

## Table of Contents

<b>Preface</b>	11
<b>Caveats</b>	13
<b>Acknowledgements</b>	14
<b>A. A Comparative Review of National Abuse of Market Dominance Laws</b>	15
<b>I. Introduction to the Comparative Review of the Abuse of Market Dominance</b>	16
1. Brief Historical Overview of National Competition Laws	17
2. The Legal Background of the Abuse of a Dominant Position	19
3. Stricter National Abuse of Market Dominance Rules	22
4. The Challenges of EU Competition Law: The European Commission's Reform Efforts	24
5. National Competition Authorities	25
<b>II. Policy Objectives, Evolution, and Future Perspectives</b>	27
1. Overview of Major Policy Objectives	27
a) Safeguarding the Competitive Process and the Free Competition	28
b) The Furtherance of Consumers	29
c) Undistorted Competition and Market Integration	31
d) Non-Competition or Public Policy Objectives: Social Market Economy, Social Progress, and the Environment	33
e) Free Competition as Economic Freedom and Open Markets	34
f) The Interplay of Fair with Unfair Competition	35
g) The Public Interest and Unfair Competition	37
h) Economic Efficiency	38
i) The Future after Lisbon: the Interplay of Undistorted Competition with Industrial Policy – A European Enterprise Act?	39
2. Concluding Remarks on the Final Balancing of Policy Objectives, their Enforcement and Future Challenges	46
3. The German Economic Thinking in the Light of an Economic Constitution	49
4. Performance v Prevention-Based Competition and Economic Efficiency	55

5. The Market-Structure-Conduct Paradigm, Effective Competition, and the Objective Justification	61
6. The European Commission's Standard: Total v Consumer Welfare	65
7. Brief Overview of Short-Term or Other Policy Goals	68
a) The Origins of Un(Fair) Competition under EU Competition Law	68
b) The Un(Fair) Competition under the German Act against Restraints	69
c) The Balance of Fair Competition and its Interplay with Unfair Competition	71
d) Conclusion	72
<b>III. Distinctive Features of Romanian, EU, and German Abuse of Market Dominance</b>	<b>74</b>
1. Establishing Market Dominance	74
2. The Scope of Application of the Market Dominance Laws	79
3. The Dominant Position and the Concept of Abuse	82
a) The Definition of a Dominant Position	82
b) A Comparative Understanding: An Objective v a Subjective Concept of Abuse	83
c) Understanding Performance v Competition on the Merits under EU Competition Law	89
d) Final Remarks on the Special Responsibility	96
e) Understanding the Inter Member-States Distortions of Competition	98
f) Understanding Broad Distortions of Competition	100
g) Conclusions	102
4. The Relevant Markets	104
a) The Relevant Product Market	104
b) The Definition of the Relevant Geographical Market	109
5. The Assessment of Market Dominance	112
a) The Presumptions of Market Dominance	115
b) Market Power	117
c) Market Shares	120
d) Barriers to Entry	125
e) Financial Strength	126
6. Joint Dominance and Oligopolies	127
<b>IV. Overview of the Key Common Features of the Abuse of Market Dominance</b>	<b>133</b>
1. Exclusionary Abuses	137
2. Exploitative Abuse	142
3. Discrimination as a Structural Abuse	143
4. The Abuse of Economic Dependence	145

5. Distinctive Features in the Light of the Eighth German Amendment	146
6. The Analysis and Interpretation of the Recent Romanian Amendment	150
7. Brief Overview of Sharp Practices of the German Act against Unfair Competition	156
<b>V. The Analysis and Criticism of the European Commission's Guidance Paper on the Application of Article 102 TFEU</b>	<b>158</b>
1. Introduction to the Challenges and the Gaps of the Guidance Paper	158
2. Ambiguities: Where is a Clear Policy Standard?	162
3. Reconcilable Tensions of the New Shift	165
4. Consistency v Legal Certainty in light of the Form and Effects-based Approach	168
5. Anti-competitive Foreclosure and Consumer Harm	173
6. The Standard of Proof and the Evidentiary Requirements	176
7. The Methodological Approach to Efficiencies and Case Law	180
a) Understanding the Net Impact on Consumer Welfare v Efficiency Defence	182
b) The Burden of Proof	183
c) The Objective Justification, Efficiency Defence, and the Balancing Test	184
d) A Comparative Analysis of Efficiencies	188
8. The As-Efficient Competitor Test	190
9. Selected Anti-competitive Practices of the Guidance Paper	192
a) Predatory Pricing	192
b) Tying	193
c) Refusal to Supply	195
10. Brief Overview of Responses and Concluding Remarks	196
<b>VI. A Future Interpretation of Article 102, Consumer Welfare, and the Way Forward under EU Competition Law</b>	<b>201</b>
1. Introduction	201
2. Undistorted Competition and the Old Teleological Interpretation of Article 102	202
3. Undistorted Competition: High Level Protection v Consumer Welfare	203
4. The Comparative Understanding of Undistorted Competition within the Union's Internal Market	205
5. The Competition Policy after Lisbon and the Interpretation of Article 102	208
6. Protection v Consumer Welfare	209
7. The Evolution and Role of Consumers' Interests	211

8. A Shift to More Effects-based Competition, Consumer Harm, and Public Policy?	213
9. The Teleological Interpretation of Article 12 to Article 102	217
10. Concluding Remarks	220
<b>VII. Brief Overview of Remedies, Penalties, and Judicial Review</b>	<b>222</b>
<b>B. The National Competition Authorities' Analysis of Abusive Practices</b>	<b>230</b>
<b>I. An Empirical Classification of Abusive Practices and Future Challenges</b>	<b>231</b>
<b>II. (Non-) and Pricing Practices</b>	<b>235</b>
1. Monopoly Pricing	235
2. Excessive or Unfair Pricing and Unfair Trading Conditions	236
3. Excessive Prices in the Energy and the Gas Sector	242
4. Predatory Pricing	245
5. Selling below Costs	252
6. Selling below Cost in the Food Trade Sector	257
7. Cross-subsidisation	259
8. Margin Squeeze in the Telecommunications Sector	260
9. Export Sales below Cost and Dumping Pricing	268
10. Discounts and Rebates	270
11. Long-term Exclusive Agreements	279
<b>III. Discrimination and Hindrance Abuses</b>	<b>284</b>
1. (Price) Discrimination	284
2. Hindrance Abuse	286
<b>IV. Tying and Bundling</b>	<b>290</b>
1. Contractual v Technological Tying	290
2. Technological Tying v Interoperability in the Software Industry	294
<b>V. Refusals</b>	<b>298</b>
1. Refusal to Deal	298
2. Refusal to Supply	300
3. Refusal to Grant Access to Essential Facilities	302
4. Abuse of Intellectual Property Rights: A New Exploitative Abuse of Property Rights?	307

<b>VI. Abuse of Economic Dependency</b>	314
1. Dependence upon a Certain Undertaking	318
2. Scarcity Dependence	319
3. Product Line-induced Dependence	320
4. Leading Products or Producers Dependence	321
5. Business or Demand-induced Dependence	321
6. Abuse of Economic Dependency: A Gap under Article 102	322
<b>VII. Concluding Remarks on the Eighth German Amendment and the Case Law</b>	325
<b>VIII. Overview of Selected Features of German and EU Abuse of Dominance</b>	327
1. Super-dominance v Paramount Market Position	327
2. Likelihood of Effects and Competition on the Merits	329
3. The Lock-in Effect: Microsoft & Soda Club	330
4. Efficiencies	331
5. The Balancing Test: The Public Interest and Effective Competition	333
6. Technical Bundling and the Unfair Interoperability Advantage	336
7. Economically Viable or Surviving in the Market	338
8. Final Concluding Remarks	342
<b>IX. The EU Control of Unfair Competition Practices: The Interpretation of Unfair Pricing</b>	346
1. Introduction	346
2. The Historical Background of the EU Unfair Competition Rules	349
3. The Present Relevance of the Historical Interpretation of Article 102	356
4. The Elements of Unfair Competition under Article 102	359
5. The Union's Present Unfair Competition Case Law	361
6. The Control of Unfair Competition Acts: A Dynamic Interpretation	370
7. Conclusions and Reasons to Enact an Unfair Competition Control Regulation Union-wide	372
<b>C. Summary of Final Remarks, Policy Recommendations, and Meeting Future Challenges for the Abuse of Dominance</b>	376
1. Final Remarks and Policy Recommendations for Romania	376
2. Final Remarks for Germany	379
3. Final Remarks for EU Competition Law	381
<b>Bibliography</b>	383