

Preface

In the late 1990s a malfunction in the European Community competition law system was recognised by the European Commission. It consisted of an enforcement deficit and a priority problem. A considerable part of the Commission's resources was spent on controlling vertical restraints such as reseller agreements, leaving many serious offences such as cartels untouched. Furthermore, the Member States were not actively involved in EC competition law control, while the Commission had insufficient resources to supervise competition in the EC single-handedly. The cure, brought into force in 2004, included increased involvement of Member States in competition law supervision, and a new focus on action against cartels. The malfunctions which the reform aimed to remedy may be classified as a legitimacy problem.

Legitimacy may be understood to presuppose two things: that the law rests on rational foundations, and that average compliance can be ensured.

This work explores the role of legitimacy in EC competition law, as regards the new policy focus on cartel control. Legitimacy must be distinguished from legality. By and large, there is seldom any reason to question that the law has been adopted in accordance with applicable constitutional principles. Legitimacy, on the other hand, is a more profound question: whether the law corresponds to deeper notions in society.

There are several different ways of evaluating legitimacy. One may look for empirical legitimacy, actual acceptance of the rules in society. One may look at normative legitimacy, whether the law can be reconstrued rationally. One may look for the democratic aspects of the process according to which the law is adopted. And then there is the matter of enforcement, to ensure that the law does not self-destruct from within the system.

Exploring legitimacy in EC competition law is a work-intensive exercise, given that not much of the law is codified in statutes; the massive bulk of law consists of administrative decision-making, soft law and case law. In order for it to be operative when applied in 27 Member States and by the Commission, it must possess some degree of internal rationality. Reflection must also be made on the institutional guarantees for average compliance; in other words, what will happen if all Member States do not apply the law in a uniform and effective way.

This book brings together all these strands: whether the Community's central policy against cartels is legitimate; how sanctions ought to be structured; whether the law is characterised by rationality; whether it is possible to envisage that Member States will respond favourably and ensure average compliance; and, ultimately, the role of legitimacy in public enforcement against cartels in the EC.

Ingeborg Simonsson
Stockholm, August 2009

Acknowledgements

Law is in a sense an ongoing dialogue where participation is of essence.

Thanks must go to my supervisor, Nils Wahl, for accepting me as a PhD candidate and for helping me escape velocity. To my co-supervisor, Steven Anderman, for being an extra parent to this work. To Stockholm University for financing this research. To my husband, Sven, for listening to my ideas and for gracefully accepting the substantive and long-term reduction of my salary brought about by the change of career path necessary for this project. To Louise Widén for helping me with my first work on cartels, an article published in a Swedish legal review in 2002. To Ida Otken Eriksson and Ulf Öberg—together we carried out several academic and commercial projects during our time as PhD candidates. To Vladimir Bastidas, Dan Eklöf, Lars Henriksson, Evelina Janunger, Peter Whelan and Mauro Zamboni for reviewing earlier draft chapters. To all my fellow colleagues at Stockholm University and other universities and public and private institutions for your generosity in adopting me into the academic community, and for excellent co-operation on various academic projects. And to my colleagues at Stockholm City Court for your encouragement and support during the project's final year. To Olav Kolstad who was the opponent when a previous version of this work was publicly defended as a PhD thesis in Stockholm, and to Ulla Neergaard, Lars Pehrson and Wouter Wils who jointly formed the examination board at the same occasion. Lastly, to Richard Hart, Jo Ledger and Mel Hamill at Hart Publishing.

Note to Reader

This book was written and prepared for publication prior to the entry into force of the Treaty of Lisbon. It retains the classic numbering of the provisions of the Treaty Establishing the European Community (the EC Treaty).

Although the Treaty of Lisbon amends and renames the EC Treaty—now the Treaty on the Functioning of the European Union—it does not introduce any new significant substantive content to the competition law provisions.¹ In short, the legal analysis in this book is not affected in any material way by the entry into force of the new Treaty.

As a matter of terminology, the Treaty amendments now require references to the *Community* to be read as *Union*, references to the common market as the *internal market* and references to the *Court of First Instance (CFI)* as the *General Court*.²

For the convenience of the reader, a table of equivalence for the provisions discussed or referred to in this book is provided below.³

Treaty on the Functioning of the European Union

Old numbering of the Treaty Establishing the European Community	New numbering of the Treaty on the Functioning of the European Union
---	--

Article 3, paragraph 1 (repealed) ⁴	Article 4.3 TEU
Article 10 ⁵	Article 101
Article 81	Article 102
Article 82	Article 103
Article 83	Article 225
Article 192(2)	Article 17 TEU
Article 211 ⁶	Article 258
Article 226	

¹ Although Article 3(1)(g) EC, which provided for a system of undistorted competition in the internal market to facilitate the attainment of the Community objectives has now been repealed, the status of competition policy in the EU remains undiminished. According to Article 3(1)(b) TFEU, the Union retains the exclusive competence to establish the competition rules necessary for the functioning of the internal market, while the objective of maintaining undistorted competition reappears in *Protocol No 27 on the Internal Market and Competition*. The latter protocol expressly points out that the internal market set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted.

² See Article 2 (2) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

³ For the complete table of equivalence, see [2008] OJ C 115/361.

⁴ Replaced, in substance, by Articles 3 to 6 TFEU.

⁵ Replaced, in substance, by Article 4, paragraph 3, Treaty on the European Union.

Article 230

Article 234

Article 250

Article 251

Article 252 (repealed)⁶

Article 253

Article 263

Article 267

Article 293

Article 294

Article 296

<http://www.pbookshop.com>

⁶ Replaced, in substance, by Article 17, paragraph 1, Treaty on the European Union

Summary Contents

<i>Preface</i>	v
<i>Acknowledgements</i>	vii
<i>Note to Reader</i>	ix
<i>Contents</i>	xiii
<i>Table of Cases</i>	xxiii
<i>Other Commission Decisions</i>	lxi
<i>Advocate-General Opinions</i>	lxi
<i>US Case Law</i>	lxii
<i>Table of Legislation</i>	lxiii
<i>International Agreements</i>	lxiv
1 The Method	1
2 The Role of Legitimacy in Decentralisation	9
3 Testing Legitimacy of the Policy Pursued	45
4 Legitimacy of Substantive Cartel Law	111
5 Legitimacy and Evidentiary Standards	181
6 Legitimacy and the Relation between National Competition Procedure and EC Law	217
7 Legitimacy in Fines and Sanctions	271
8 Sourcing Legitimacy	327
<i>Bibliography</i>	351
<i>Index</i>	369

Contents

<i>Preface</i>	v
<i>Acknowledgements</i>	vii
<i>Note to reader</i>	ix
<i>Table of Cases</i>	xxiii
<i>Other Commission Decisions</i>	lxi
<i>Advocate-General Opinions</i>	lxi
<i>US Case Law</i>	lxii
<i>Table of Legislation</i>	lxiii
<i>International Agreements</i>	lxiv
1 The Method	1
I. Why legitimacy is needed in EC competition law	1
II. Basic methodology	2
A. The discussion of legitimacy in contemporary European law and its application to this work	2
B. Comparative legal studies: US antitrust law	7
2 The Role of Legitimacy in Decentralisation	9
I. Exploring legitimacy	9
A. Modernisation sought to remedy a legitimacy deficit	9
B. Uniformity as a cornerstone of Regulation 1	10
1. The <i>travaux préparatoires</i>	10
2. What is uniformity?	13
3. Defining the relation between EC law and national law	16
C. Effectiveness as the other cornerstone of Regulation 1	17
D. Efficiency	19
E. Action against hard-core infringements as a top priority	20
1. A choice of law provision	21
2. Engaging national authorities in EC competition law supervision	23
3. Strengthened investigative powers of the Commission	24
F. Preliminary conclusion: output orientated legislation	24
II. A focus on hard-core restraints as a study object	25
III. Judicial co-operation and legitimacy	26
IV. Prerequisites for ensuring average compliance	27

A.	Importance of institutional structure and human resources	28
B.	The principle of institutional autonomy and Regulation 1	30
V.	Efficiency: ECN and the Commission's central supervision and enforcement mechanisms	31
A.	ECN co-operation	31
B.	The Commission's powers in relation to national competition authorities and courts	33
1.	Enforcement priorities following decentralisation	35
VI.	Leniency and settlement procedures lead back to centralised enforcement	35
VII.	Institutional aspects	36
A.	The Commission's role in EC competition law	36
1.	To be the primary force in EC competition law control	37
2.	To co-ordinate decentralised enforcement	37
3.	To supervise the guarantees in Member States for well-functioning competition law enforcement	38
4.	Article 234 cases referred to the Court of Justice and amicus curiae observations	38
5.	Peer pressure and benchmarking	39
6.	International co-operation	39
7.	Law and policy development	40
VIII.	A roadmap	42
3	Testing Legitimacy of the Policy Pursued	45
I.	Whether the fight against cartels is legitimate in a deeper sense	46
A.	Cartels: an introduction	47
B.	Empirical legitimacy: international discussions, experiences and policies	48
C.	Economic perspectives and some facts and figures on cartels and cartel law enforcement	51
1.	Allocative inefficiencies resulting from cartels	51
2.	X-efficiency and social costs resulting from cartels	52
3.	Cartel frequency and geographic impact	54
4.	Empirical studies on cartel duration	57
5.	Probability of detection	58
6.	On cartel profits and overcharges	59
7.	Empirical studies of overcharges	63
8.	Cartel formation and cartel stability	65
D.	Moral aspects of cartel behaviour	68
II.	Contrasting perspectives	70

A. Cartels versus tacit collusion	70
B. Cartels versus merger control and abuse of dominance	72
C. Cartels versus vertical restraints	73
III. Collapsing the cartel concept	76
A. Horizontal behaviour with the object of restricting competition	76
1. Price-fixing	78
2. Quotas and other output limitation	80
3. Market sharing including bid-rigging	81
4. Buyer cartels	83
5. Boycotts and other joint exclusionary conduct	85
6. Facilitating practices including information exchange	87
7. Mixed horizontal and vertical cartels	89
8. Single brand dealer cartels	94
B. Cartels as naked restraints without redeeming virtues	96
1. Article 81(3) EC and cartels	96
2. The decision-making on exemptions for cartels	99
3. Cases before the Community courts where cartels were notified and tried under Article 81(3) EC	100
C. Conclusion: cartel control as a structural remedy	102
1. Trade associations	103
2. Permitted forums for concertation—shipping cartels	104
3. Cartels stemming from sector regulation and other forms of government intervention	106
4. Summing up on cartel control as structural rather than behavioural	107
D. Defining cartels	108
IV. Summary and conclusions	109
4 Legitimacy of Substantive Cartel Law	111
I. Per se or not per se	112
A. What is a per se prohibition?	112
B. The development towards a per se prohibition in EC law	114
1. De minimis for hard-core restraints?	114
2. Whether market definitions are necessary in cartel cases	116
3. Assessment in the legal and economic context for hard-core restraints?	117
4. Use of economic analysis in hard-core restraint cases	119
5. Analysis: per se prohibition or effects-based approach?	120
II. Agreements and concerted practices, decisions by associations of undertakings	124

A.	Agreements	124
1.	Decision-making meetings; opt-out necessary	125
B.	Decisions by associations of undertakings	127
C.	Concerted practices	131
1.	Opt-out not possible for concerted practices, including information exchange	135
D.	Complex infringements	135
1.	Opt-out necessary for complex infringements	139
E.	One or several cartels?	139
F.	Small, marginal players	140
1.	Parties forced to join	140
G.	Unilateral versus joint market conduct	141
H.	'No authority to bind the principal' argument	143
I.	Collaborators	144
J.	Legal requirements for withdrawing from a cartel	145
K.	Conclusion: a deterrence-based substantive policy	147
III.	Jurisdiction	147
IV.	Effect on trade	149
A.	Jurisprudence on effect on trade	150
1.	Some basic aspects	150
2.	Cross-border infringements	150
3.	Domestic practices	150
4.	Local practices	153
5.	Export cartels	153
6.	The conflict between classic integration and welfare economics in the present case law	156
B.	Presenting a deterrence theory on effect on trade	160
V.	When do Articles 81 and 82 EC apply to cartels?	164
A.	Parallel application	164
1.	National competition law and Community competition law	164
B.	Undertakings	164
1.	Outside Articles 81 and 82 EC: collective agreements, authorities, social security systems and certain purchasers	166
2.	Severability between economic activities and other activities	167
C.	Agriculture	168
D.	State action defence	169
E.	Conclusion: delimiting Article 81 EC is not deterrence based	170
VI.	Responsibility for related companies: lifting the corporate veil	171
A.	Responsibility for subsidiaries and other related companies	171

B. Change of ownership: acquirer's and seller's responsibility	177
C. Liability when two or more companies in the same group participate	178
D. Conclusion: attribution of liability is deterrence based	179
VII. Conclusions	179
 5 Legitimacy and Evidentiary Standards	 181
I. The relation in principle between Community law and national law on evidence	181
A. Uniformity, effectiveness, fundamental rights and procedural autonomy—a balancing act	181
B. Ascertaining the facts and determining the relevance of facts of a case—a division of functions	184
C. Burden of proof and presumption of innocence	185
1. Opt-out principle and presumption of pursuant market behaviour—the nature of the rules created by the Court of Justice	186
D. Standard of proof	189
E. Standard of legal review	192
F. Preliminary conclusions	193
II. The emergence of a Community law on evidence in cartel cases	194
A. Principles—a discussion	194
B. The standard of proof and general methodology for evaluating evidence in cartel cases	196
1. Evidence taken together	196
2. Direct versus indirect evidence	197
3. Parallel behaviour	199
4. Standard of proof for demonstrating a role as an instigator or a ringleader of a cartel	202
5. Standard of proof for demonstrating participation in a complex infringement	202
6. Standard of proof for demonstrating duration	203
7. Standard of proof for cartel overcharges	204
8. Circumstantial evidence, indicia	205
9. Refusal to reply	206
C. Cartel cases where the Commission lost in substance	207
D. Evaluation of certain pieces of evidence	210
1. Whether the practice was in the company's interest	210
2. Whether some caution is called for in relation to evidence submitted under a leniency application	211

3. Probative value of corporate statements made by representative who did not participate himself	212
4. Anonymous informers	212
III. Comparisons with Community law principles on evidence in cases on hard-core vertical restraints, State aid and merger control	213
IV. Summary, discussion and conclusions	214
6 Legitimacy and the Relation between National Competition Procedure and EC Law	217
I. Empirical legitimacy of EC antitrust procedure	219
A. The references to national law in Regulation 1	220
II. Normative legitimacy—uniformity, effectiveness and national procedural autonomy	221
III. Fundamental rights and national procedure	223
A. Rights of the defence	225
1. Non-applicability of the rights of defence in private litigation	228
IV. The emergence of a common set of rules applicable in competition procedure	228
A. Investigatory powers—Member State discretion	229
1. Necessary inspections and investigations	229
2. Right to legal representation	230
3. Duty to state reasons in decisions authorising investigations	231
4. The undertaking's duty to co-operate	233
5. Extent of the investigatory powers	233
B. Legal professional privilege	236
C. Assistance by national authorities	238
1. Information obtained from Member State authorities	239
D. Incriminating questions	239
1. What is an incriminating question?	239
2. Legal consequences if incriminating questions are asked	241
3. Information supplied voluntarily	244
4. Use of evidence collected in non-EU jurisdictions	244
E. Use of unlawfully obtained evidence	245
1. Obligation to exclude evidence in national proceedings—the <i>Steffensen</i> principle	245
2. Rights of the defence can be precluded if an undertaking fails to use available legal remedies	247
3. Confidentiality as to the origin of evidence	248

4. Obligation to return unlawfully obtained documents and information?	249
5. Incriminating questions—statements by natural persons	249
6. Indirect use of unlawfully obtained evidence	250
F. Witness statements	251
1. Right to cross-examine a witness	252
G. Unlawful procedural steps taken before 1 May 2004	252
H. Statement of objections, applicability of Community case law in national procedure	253
I. Access to file	254
1. Access to file and the adversarial principle	254
2. Consequences of failure to provide access to documents	255
J. Right to be heard	256
1. Preclusion of the procedural right to dispute the allegations	257
K. Languages—specific problems arising from multinational cartel cases	257
L. Duty to investigate exculpatory facts	261
M. Sound administration	261
N. Duty to act within reasonable time	262
O. Limitation periods	263
P. Duty to state reasons	265
Q. Legitimate expectations and legal certainty	267
V. Summary, discussion and conclusions	268
7 Legitimacy in Fines and Sanctions	271
I. Enforcement and legitimacy	271
II. The relation between national law and Community law on fines and other sanctions	273
A. National law governs fines and sanctions imposed in Member States	273
B. Effectiveness requirements	273
C. The purpose of fines	275
D. Significance of the economic impact of the infringement	276
1. A line of cases playing down the importance of actual effects	277
2. New developments: a ‘but for’ approach	278
3. Economic analysis and fines	278
E. Member States’ discretionary power equals that of the Commission	281
III. Efficiency: theories and empirical observations on fining policy	283

A.	Deterrence	283
1.	The basic theory and available empirical support	283
2.	The harm-based approach	284
3.	The gain-based approach	285
4.	Problems with the deterrence model	286
5.	Criminology and cartel behaviour	288
B.	Retribution	293
1.	The basic theory	293
2.	The problems with retributive theory	294
3.	The Commission's 1998 fining guidelines	296
4.	Conclusions on retributive theory in competition law	298
C.	Collaborative compliance techniques and trade associations	299
D.	Behavioural law and economics	301
E.	Conclusion: efficient competition law fines	302
F.	What type of bird is the Commission's 2006 fining policy?	304
IV.	Efficiency through detection—leniency	305
A.	Relation between national law and Community law	306
B.	Efficiency considerations	306
V.	Intention/negligence	309
A.	National law or Community law issue?	309
B.	Case law of the Community courts	309
VI.	General principles of Community law applicable when Member States impose fines	310
A.	Foreseeability and legal certainty	310
B.	Legitimate expectations	312
C.	Individual assessment and non-discrimination	313
D.	Statement of reasons	314
E.	Principle of proportionality and equal treatment	315
F.	Legality	316
G.	<i>Ne bis in idem</i>	318
H.	Conclusions on general principles applicable when Member States penalise infringements	319
VII.	Other principles of relevance when fines are imposed in Member States	320
A.	How serious is a domestic cartel?	320
B.	Ringleaders and instigators	320
C.	Trade associations	320
D.	Reference year for calculation of fines	322
VIII.	Is there a need for harmonised sanctions?	322
IX.	Summary, discussion and conclusions	323

8 Sourcing Legitimacy	327
I. Where to find the legitimate genesis of the law in EC cartel control	327
A. The integration objective	327
B. Reliance on precedents	328
C. Economic theory and empirical observations	329
D. Legal theory	330
E. Internal rationality of the law	330
F. Comparative law	330
G. Common legal traditions in Member States	331
H. International standards including the ECHR	331
II. Democracy, participation, transparency	331
III. Ensuring average compliance as an outflow of ensuring the law's rationality?	332
A. What exactly is renationalisation?	332
B. Evaluating the relation between uniformity, effectiveness and efficiency in EC competition law	335
C. The role of harmonised procedure	336
D. The current system is implicitly based on a case-by-case approach	337
E. An enforcement deficit identified	337
F. Conclusion: not even increased rationality of the law will cure the enforcement deficit	338
G. A definition of efficient EC cartel control	339
H. Has the Commission pursued a legitimate enforcement strategy against cartels?	339
I. Supervision and enforcement through best-performing national authorities	340
J. The role of Member States in an efficient decentralised system	343
IV. Integration or competition as a policy base	343
A. Decentralisation meant a shift in emphasis from integration policy to welfare economics	343
B. A modernised view of the role of integration in competition law	345
V. Discussion	347
VI. Final conclusion	349
<i>Bibliography</i>	351
Articles	351
Books	361
Other Publications	364
Official Documents	365
Other Commission Policy Documents	367
<i>Index</i>	369