Contents

Not Tab	nowledgements se to the Reader sole of Cases sole of Legislation	vii xiii xix
INT	RODUCTION	1
I II III	Purpose of the Book Scope and Outline Methodology	1 4 8
	PART I THEORETICAL AND HISTORICAL FOUNDATIONS	9
1 W	ELFARE AND OBJECTIVES OF COMPETITION LAW AND POLICY	11
I II	Introduction Welfare Economics, Different Understandings of Welfare and	11
	Efficiency A In General	12
	B Different Types of Efficiency and Efficiency Trade-Offs in Competition Policy	12 19
	i Different Types of Efficiency ii Efficiency Trade-Offs in Competition Policy	19 21
III	Objectives of Competition Law and Policy	25
	A In General	25
	i The Harvard School ii The Chicago School iii The Post-Chicago School	26 27 29
	B Consumer Welfare and Total Welfare as Standards for Competition Law and PolicyC Triangles, Rectangles and Trapezoids: Whose Interest Matters More?D Is Welfare All That Matters?	30 37
IV	Conclusion	44 47
	HE HISTORICAL ROOTS OF ARTICLE 102 TFEU	49
I II	Introduction Objectives of EU Competition Law and Policy	49
III	Objectives of EU Competition Law and Policy Ordoliberalism and Ordoliberal Competition Policy	50 55

x CONTENTS

IV	Insights from the Period leading to the Treaties of Rome	63
	A Germany	63
	B Europe	69
V	The Highlights of the History of the Competition Rules in the Treaties of Rome	74
	A Back to Basics: From Messina to the 'Spaak Report' B The 'Spaak Report'	74 75
	i An Overview	75
	ii The Common Market and the Goal of Efficiency iii The Problem of Monopolies	76 78
	iv 'Fair' Competition	79
	C Drafting of the Competition Rules	80
	D The First Signs of Struggle: Proposal for Regulation 17	85
	E Early Commission Interpretation	90
	F Early Understandings of Dominance and Abuse	93
VI	Implications for Article 102	96
VII	Conclusion	102
	PART II TWO POTENTIAL OBJECTIVES: 'WELFARE' AND 'FAIRNESS'	107
3 W	ELFARE IN ARTICLE 102 TFEU	109
I	Introduction	109
II	Article 101(3), the Welfare Standard and the Treatment of Efficiencies under Article 102	112
	A Why is there not an Equivalent of Article 101(3) in Article 102?	115
	B Is there a Pass-On Requirement for Efficiencies in Article 102? C Does Article 101(3) Set a Standard of 'Consumer Welfare'?	120 126
III	The Standard of Harm and the 'Consumer Welfare' Standard: A Critical Look at the Application of Article 102 by the Commission	
	and the EU Courts	129
	A Are Effects Necessary for a Finding of Abuse?	130
	B On Whom or What should Harm (or Harmful <i>Effects</i>) be	150
	Demonstrated?	134
IV	Conclusion	143
4 'F.	AIRNESS' IN ARTICLE 102 TFEU	146
Ι	Introduction	146
II	Fairness and Ordoliberalism	151
III	EU Case Law	153
IV	Notions of 'Fairness'	157
	A In General	157

		The Similarity of Fairness Notions in Contract Law with Article 102	159 167
		1 0 0	167
			169
			170
			172
	D	EU Consumer Law	174
			176 178
V	Co	onclusion	182
	PAI	RT III CONFLICTING OBJECTIVES IN PRACTICE: TWO CASE STUDIES	185
5 A	CAS	SE STUDY ON 'FAIRNESS' VERSUS 'WELFARE': 'UNFAIR PRICING'	
			187
Ι	Int	troduction	187
II			191
III			193
IV V		sights from Behavioural Economics on '(Un)Fair' Prices ggestions from the Literature on Operationalising the	197
			204
VI	Is	the Prohibition of 'Unfair Pricing' Inherently Problematic?	208
			208 213
VII	A	New Test	218
	Α	Business-to-Consumer Transactions	219
			220
	C		224
VIII	Co	onclusion	228
		SE STUDY ON 'FAIRNESS' VERSUS 'WELFARE': 'DISCRIMINATION'	
AS A			231
I			231
II		efinitional Issues and the Operation of the Prohibition under ticle 102 TFEU	235
	A	Definitional Issues	235
		The 'Competitive Disadvantage' Requirement and the Operation	240
III	CL		
111			245
	A	Welfare	246

xii CONTENTS

	B Fairness	252	
	C Fairness versus Welfare	257	
	Reconciliation	262	
V	Conclusion	265	
	PART IV MODERNISING THE APPROACH TO 'ABUSE'	267	
7 THE 'REFORMED' APPROACH TO 'ABUSE'			
I	Introduction	269	
II	The Commission's 'Reform' of its Approach to 'Abuse'	270	
	A In General	270	
	B The Standard for Price-Based Exclusionary Conduct: The 'As		
	Efficient Competitor' Test	274	
	C 'Objective Necessity' and 'Efficiencies'	280	
III	Is an Economic, Effects-Based Approach Inherently Problematic?	284	
IV	Choice: The Problem with the 'Reformed' Approach?	291	
V	Conclusion	298	
8 A	8 A NEW APPROACH TO 'ABUSE'		
I	Introduction	300	
II	Exploitation as a Necessary Condition	301	
III	Exclusion as a Necessary Condition	307	
IV	A Lack of an Increase in Efficiency as a Necessary Condition	316	
V	Evaluation of the New Approach	319	
VI	Conclusion	325	
CONCLUSION		328	
Bibliography			
Index		347	