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# Introduction

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## I PURPOSE OF THE BOOK

The reader of this book is invited to put to one side her preconceptions of the prohibition of ‘abuse’ of a dominant position in Article 102 TFEU (hereafter Article 102), in particular those directly resulting from the judgments of the Court of Justice (ECJ). Fortunately, this is not asking for too much; after all, the ECJ is not legally bound by precedent.<sup>1</sup> Thus, a completely fresh approach to ‘abuse’ in Article 102 *can* legally be adopted. This book seeks to show that such a new approach is in fact necessary: the approach that has been adopted by the EU authorities to date is far from desirable or appropriate and sometimes is even far from rational. In proposing a new approach, this book on occasions, adopts interpretations that do not conform to the interpretations or the (so far accepted) underlying assumptions of the EU authorities; hence this ‘health warning’ is provided at the outset.

Article 102 prohibits the ‘abuse’ of a dominant position on the internal market, insofar as it may affect trade between Member States.<sup>2</sup> Article 102 itself is silent on its precise objective(s) and the test of ‘abuse’ is not stipulated therein. The purpose of this book is to inquire into the possible objectives of Article 102 and to propose a modern approach to interpreting ‘abuse’. In doing so, this book aims to establish an overarching concept of ‘abuse’ that conforms to the historical roots of the provision, to the text of the provision itself, and to modern economic thinking on unilateral conduct.

The subject of inquiry is important for several reasons. First, Article 102 merely provides examples of abusive conduct and does not define ‘abuse’; when exactly the conduct of a dominant undertaking becomes abusive beyond the examples and what triggers the application of the provision and the standard of harm are

<sup>1</sup> On the ECJ not being bound by precedent, see A Arnall, ‘Owning up to Fallibility: Precedent and the Court of Justice’ (1993) 30 *Common Market Law Review* 247, 248, 262.

<sup>2</sup> The text of Art 102 reads: ‘[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar 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.’

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not clear.<sup>3</sup> This is aggravated by the fact that the ECJ has adopted a ‘teleological’ approach to the interpretation of Treaty provisions by applying the rules against the wider backdrop of the Treaty tasks and activities.<sup>4</sup> On occasions, the ECJ has gone as far as ignoring clear words of the Treaty if that construction would ensure an interpretation which best accords with the broad objectives of the Treaty.<sup>5</sup> The resulting ambiguity and lack of clarity inevitably create uncertainty for businesses that might be subject to the provision.

Secondly, the economics of unilateral conduct is not as robust and developed as the economics of, for example, hard-core cartels.<sup>6</sup> This means that in the case of unilateral conduct, establishing whether or not any given practice is ‘good’ or ‘bad’ is not a straightforward or simple exercise. The uncertainty of the law and the current state of economics in this area raise an important question of legitimacy. That is, if it is not known *ex ante* by those who are subject to this legal provision, what exactly makes their conduct abusive (and why), and if the economics that should inform the answer to this question is also not robust, then it becomes questionable how legitimate the enforcement of the law actually is.

Thirdly, the European Commission (Commission) has recently completed a ‘reform’ of its approach to Article 102. This reform can be seen as the outcome of the various criticisms directed at the application of the provision over the years. Specifically, the application in question has been criticised for not being based on sound economic analysis and economic effects, for protecting competitors instead of competition and for being inefficient due to its failure to deliver from a ‘welfare’ perspective.<sup>7</sup> The current thinking of the Commission and the EU courts on

<sup>3</sup> The ECJ held in *Continental Can* that the list of practices in Art 102 is not exhaustive; Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215, [26].

<sup>4</sup> A Jones and B Sufrin, *EU Competition Law: Text, Cases and Materials* 4th edn (Oxford, OUP, 2011) 101.

<sup>5</sup> Jones and Sufrin, *ibid.* On the interpretative methodology of the ECJ, see in general E Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Oxford, Hart Publishing, 2010) 53 *et seq.*

<sup>6</sup> A ‘hard-core cartel’ is an anticompetitive agreement, anticompetitive concerted practice or anticompetitive arrangement by competitors to fix prices, make rigged bids, establish output restrictions or share or divide markets by allocating customers, suppliers, territories or lines of commerce; ‘Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels’ adopted by the Council on 25.3.1998 available at [www.oecd.org/dataoecd/39/4/2350130.pdf](http://www.oecd.org/dataoecd/39/4/2350130.pdf), [2(a)]. There is a consensus that such conduct is devoid of procompetitive benefits; see ‘Defining Hard Core Cartel Conduct – Effective Institutions, Effective Penalties’ report prepared by ICN Working Group on Cartels, ICN 4th Annual Conference (Bonn, 6–8 June 2005) 14. On the current state of economics of unilateral conduct being less clear-cut, see M Motta, ‘The European Commission’s Guidance Communication on Article 82’ (2009) 30 (12) *European Competition Law Review* 593, 595; I Lianos, ‘“Judging” Economists: Economic Expertise in Competition Law Litigation: A European View’ in I Lianos and I Kokkoris (eds), *The Reform of EC Competition Law* (The Netherlands, Kluwer Law International, 2010) 244–45.

<sup>7</sup> For various criticisms, see among others, EM Fox, ‘Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness’ (1986) 61 *Notre Dame Law Review* 981; P Jebesen and R Stevens, ‘Assumptions, Goals and Dominant Undertakings: The Regulation of Competition under Article 86 of the European Union’ (1996) 64 *Antitrust Law Journal* 443; B Sher, ‘The Last of Steam-Powered Trains: Modernising Article 82’ (2004) 25(5) *European Competition Law Review* 243; J Kallaugher and B Sher, ‘Rebates Revisited: Anti-Competitive Effects

Article 102 has been suggested to be irreconcilable with the modern understanding of Article 101 TFEU (hereafter Article 101) and EU merger control, leading to the proposition that Article 102 is the ‘last of the steam-powered trains’.<sup>8</sup> The Commission’s reform has culminated in a guidance document on the Commission’s enforcement priorities in applying Article 102 to abusive exclusionary conduct.<sup>9</sup> The outcome of the reform, however, is far from satisfactory as the fundamental question of what the objective of the law and its enforcement is still remains unanswered. Moreover, the reform process has focused on ‘exclusionary’ practices and left ‘exploitative’ practices outside its scope. This presents an important problem and a contradiction: former Commissioner Kroes, under whose mandate the review was undertaken, expressed the reasoning for focusing on exclusionary abuse as it being ‘wise in [their] enforcement policy to give priority to so-called exclusionary abuses, since exclusion is often at the basis of later exploitation of customers’.<sup>10</sup> This focus on ‘exclusionary’ conduct to the exclusion of ‘exploitative’ abuse is paradoxical as it raises the question why the emphasis is not on exploitative abuse if exclusionary abuses are problematic *because* they ultimately exploit consumers.<sup>11</sup> This paradox follows from the fact that the *main* objection to an undertaking with market power is its ability to *exploit* its position in a way that would not be possible for an undertaking on a competitive market.<sup>12</sup> The reform of the Commission is also incomplete in that it has only provided a general test of abuse for price-based exclusionary practices, thereby creating an artificial separation between price-based conduct and non-price-based conduct.

All in all, an overarching and all-encompassing concept of ‘abuse’ still does not exist. This means that there is still a gap in the law and its enforcement that has to be filled for the sake of legitimacy and legal certainty. This book therefore inquires into what Article 102 *is* about, what it *can* be about and what it *should* be about regarding both objectives and scope. By providing an overarching concept of ‘abuse’, it is hoped that this book will contribute to remedying this deficiency concerning legitimacy and legal certainty.

and Exclusionary Abuse under Article 82’ (2004) 25(5) *European Competition Law Review* 263; D Waelbroeck, ‘Michelin II: A Per Se Rule Against Rebates by Dominant Companies?’ (2005) 1(1) *Journal of Competition Law and Economics* 149; C Ahlborn and AJ Padilla, ‘From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law’ in CD Ehlermann and M Marquis (eds), *European Competition Annual 2007: A Reformed Approach to Article 82 EC* (Oxford, Hart Publishing, 2008); Jones and Sufrin (n 4) 363–64.

<sup>8</sup> Sher (n 7) 243–44. The term ‘EU courts’ in this study refers collectively to the ECJ and the General Court (GC).

<sup>9</sup> ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ [2009] OJ C45/7.

<sup>10</sup> N Kroes, ‘Tackling Exclusionary Practices to Avoid Exploitation of Market Power: Some Preliminary Thoughts on the Policy Review of Article 82’ in B Hawk (ed), *International Antitrust Law and Policy: Fordham Corporate Law Institute Annual Proceedings 2005* (New York, Juris Publishing, 2006) 384.

<sup>11</sup> See BR Lyons, ‘The Paradox of the Exclusion of Exploitative Abuse’ in *The Pros and Cons of High Prices* (Swedish Competition Authority, 2007) 65.

<sup>12</sup> Jones and Sufrin (n 4) 359.

## II SCOPE AND OUTLINE

This book is concerned with the prohibition of abuse of a dominant position in Article 102. As regards jurisdiction, the scope of the book is limited to the law of the European Union. On occasions, however, where necessary, reference is also made to national laws within and outside the European Union. This book is intended to be a research monograph aimed at displaying and promoting research that can inform the practice and making of law and policy in the area of abuse of a dominant position. It is not intended as a textbook and therefore does not deal with all of the issues that might be relevant for a general understanding of the prohibition of abuse of a dominant position. Substantively, the scope of the book is limited to the concept of ‘abuse’. As such, it does not concern itself directly with ‘dominance’, although establishing dominance is an essential part of an assessment under Article 102.<sup>13</sup>

This book is divided into four parts, with each part being comprised of two chapters.

Part I is concerned with the theoretical and historical foundations of the subject of inquiry. Chapter one discusses ‘welfare’ and other possible objectives of competition law and policy. This has been chosen as the first inquiry of the study as the Commission – which sought to adopt a ‘more economic approach’ during the ‘reform’ process – appears to favour ‘consumer welfare’ as the objective of Article 102.<sup>14</sup> By looking at welfare and other possible objectives, chapter one establishes that, regarding objectives, the best starting point seems to be the acceptance that both process and outcome matter in competition law and policy.<sup>15</sup> In the context of Article 102, this would suggest that the objective of Article 102 should be conceptualised as preventing both the distortion of competition (process) and the consumer harm (outcome) that might result from the practice. This would be the case particularly if ‘consumer welfare’ is accepted as the objective of the provision. In fact, the thesis of this book is that this approach implies the fusion of ‘exclusionary’ and ‘exploitative’ abuse: it is harm to custom-

<sup>13</sup> The ECJ has defined ‘dominance’ as ‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers’; Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, [38].

<sup>14</sup> See ‘Guidance’ (n 9); ‘DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses’ (Brussels, December 2005) [ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf](http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf) [4]. See also N Kroes, ‘Preliminary Thoughts on Policy Review of Article 82’ speech at the Fordham Corporate Law Institute (New York, 23 September 2005) 2; N Kroes, ‘Exclusionary Abuses of Dominance – The European Commission’s Enforcement Priorities’ speech at the Fordham University Symposium (New York, 25 September 2008) 2; P Lowe, ‘The Commission’s Current Thinking on Article 82’ BIICL Annual Trans-Atlantic Antitrust Dialogue (15 May 2008) 2, 3.

<sup>15</sup> The assessment of both process and outcome is suggested in J Farrell and ML Katz, ‘The Economics of Welfare Standards in Antitrust’ (2006) 2(2) *Competition Policy International* 3. See ch 1 this volume, section III.D for a discussion.

ers (exploitation) that is linked to harm to competition (exclusion) that Article 102 seeks to prevent.<sup>16</sup>

Chapter two establishes the historical roots of Article 102, the historical context in which the provision was adopted and the implications these have for a modern application of Article 102. This task is undertaken because the predominant literature claims that Article 102 historically has ‘ordoliberal’ roots.<sup>17</sup> Based on ordoliberal arguments, some suggest that Article 102 cannot be applied with a ‘consumer welfare’ standard as the provision in question protects the ‘institution of competition’ and not necessarily a certain outcome that would result from the protection of the competitive process.<sup>18</sup> This is because, for ordoliberalism, the main objective of competition policy is the protection of ‘economic freedom of action’ of market participants.<sup>19</sup> It has indeed been argued by certain commentators that the Commission has gone too far by adopting a consumer welfare standard; for them, it has departed from the jurisprudence of the EU courts, something which it cannot do.<sup>20</sup> Chapter two therefore examines the *travaux préparatoires* (preparatory works) of the nego-

<sup>16</sup> One commentator has remarked that, for a model based on consumer or total welfare, there is no ‘exclusionary’ violation and that the only type of violation is ‘exploitation’; see EM Fox, ‘What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect’ (2002) 70 *Antitrust Law Journal* 371, 372. More recently, Pardolesi and Arnaudo have also suggested the same: R Pardolesi and L Arnaudo, ‘Single-Firm Conduct: A Discipline in Search of Itself (Try with Google?)’ Working Paper (2010) available at: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1541928](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1541928). This is not the proposal of this study; by contrast, this study argues that exploitation and exclusion must *both* be present for a violation of Art 102 to occur.

<sup>17</sup> See, eg, DJ Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, OUP, 1998) 264; L Lovdahl Gormsen, ‘Article 82 EC: Where Are We Coming From and Where Are We Going To?’ (2005) 2(2) *The Competition Law Review* 5, 10; KJ Cseres, *Competition Law and Consumer Protection* (The Hague, Kluwer Law International, 2005) 82; G Marengo, ‘The Birth of Modern Competition Law in Europe’ in A von Bogdandy PC Mavroidis and Y Mény (eds), *European Integration and International Co-ordination: Studies in Honour of Claus-Dieter Ehlermann* (The Hague, Kluwer Law International, 2002) 303; E Rousseva, ‘Modernizing by Eradicating: How the Commission’s New Approach to Article 81 EC Dispenses with the Need to Apply Article 82 EC to Vertical Restraints’ (2005) 42 *Common Market Law Review* 587, 590–91. Focusing on Art 101 regarding the influence of ordoliberalism, see G Monti, ‘Article 81 and Public Policy’ (2002) 39(5) *Common Market Law Review* 1057.

<sup>18</sup> See, eg, DJ Gerber, ‘The Future of Article 82: Dissecting the Conflict’ in CD Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Oxford, Hart Publishing, 2008) 37, 50–51; T Eilmansberger, ‘How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-competitive Abuses’ (2005) 42 *Common Market Law Review* 129, 133; H Schweitzer, ‘The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC’ in CD Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Oxford, Hart Publishing, 2008) 119, 161.

<sup>19</sup> W Möschel, ‘Competition Policy from an Ordo Point of View’ in A Peacock and H Willgerodt (eds), *German Neo-Liberals and the Social Market Economy* (London, Macmillan, 1989) 149, 151. Cf F Maier-Rigaud, ‘On the Normative Foundations of Competition Law: Efficiency, Political Freedom and the Freedom to Compete’ (5th Academic Society for Competition Law (ASCOLA) Conference on the Goals of Competition Law, Bonn, May 2010) available at: [www.iask.de/micro/paper/ascola.pdf](http://www.iask.de/micro/paper/ascola.pdf) (forthcoming in the ASCOLA Competition Law series by Edward Elgar).

<sup>20</sup> See statement by B Heitzer, President of the Bundeskartellamt on European Competition Day (Paris 18–19 November 2008) available at: [www.bundeskartellamt.de/wDeutsch/download/pdf/Diskussionsbeitraege/081127\\_ECD\\_Paris.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Diskussionsbeitraege/081127_ECD_Paris.pdf); H Schweitzer, ‘Recent developments in EU Competition Law (2006–2008): Single-firm Dominance and the Interpretation of Article 82’ (2009) (2) *European Review of Contract Law* 175, 184; L Lovdahl Gormsen, ‘Why the European Commission’s Enforcement Priorities on Article 82 EC should be Withdrawn’ (2010) 31 *European Competition Law Review* 45, 50, 51.

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tiations of the Treaties of Rome, as well as other archival evidence relating to the early period of enforcement, to establish whether Article 102 can be applied with a welfare standard. Chapter two shows that – in contrast to the conventional wisdom – Article 102 was *not* envisaged as an ordoliberal rule and that its objective can be based on welfare. It further shows that Article 102 was intended to prohibit ‘exploitative’ conduct (ie, conduct that harms the trading partners of the dominant undertaking) as opposed to ‘exclusionary’ conduct (ie, conduct that harms the [competitive position of the] competitors of the dominant undertaking).<sup>21</sup> Chapter two also provides a definition of ‘exploitative’ abuse that is based on some early understandings of abuse. Similarly, chapter two finds efficiency to have been one of the main concerns of the drafters of the provision. It thus argues that efficiency should be incorporated into the concept of ‘abuse’.<sup>22</sup> Based on the premises established in Part I, the remainder of the book seeks to find the correct interpretation of ‘abuse’ in Article 102, one which aims to prevent ‘exploitation’ as well as to protect efficiency at the same time.

Part II examines two specific, potential objectives of Article 102: ‘welfare’ (chapter three) and ‘fairness’ (chapter four). Since the Commission is propagating a ‘consumer welfare’ standard for Article 102, chapter three investigates the particular role that ‘welfare’ has played in the enforcement of Article 102 and provides a critical look at the standard of harm in the application of Article 102 by the Commission and the EU courts. Chapter three also provides a comparison between Article 101(3) TFEU (hereafter Article 101(3)) and Article 102, since it has been suggested that the former sets ‘consumer welfare’ as the standard for EU competition rules.<sup>23</sup> Chapter three finds that it is difficult to argue that there is a

<sup>21</sup> According to the ECJ ‘[t]he concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition’; *Hoffmann-La Roche* (n 13) [91]. Without recourse to the *travaux préparatoires*, on the basis of a textual analysis and a comparison with the US Sherman Act Section II, Joliet had also reached the conclusion that Art 102 does not apply to exclusionary practices; see R Joliet, *Monopolization and Abuse of Dominant Position* (La Haye, Martinus Nijhoff, 1970) 250.

<sup>22</sup> See Whish, noting that the finding from the *travaux préparatoires* concerning efficiency provides a solid foundation for contemporary policy; R Whish, *Competition Law* 6th edn (Oxford, OUP, 2009) 193.

<sup>23</sup> According to Art 101(1), 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 internal market are prohibited as incompatible with the internal market. According to Art 101(3): ‘[t]he 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’. For the argument that Article 101(3) sets a consumer welfare standard see, eg,

'consumer welfare' standard that is adopted in the decisional practice since there does not appear to be a unified and coherent test applied by the EU authorities in finding behaviour to constitute an 'abuse'. In particular, the jurisprudence of the ECJ does not seem to welcome such an approach either. Therefore, chapter four considers 'fairness' as a potential objective of Article 102. This is done because certain 'unfair' conduct is explicitly prohibited in various examples in Article 102, a fact which suggests that 'fairness' might be an objective more so than 'welfare'. Chapter four finds that although there is a 'fairness' element in Article 102, it is practically undefined. Consequently, the chapter looks into other related areas of law, such as contract law and consumer law, seeking insights into 'fairness' from these disciplines. It finds that there is an inherent difficulty with defining and operationalising 'fairness' and that, even when a definition is provided, a significant element of vagueness and arbitrariness remains. This is important since a stand alone 'fairness' objective can clash with other goals, such as 'welfare' and 'efficiency'. Chapter four therefore advocates an understanding of 'fairness' simply as 'exploitation' and not as a stand alone objective.

Part III of this book seeks to achieve two aims: first, to support further the findings of chapter four by showing that the concept of 'fairness' does not *function* effectively on its own; and secondly, to demonstrate the clash between stand alone 'fairness' objectives and 'welfarist' objectives. This is done by an examination of two practices that are prohibited in Article 102: 'unfair pricing' (chapter five) and 'discrimination' (chapter six). The examination of these two practices also highlights the problems with prohibiting 'exploitation' without separate harm to competition for competition law purposes. As such, chapter five establishes the various problems with the prohibition of 'unfair pricing', some of which are of such a degree that the first best option is suggested to be the removal of this particular prohibition from Article 102. However, since a Treaty amendment to realise this is unlikely to be obtained, chapter five also proposes a new method of interpreting 'unfair pricing' that is more rational and operational than the current approach. Chapter six turns to the prohibition of 'discrimination' in Article 102, an issue which demonstrates an important tension between the objectives of 'fairness' and 'welfare'. This is because discrimination – particularly price discrimination – is a ubiquitous business practice with ambiguous effects on welfare. Moreover, chapter six shows that a *prohibition* of discrimination can be objectionable not only for making everyone worse off, but because it can also lead to 'unfairness' itself; all depends on one's understanding of 'fairness'. As with chapter five, chapter six also offers an approach that can reconcile the law and economics concerning the prohibition of 'discrimination'.

Part IV of this study focuses on modernising the approach to Article 102, particularly the concept of 'abuse' therein. Chapter seven assesses the reform process of the Commission, while chapter eight presents this book's proposal for a

J Bourgeois and J Bocken, 'Guidelines on the Application of Article 81(3) of the EC Treaty or How to Restrict a Restriction' (2005) 32(2) *Legal Issues of Economic Integration* 111, 119. For a detailed discussion, see ch 3 this volume, section II.

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modern approach to Article 102. Chapter seven aims, therefore, to establish fully the position over which this study's proposal is sought to be an improvement. Chapter seven provides the highlights of the documents that have been adopted in the reform process and critically assesses the 'reformed' approach. It establishes that, by leaving out exploitative conduct and by limiting the general test for abuse to price-based exclusionary conduct, the reform has fallen short of providing a comprehensive and workable concept of 'abuse'. Similarly, chapter seven finds that it is not possible to suggest unequivocally that the Commission has adopted a 'consumer welfare' standard as it advocates. Chapter eight in turn sets out to provide an overarching concept of 'abuse' on the basis of the main findings of this study. The chapter proposes that there are three *necessary and sufficient* conditions for a given practice to be found abusive under Article 102. These cumulative conditions are: (i) exploitation; (ii) exclusion; and (iii) a lack of an increase in efficiency. Chapter eight details why and how these make up the necessary and sufficient conditions under a modern approach to the concept of 'abuse'. It is argued therein that, although this approach does require departure from some of the principles established in the jurisprudence, it brings the application of the provision closer to the true nature of Article 102 itself. By adopting an interpretation that is loyal to the provision itself and that is in line with current economic thinking, this proposal presents a plausible alternative to the current approach.

## III METHODOLOGY

With the exception of chapter two, which contains an historical analysis that involves archival research, this book adopts a traditional legal approach which comprises the analysis of the relevant case law, decisional practice, legislation, policy documents and literature. Although the book is in the area of competition law, it adopts an interdisciplinary approach by which it has recourse to contract law, consumer law, industrial economics and behavioural economics. Incorporating contract law and behavioural economics is particularly important for the inquiry due to doctrines of 'fairness' in the former and insightful explanations of 'fairness' in the latter, both of which provide means to interpret 'exploitation' and 'abuse' in Article 102. This approach is also a contribution to the literature since competition law has traditionally been conceived without sufficient reference to contract law or behavioural economics, even though both of these can provide useful guidance.