
CONTENTS

1		
2		
3		
4		
5		
6		
7		
8	<i>Foreword</i>	vii
9	<i>Introduction</i>	xiii
10	<i>Table of Cases</i>	xxi
11	<i>Table of Legislation</i>	000
12	<i>Abbreviations</i>	000
13		
14	1. EC PRIVATE ANTITRUST ENFORCEMENT	1
15	I. A Delimitation of EC Private Antitrust Enforcement: Definitions and Modalities	1
16	(a) Definition	1
17	(b) The Modalities of EC Private Antitrust Enforcement	2
18	(i) Sword–Shield Litigation	2
19	(ii) <i>A titre principal—à titre incident</i> Litigation	3
20	(iii) Administrative–Public Enforcement—Civil–Private Litigation	6
21	(iv) Stand-alone—Follow-on Litigation	6
22		
23	II. Public and Private Antitrust Enforcement and the Objectives of	
24	EC Competition Law	7
25	(a) Enforcement Objectives	7
26	(b) Advantages of Private Antitrust Enforcement and its Complementarity	
27	with Public Enforcement	8
28	(c) The Relevance of the Goals of EC Competition Law: Between Public and	
29	Private Interest	11
30	III. The Independence of Private Antitrust Enforcement	15
31	(a) Independence as Principle	15
32	(b) The Commission Green Paper and National Competition Laws on the	
33	Independence of Private Enforcement	17
34	(c) Practical Problems in the Interrelationship between Public and Private	
35	Enforcement: Settlements, Leniency, Amount of Fines and Damages	19
36	(i) Settlements	19
37	(ii) Leniency	20
38	(iii) Fines and Damages	21
39		
40	2. THE INSTITUTIONAL LAW ASPECTS OF THE APPLICATION OF EC	
41	COMPETITION LAW BY NATIONAL COURTS	25
42		
43	I. The Old Administrative Authorisation and Notification System	25
44	(a) The ‘Foundational’ Public Enforcement System	25
45	(b) Competence of Civil Courts to Apply Articles 81(1),(2) and 82 EC	27
46	(c) Competence of Civil Courts to Apply Article 81(3) EC	29
47	(d) The Case of Block Exemptions	33

xviii *Contents*

(e) The Case of Comfort Letters	34
(f) Competence of Civil Courts in Merger Cases?	36
II. The Advent of Modernisation and the Passage to a Legal Exception System	39
(a) The 1999 White Paper and the Reasons that Lay behind it	39
(b) Modernisation and Decentralisation between Substance and Procedure	42
(c) The 'Legal and Cultural Revolution' of the 1999 White Paper	45
(i) Is Subsidiarity Relevant?	46
(ii) The Basic Revolutionary Elements of the 1999 White Paper	48
(iii) The Compatibility of the New System with the Treaty	48
(iv) Efficiency of Competition Law Enforcement under the New System	54
(v) Consistency and Coherence of the New Enforcement System	56
(vi) Legal Certainty in the New Enforcement System	57
(d) The New Regulation 1/2003	59
III. The Pillars of the New Decentralised System of EC Competition Law Enforcement: 'Centralised Decentralisation'?	63
(a) Strengthening the Supremacy of Community over National Competition Law	64
(i) The Confirmation of the Broad Nature of the Effect on Trade among Member States	64
(ii) The Relationship between National and Community Competition Law—The Pre-existing Unsatisfactory State of the Law	66
(iii) The Relationship between National and Community Competition Law—The Supremacy Rule of Article 3 of Regulation 1/2003	70
(iv) The Progress Brought by Article 3	72
(b) The New Institutional Position of National Competition Authorities and the European Competition Network	76
(i) The Powers of NCAs under the New System	76
(ii) Cooperation Mechanisms within the European Competition Network	78
(iii) Allocation of Cases	81
(iv) Exchange of Information	82
(c) The New Institutional Position of Civil Courts	84
(i) The Powers of National Courts under the New System	84
a. The Courts' New Competence to Apply Article 81(3) EC	84
b. The Specific Language of Regulation 1/2003	85
c. Remnants of Public Enforcement Monopoly: Withdrawal of the Benefit of a Block Exemption Regulation	87
d. The New Competence to Enforce Commission Commitments Decisions	89
(ii) Co-operation Mechanisms between the Commission and National Courts	90
(iii) The Right of National Courts to Seek the Commission's Assistance	94
a. Reinforcing an Already Existing Procedure	94
b. Procedural Questions	96
(iv) Information Exchange between the Commission and National Courts	99
(v) The Duty of Member States to Transmit Copies of Judgments to the Commission	102

1	(vi) The <i>amicus curiae</i> Mechanism	104
2	(vii) Other Indirect Co-operation Mechanisms or Support for	
3	National Courts	108
4	a. Guidance Letters	108
5	b. Regulation 1049/2001	110
6	(d) Strengthening the Supremacy of Community over National Proceedings	112
7	(i) <i>Masterfoods</i> and Article 16 of Regulation 1/2003	112
8	(ii) The Scope of the Supremacy Rule	115
9	a. Positive Binding Effect v. Negative Duty of Abstention	115
10	b. Non-applicability of the Supremacy Rule to National Competition	
11	Authorities' Decisions	117
12	(iii) The Concept of 'Conflict'	119
13	a. Maximalist or Minimalist Interpretation?	119
14	b. <i>Crehan</i> and the House of Lords	122
15	(iv) Resolution of Conflicts between Commission and National Civil Court	
16	Proceedings	124
17	a. First Scenario: Pending National Court Proceedings and Envisaged or	
18	Final Commission Decision	124
19	b. Second Scenario: Non-final National Court Judgment and Envisaged	
20	Commission Decision	126
21	c. Third Scenario: Final National Court Judgment Finding Inapplicable	
22	the Competition Rules and Envisaged Applicability Commission	
23	Decision	128
24	d. Fourth Scenario: Final National Court Judgment Finding a	
25	Violation of the Competition Rules and Envisaged Inapplicability	
26	Commission Decision	135
27	e. Fifth Scenario: The Special Case of Commission Commitment	
28	Decisions under Article 9 of Regulation 1/2003	137
29		
30	3. THE SUBSTANTIVE AND PROCEDURAL LAW ASPECTS OF EC PRIVATE	
31	ANTITRUST ENFORCEMENT	141
32		
33	I. Moving from a Decentralised System to a System of Private Enforcement	141
34	(a) Decentralisation: A Necessary but Insufficient Tool to Promote Private	
35	Enforcement	141
36	(b) EC Private Antitrust Enforcement Between National and Community Law	142
37	(c) National Remedial and Procedural Autonomy: A New Approach	147
38	II. The Substantive Law Framework	149
39	(a) Nullity	149
40	(i) Nullity of Anti-competitive Agreements under Article 81(2) EC	149
41	(ii) The Nature of the Article 81(2) EC Nullity	150
42	(iii) Competition Authorities and Article 81(2) EC	155
43	(iv) The Legal Consequences of Nullity: Severance and Related Contracts	156
44	(v) Nullity under Article 82 EC	158
45	(b) Damages Actions	160
46	(i) From Non-existence to the Awakening of EC Private Enforcement	160
47	(ii) The Brussels Way to <i>Courage</i>	162

xx Contents

(iii) The Luxembourg Way to <i>Courage</i>	165
(iv) <i>Courage v. Crehan</i> : The Consecration of a Community Right to Damages	167
(v) <i>Courage</i> Seen between Community and National Law	170
(vi) <i>Manfredi</i>	174
(vii) The Importance of <i>Courage</i> for Community Law in General	176
(viii) Post- <i>Courage</i> Developments: The Commission Green Paper on Damages	179
(ix) Post- <i>Courage</i> National Legislative Developments	183
(x) Post- <i>Courage</i> National Case Law Developments	187
(xi) The Conditions of Civil Liability	190
a. Standing	190
b. Fault	194
c. Defences	197
d. The Passing-on Defence	199
e. Standing of Indirect Purchasers and Consumers	202
f. The Nature of Harm and Causation	207
g. Nature and Measure of Damages	210
h. Punitive Damages	211
(c) Permanent Injunctions	214
(d) Preliminary Injunctions	217
(e) Restitution and Declaratory Actions	219
III. The Procedural Law Framework	220
(a) National Procedural Divergences and the Challenge for an Effective System of EC Private Enforcement	220
(b) The <i>ex officio</i> Application of EC Competition Law	221
(c) Rules of Evidence	225
(i) Inherent and Systemic Difficulties of Proof in Europe	225
(ii) Institutional Responses	228
(iii) Other Concrete Procedural Solutions	230
(d) Collective and Representative Claims	232
(e) Costs	235
(f) Other Procedural Questions	237
IV. Private International Law Aspects	239
(a) Applicable Law	239
(i) EC Competition Law as Applicable Law	239
(ii) Law Applicable to the Civil Claim—Intra-EU Context	243
(iii) Law Applicable to the Civil Claim—Extra-EU Context	247
a. First Hypothesis: EU Forum	247
b. Second Hypothesis: Non-EU Forum	249
(b) Jurisdiction and Enforcement	250
(i) Jurisdiction	250
(ii) Enforcement—Full Faith and Credit	254
(iii) Enforcement—Public Policy Violation as <i>ultimum refugium</i>	257
<i>Bibliography</i>	261
<i>Index</i>	307