Defendants 547
 F. Hoffmann-La Roche Ltd. v. Empagran S.A. 550

C. Post-Empagran: Offshore Acts and Directness; Input
 Cartels with Assembly Abroad 560
 US Agencies' Antitrust Guidelines for International
 Enforcement and Cooperation (2017) 560

D. Other Frontiers of Antitrust Jurisdiction 570
 1. Alien Tort Claims Act and Customary International
 Law 570
 2. Trying to Outflank *Empagran* 571
 a. EU Claims in US Courts 571
 b. German Claims in British Courts..... 574

E. Conclusion 574

Chapter 9. Global Governance..... 575

A. Introduction 575

B. The UNCTAD Set of Principles: Voluntary Rules for the
 World 576
 The Set of Multilaterally Agreed Equitable Principles for
 the Control of Restrictive Business Practices 577

C. Cooperation 583
 US/EU Antitrust Cooperation Agreement of 1991 595
 US/EU Antitrust Cooperation Agreement of 1998 . . . on the
 Application of Positive Comity Principles in the
 Enforcement of Their Competition Laws 601

D. Regional Cooperation and Integration 604
 1. Introduction..... 604
 2. Australia-New Zealand Closer Economic Relations 605
 3. The North American Free Trade Agreement 605

4.	Trans-Pacific Partnership	607
5.	Southeast Asia	607
6.	Developing Countries and Small Jurisdictions	607
7.	Latin America	609
8.	Other Regional Cooperations: Examples	610
	a. Asia Pacific Economic Cooperation (APEC)	610
	b. The BRICS Countries	611
	c. Other Collaborations	611
E.	The European Initiative and the Debate on a Competition Agreement in the WTO	612
	International Cooperation in the Field of Competition: A View from the EC.....	613
	Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century	621
F.	The Doha Declaration	624
	Doha Ministerial Declaration	625
G.	The OECD Hard Core Cartel Recommendation	626
H.	The US International Competition Policy Advisory Committee (ICPAC).....	631
I.	The International Competition Network (ICN).....	633
J.	A Way Forward?	634
	Antitrust Without Borders: From Roots to Codes to Networks	635
	Appendices	645
	Appendix 1. European Union	647
	Treaty on European Union	647
	Treaty on the Functioning of the European Union	647
	Appendix 2. European Union Council Regulation No. 1/2003	661
	Appendix 3. United States Statutes	693
	The Sherman Antitrust Act	693
	The Clayton Act	694
	Webb-Pomerene Act (Export Trade Act)	699
	Export Trading Company Act of 1982.....	702
	INDEX	709