# Abusive Practices in Competition Law

Edited by

#### Fabiana Di Porto

Professor of Law, Economics and Innovation, University of Salento, Italy

#### Rupprecht Podszun

Chair for Civil Law, German and European Competition Law, Heinrich Heine University Düsseldorf, Germany

ASCOLA COMPETITION LAW



Cheltenham, UK • Northampton, MA, USA

#### © Fabiana Di Porto and Rupprecht Podszun 2018

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the publisher.

Published by Edward Elgar Publishing Limited The Lypiatts 15 Lansdown Road Cheltenham Glos GL50 2JA UK

Edward Elgar Publishing, Inc. William Pratt House 9 Dewey Court Northampton Massachusetts 01060 USA

1137752

A catalogue record for this book is available from the British Library

Library of Congress Control Number: 2018958442

This book is available electronically in the **Elgar**online Law subject collection DOI 10.4337/9781788117340

Printed on 30% PCR Stock ISBN 978 1 78811 733 3 (cased) ISBN 978 1 78811 734 0 (eBook) Printed and bound by Thomson-Shore, Inc. Typeset by Columns Design XML Ltd, Reading

### Contents

|     | t of contributors  | viii |
|-----|--|------|
|     | eword: important divergences   | Хi   |
| Pau | l Nihoul and Iwakazu Takahashi   |      |
|     | roduction  | 1    |
| Кир | oprecht Podszun and Fabiana Di Porto   |      |
| PA] | RT I FUNDAMENTAL QUESTIONS OF DOMINANCE AND ABUSE  |      |
| 1   | The ordoliberal concept of 'abuse' of a dominant position and its impact on Article 102 TFEU | 5    |
| 2   | Peter Behrens The European Commission's enforcement of abuse cases: a                        |      |
| _   | statistical analysis   | 26   |
|     | Lorenz Marx  |      |
| 3   | Presumptions and short-cut rules in abuse regulation: (where) do                             | )    |
|     | EU and US antitrust approaches meet?   | 47   |
|     | Pieter Van Cleynenbreugel  |      |
| 4   | The pitfalls of market definition: towards an open and                                       |      |
|     | evolutionary concept   | 68   |
| 5   | Rupprecht Podszun  | 91   |
| 3   | Exploitative prices in European competition law  Antonio Robles Martín-Laborda               | 91   |
| 6   | All's well that ends well? Abuse regulation in the wake of the                               |      |
| U   | financial crisis: the interplay between regulation and the                                   |      |
|     | application of competition law to the financial sector                                       | 109  |
|     | Luís Silva Morais and Lúcio Tomé Feteira   | 107  |
| 7   | The application of Article 102 TFEU in the EU energy sector:                                 |      |
| ,   | a critical evaluation of commitments   | 129  |
|     | Maria Ioannidou  |      |

## PART II SUPERIOR BARGAINING POWER, ECONOMIC DEPENDENCE AND ABUSE

| 8   | Abuse without dominance in competition law: abuse of                       |     |
|-----|--|-----|
|     | economic dependence and its interface with abuse of                        |     |
|     | dominance  | 157 |
|     | Mor Bakhoum  |     |
| 9   | Superior bargaining power: dealing with aggregate                          |     |
|     | concentration concerns   | 185 |
|     | Thomas K. Cheng and Michal S. Gal  |     |
| 10  | Unilateral conduct by non-dominant firms: a comparative                    |     |
|     | reappraisal  | 225 |
|     | Florian Wagner-von Papp  |     |
| 11  | Restraining bargaining power through competition law:                      |     |
|     | superior bargaining position regulation in Japan as                        |     |
|     | compared with the EU   | 265 |
|     | Toshiaki Takigawa  |     |
| 12  | Ex ante and ex post control of buyer power                                 | 283 |
|     | Stefan Thomas  |     |
|     |  |     |
| PA  | RT III NATIONAL EXPERIENCES WITH THE                                       |     |
|     | REGULATION OF ABUSIVE CONDUCT  |     |
| 12  | The continue of the Chinese Antinue and Liverine                           |     |
| 13  | The application of the Chinese Antimonopoly Law to                         | 210 |
|     | state-owned enterprises  | 318 |
| 1.4 | Fang Xiaomin   |     |
| 14  | Unconscionable conduct in the context of competition law                   |     |
|     | with special reference to retailer/supplier relationships within Australia | 242 |
|     |  | 343 |
| 15  | Allan Fels and Matthew Lees  |     |
| 15  | The Italian regulation against the abuse of economic                       | 275 |
|     | dependence at the crossroads   | 375 |
| 1.6 | Valeria Falce  | 200 |
| 10  | Unconscionable conduct in France  David Bosco                              | 388 |
| 17  |  |     |
| 17  | Comparative analysis of the Japanese Subcontract Act and                   |     |
| 10  | the regulations on unfair trade practices in the EU: focus                 | 405 |
|     | on the grocery industry  | 403 |
|     | Kazuhiko Fuchikawa   |     |
| 18  |  | 406 |
|     | in emerging markets  | 425 |
|     | Abayomi Al-Ameen   |     |

|     | Contents  | vii |
|-----|---|-----|
| 19  | Abuses of dominant and non-dominant position: a tale of (ir)reconcilable views?  Fabiana Di Porto | 451 |
| Ina | Index   |     |