

FOREWORD TO THE THIRD EDITION

It is with great pleasure and honour that I accepted to write the foreword to the third edition of “The Law and Economics of Article 102 TFEU”. From its first edition, this book stood out for its comprehensive, thorough and systematic manner in which it analyses both the legal and economic principles underpinning the application of Article 102 TFEU. The success of this book was such that it became a reference book in this area of EU competition law and a must-have companion for academics, enforcers and practitioners alike, as well as EU and national judges.

There seem to be at least three reasons for the great success of this book.

First, this book, co-authored by a lawyer and an economist, achieves something unprecedented—economists will finally be able to grasp the law, and lawyers actually understand economics! On a more serious note, indeed, the book strikes a perfect “equilibrium” in presenting, on the one hand, the legal rules in a comprehensible and articulate manner that non-lawyers will easily understand, and, on the other hand, the economic theory behind these rules in an accessible way (often using case studies). This without having recourse to complex formulas and econometric models that sometimes tend to put lawyers off. Apart from proving that the symbiosis of law and economics is actually possible and beneficial, this achievement is not to be underestimated, particularly given the intrinsically economic nature of Article 102 TFEU.

Second, the book masterfully navigates through the relevant legislation, case law, decisional practice and legal and economic doctrine, clearly exposing and explaining the current state of the law and the shape it is likely to take in the future. The systematisation of this wealth of information is remarkable. For instance, the case law is not merely used in the traditional narrative (summarising the facts and what the court held) but is contextualised and often used to illustrate how a specific argument has been dealt with by the EU Courts. Similarly, given the relatively few judgments of the EU Courts in this field (compared to Article 101 TFEU), the authors refer extensively (and exhaustively) to the European Commission decisions, and selectively to the decisional practice of national competition authorities and courts. Equally impressive is the use of legal and economic literature. The authors should be praised for carefully choosing to analyse and refer to the latest and most authoritative legal and economic writings of both EU and US scholarship.

Third, the legal analysis carried out in this book is not limited to a simple positivist portrayal of the current state of the law but offers clear normative propositions. Indeed, the authors do not shy away from taking clear positions and presenting, through an in-depth analysis, their critical remarks on the various judgments of the EU Courts and Commission decisions. While one does not necessarily need to agree, such criticism, stemming from two experienced and distinguished practitioners, offers an insight that goes beyond mere academic theory and reflects not only the practitioners’ perspective on the enforcement of Article 102 TFEU but also the actual concerns of the actors primarily concerned by these rules—the companies. It should therefore be welcome. It follows that the book offers a constructive and authoritative contribution to the debate on the numerous legal questions pertaining to the application of Article 102 TFEU that are still open and contentious.

If the achievement of the first two editions of the book, in the words of John Temple Lang, was to “create a new paradigm which provides a basis for subsequent analysis, and be definitive on some issues, in the sense that some of the conclusions reached are so clearly convincing and

correct that nobody questions them again”, the third edition carries this achievement further by methodically analysing the developments that occurred in the field of Article 102 TFEU since August 2013. The fact that the current edition of the book is considerably longer than the previous one is indicative. In that regard, I wish to signal out what I consider the highlights of this new edition.

To begin with, the current edition of the book meticulously updates each individual chapter corresponding to a type of abuse (Chapters 6-17) as to include the latest relevant case law, EU and national decisions and legal/economic literature (see, indicatively, predatory pricing, margin squeeze, exclusive dealing, loyalty rebates, refusal to deal, tying and bundling, exclusionary non-price abuses, FRAND terms, excessive pricing and discrimination). Similarly, the introductory and more general chapters of the book (Chapters 1-5 and 18-19) have been reworked to reflect the latest developments [see, indicatively, the role of “fairness” as a possible new objective of Article 102 TFEU, particularly in the digital and digital platform markets; the territorial scope of Article 102 TFEU post-*Intel*; the latest developments in the interaction between regulation and Article 102 TFEU; the application of abuse of dominance to digital platform markets, both at EU and national level; the latest developments pertaining to the product market definition (in terms of demand-side substitution, potential competition, and two-sided markets); the concept of dominance in multi-sided markets; the new aspects of the general concept of abuse (e.g., the application of the equally-efficient competitor test, price discrimination, and the recent examples of analysis of anticompetitive effects) and, finally, the different types of remedies].

Moreover, this new edition features a new Chapter 17, which discusses the recent application of Article 102 TFEU in the area of multi-sided digital platform markets. This chapter includes an in-depth analysis of the *Google* cases recently pursued by the Commission—*Shopping*, *Android* and *Search (AdSense)*—and provides valuable insight into the main legal issues that these cases raise in the context of the current appeals before the EU Courts.

Finally, the 2017 *Intel* judgment has undoubtedly affected the application of Article 102 TFEU in a way that extends beyond the area of rebates. On the one hand, it crystallised “consumer welfare” as the primary objective of Article 102 TFEU, and, on the other hand, it seems to have brought, once and for all, an end to the long-standing debate on whether the application of Article 102 TFEU should move towards a more “effects-based approach”. In fact, following this judgment, a demonstration of anticompetitive effects based on solid economic analysis is to be expected in every Article 102 TFEU decision and the latest Commission decisions seem to fully endorse this approach. It follows that this last edition of the book comes at a time when attention will focus on the way the EU Courts, and the General Court in particular, will review decisions based on complex economic considerations. In this regard, the General Court will be called to exercise its full powers of judicial review and possibly revisit the limits to the margin of appreciation that the Commission enjoys in respect of complex economic considerations. I am positive that the EU Courts have the ability, will, and resources to properly carry out such a demanding level of judicial review, which I am hopeful will be fully appraised in a future fourth edition of this book.

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