

MODERN STUDIES IN EUROPEAN LAW



# LEGITIMACY IN EU CARTEL CONTROL

INGEBORG SIMONSSON

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Ingeborg Simonsson



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## LEGITIMACY IN EU CARTEL CONTROL

This book examines the laws enacted by the EU to control cartels. These laws are carefully documented and analysed against a standard of legitimacy which questions the EU's enforcement measures, its institutional structures, policy choices, substantive law, evidentiary standards, and procedures and sanctions. It includes a unique catalogue of over 150 EU cartel decisions, as well as novel analyses of difficult borderline issues such as mixed horizontal and vertical cartels, single-brand dealer cartels and buyer cartels. The effect on trade in cartel cases is analysed with reference to established law and deterrence theory. Throughout the book the author asks whether EU law also applies at the national level, or whether certain assessments need to be made according to national law. This approach makes the book particularly helpful for national authorities, courts and private practitioners. The book includes in-depth comparisons with US law, as well as a comprehensive survey of the secondary (academic) literature on cartels. As such it presents not only a comprehensive practical view, but also a sound theoretical framework for better understanding cartel law. This is a work which will be of utmost importance to those working in competition authorities and competition courts in the EU Member States, as well as those working for EU institutions and in private practice and academia.

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# *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

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

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## 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.<sup>1</sup> 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*.<sup>2</sup>

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

### 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) <sup>4</sup>                  |                                                                      |
| Article 10 <sup>5</sup>                                         | Article 4.3 TEU                                                      |
| Article 81                                                      | Article 101                                                          |
| Article 82                                                      | Article 102                                                          |
| Article 83                                                      | Article 103                                                          |
| Article 192(2)                                                  | Article 225                                                          |
| Article 211 <sup>6</sup>                                        | Article 17 TEU                                                       |
| Article 226                                                     | Article 258                                                          |

<sup>1</sup> 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.

<sup>2</sup> 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.

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

<sup>4</sup> Replaced, in substance, by Articles 3 to 6 TFEU.

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

Article 230

Article 234

Article 250

Article 251

Article 252 (repealed)<sup>6</sup>

Article 253

Article 263

Article 267

Article 293

Article 294

Article 296

<sup>6</sup> Replaced, in substance, by Article 17, paragraph 1, Treaty on the European Union

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