

# TABLE OF CONTENTS

|   |      |
|---|------|
| <b>INTRODUCTION</b>   |      |
| DAMIEN GERADIN .....  | v    |
| <b>CONTRIBUTORS</b> .....   | xvii |
| <br><b>CHAPTER 1. MODERNISATION: WHAT DOES THE FUTURE HOLD?</b>   |      |
| MARIO MONTI .....   | 1    |
| I. Introduction .....   | 1    |
| II. A more pro-active enforcement of antitrust rules by the Commission .....  | 1    |
| A. A more pro-active approach .....   | 1    |
| B. Legal certainty .....  | 2    |
| III An efficient functioning of the network .....   | 3    |
| A. Increased application of Articles 81 and 82 .....  | 3    |
| B. Mutual assistance .....  | 4    |
| IV More enforcement by national courts .....  | 5    |
| V Conclusion .....  | 6    |
| <br><b>CHAPTER 2. REGULATION 1/2003: A REMINDER OF THE MAIN ISSUES</b>  |      |
| DR. WOUTER P.J. WILS .....  | 9    |
| I. Introduction .....   | 9    |
| II. The reform of competition law enforcement brought about by Regulation 1/2003 .....  | 10   |
| A. Regulation No 1/2003 and its implementing measures .....   | 10   |
| B. The core of the reform: the replacement of the centralised notification and authorisation system for Article 81(3) EC by a directly applicable exception system .. | 12   |
| C. The historic justification for a centralised notification and authorisation system, and why this justification is no longer valid today .....                      | 14   |
| D. The benefits resulting from the introduction of a directly applicable exception system .....   | 17   |
| a. Impact on private litigation in which Article 81 EC is used as a shield .....  | 17   |

|      |   |    |
|------|---|----|
| b.   | Impact on the Commission's enforcement priorities . . . . .   | 20 |
| c.   | The application of Articles 81 and 82 EC by national competition authorities . . . . .                        | 24 |
| d.   | The direct and hidden costs of the notification system have disappeared . . . . .                             | 29 |
| e.   | Impact on private litigation in which Article 81 EC is used as a sword . . . . .                              | 32 |
| III. | Areas of potential concern . . . . .  | 35 |
| A.   | Block exemption regulations . . . . .   | 35 |
| B.   | Burden of proof . . . . .   | 36 |
| C.   | Self-assessment . . . . .   | 38 |
| D.   | Capability of national courts to apply Article 81(3) EC . . . . .   | 40 |
| a.   | The issue put in perspective . . . . .  | 40 |
| b.   | Article 15 of the Regulation . . . . .  | 41 |
| c.   | Training and specialisation . . . . .   | 44 |
| E.   | Allocation of cases within the network of competition authorities . . . . .                                   | 44 |
| a.   | Principles of allocation . . . . .  | 44 |
| b.   | Re-allocation . . . . .   | 45 |
| c.   | Rights of the private parties concerned . . . . .   | 47 |
| d.   | Parallel action and the principle of "ne bis in idem" . . . . .   | 49 |
| F.   | Extraterritorial powers of national competition authorities . . . . .   | 51 |
| G.   | Capability of national competition authorities . . . . .  | 55 |
| H.   | National bias and renationalisation . . . . .   | 56 |
| a.   | Article 11 of the Regulation insures against national bias . . . . .  | 56 |
| b.   | Article 3 of the Regulation prevents renationalisation . . . . .  | 58 |
| I.   | Consistent application of Articles 81 and 82 EC . . . . .   | 62 |
| a.   | The issue put in perspective . . . . .  | 62 |
| b.   | Articles 11, 15 and 16 of the Regulation ensure consistency . . . . .   | 63 |
| J.   | Separation of investigative, prosecutorial and adjudicative functions . . . . .                               | 64 |
| a.   | The various systems for the public enforcement of Articles 81 and 82 EC . . . . .                             | 64 |
| b.   | The Regulation recognises the wide variation in the public enforcement systems of the Member States . . . . . | 67 |
| K.   | Differences in type and level of penalties . . . . .  | 70 |
| a.   | The issue put in perspective . . . . .  | 70 |
| b.   | Article 12 of the Regulation . . . . .  | 71 |
| c.   | Is harmonization desirable and possible? . . . . .  | 74 |
| L.   | Differences in procedural rights and guarantees . . . . .   | 75 |
| M.   | Limitation periods for the imposition of penalties . . . . .  | 78 |

|   |     |
|---|-----|
| N. Leniency .....   | 79  |
| O. Languages .....  | 80  |
| <br><b>CHAPTER 3. MODERNISATION: AN EXTENSION OF THE POWERS OF THE COMMISSION?</b>          |     |
| IAN S. FORRESTER Q.C. .....   | 83  |
| I. Introduction .....   | 83  |
| II. Extension of the Commission's powers in the quasi-legislative field .....               | 86  |
| III. Extension of the Commission's powers in the institutional field .                      | 89  |
| IV. Primacy and respect as between national courts and the Commission .....                 | 91  |
| V. Extension of the Commission's powers in the administrative enforcement field .....       | 94  |
| VI. Documents under the cherry tree in the garden and other more rigorous remedies .....    | 96  |
| <br><b>CHAPTER 4. THE NETWORK OF COMPETITION AUTHORITIES: HOW WILL IT WORK IN PRACTICE?</b> |     |
| DOMINIK SCHNICHELS .....  | 99  |
| I. Introduction .....   | 99  |
| II. Underlying objectives of cooperation .....  | 101 |
| III. Cooperation between competition authorities .....                                      | 103 |
| A. Cooperation at the beginning of a case .....   | 104 |
| a. Confidential information and leniency .....  | 105 |
| b. Reallocation period .....  | 107 |
| c. Reallocation principles .....  | 107 |
| d. Conclusion .....   | 109 |
| B. Cooperation during the fact finding phase .....  | 110 |
| a. Introduction into Article 12 of Council Regulation 1/2003 .....                          | 110 |
| b. Conditions for exchanging information .....  | 111 |
| c. Confidential information .....   | 113 |
| d. Leniency information .....   | 114 |
| e. Conclusion .....   | 116 |
| C. Cooperation during the Decision Making Phase .....                                       | 116 |
| a. Article 16 (2) of Council Regulation 1/2003 .....  | 117 |
| b. Article 11 (4) of Council Regulation 1/2003 .....  | 117 |
| c. Article 11 (6) of Council Regulation .....   | 118 |

|                                      |     |
|--------------------------------------|-----|
| d. Conclusion .....                  | 119 |
| IV. Other forms of cooperation ..... | 120 |
| V. Conclusion .....                  | 120 |

**CHAPTER 5. THE NETWORK OF COMPETITION  
AUTHORITIES – HOW WILL IT WORK IN PRACTICE:  
REMARKS FROM A PRACTITIONER**

|  |     |
|--|-----|
| ANDREAS WEITBRECHT .....                               | 123 |
| I. Introduction: modernisation in general .....        | 123 |
| A. Direct applicability of Article 81 (3) .....        | 123 |
| B. Level playing field .....                           | 124 |
| II. The network of competition authorities .....       | 124 |
| A. The fundamental issue of competition networks ..... | 125 |
| B. Case allocation .....                               | 126 |
| a. The position of the Network Notice .....            | 126 |
| b. Judicial review .....                               | 127 |
| III. Conclusion .....                                  | 128 |

**CHAPTER 6. MODERNISATION: WILL IT INCREASE  
LITIGATION IN THE NATIONAL COURTS AND BEFORE  
NATIONAL AUTHORITIES?**

|  |     |
|--|-----|
| BERNARD VAN DE WALLE DE GHELCKE .....  | 129 |
| I. Introduction .....  | 129 |
| II. Competition litigation under the “old regime” .....  | 131 |
| A. National courts .....   | 131 |
| a. General principles .....  | 131 |
| b. Types of private enforcement .....  | 134 |
| c. Specific issues .....   | 137 |
| B. National Competition Authorities .....  | 142 |
| III. The regime of Regulation 1/2003: what has changed? .....  | 144 |
| A. National courts .....   | 144 |
| a. The directly applicable exception system and the application of Article 81 (3) by national courts ..... | 144 |
| b. The obligation to apply the EC competition law rules .....  | 147 |
| c. Procedural autonomy .....   | 148 |
| d. The division of powers with the Commission .....  | 149 |

|   |     |
|---|-----|
| B. National authorities .....   | 152 |
| a. The new framework .....  | 152 |
| b. Case allocation within the Network and consequences<br>for parties ..... | 153 |
| c. Application of Article 11(6) of Regulation 1/2003 .....                  | 157 |
| d. Exchange of information and mutual assistance .....                      | 157 |
| e. Territorial scope of application of NCA decisions .....                  | 158 |

**CHAPTER 7. WILL MODERNISATION INCREASE LITIGATION  
IN NATIONAL COMPETITION AUTHORITIES AND THE  
NATIONAL COURTS?**

|                          |     |
|--------------------------|-----|
| NICHOLAS GREEN Q.C. .... | 159 |
|--------------------------|-----|

|   |     |
|---|-----|
| I. Introduction .....   | 159 |
| II. Legal issues affecting the nature and extent of national action ..... | 163 |
| III. Conclusion .....   | 169 |

**CHAPTER 8. MULTIPLE ENFORCEMENT AND FORUM  
SHOPPING AFTER 1 MAY 2004: FEAR FOR FEAR'S SAKE?**

|  |     |
|--|-----|
| JEAN-FRANÇOIS BELLIS and KRIS VAN HOVE ..... | 171 |
|--|-----|

|   |     |
|---|-----|
| I. Introduction .....   | 171 |
| A. Multiple-enforcement .....   | 171 |
| B. Forum shopping .....   | 171 |
| II. Multiple enforcement .....  | 172 |
| A. Is multiple-enforcement a new phenomenon? .....  | 172 |
| B. The perceived risks of multiple-enforcement .....  | 174 |
| C. Addressing the risk of conflicting decisions as a result<br>of multiple enforcement .....  | 175 |
| a. Conflict between a decision of a national competition<br>authority and a decision of the Commission .....  | 175 |
| b. Conflict between the decisions of national<br>competition authorities from two different Member<br>States .....  | 176 |
| c. Conflict between a judgment of a national court<br>and a Commission decision .....   | 176 |
| d. Conflict between judgments of national courts<br>from two different Member States .....  | 177 |
| e. Conflict between a decision of a national competition<br>authority of one Member State and a judgment of<br>a national court of another Member State ..... | 178 |

|  |     |
|--|-----|
| f. Conflict between a decision of a national competition authority and a judgment of a national court of the same Member State ..... | 178 |
| III. Forum shopping .....  | 179 |
| A. Forum shopping before national competition authorities is not really an option .....  | 179 |
| B. Forum shopping before national courts is not new but is likely to become more significant .....                                   | 179 |
| C. Example of forum shopping before national courts .....  | 180 |
| D. Limits to forum shopping before national courts .....   | 181 |
| IV. Conclusion .....   | 183 |

## **CHAPTER 9. NATIONAL COURTS: WHAT IS EXPECTED FROM THEM?**

|  |     |
|--|-----|
| DENIS WAELBROECK .....   | 185 |
| I. Introduction .....  | 185 |
| II. The current situation of private enforcement in Europe ..... | 186 |
| A. The barriers to private enforcement in the EC .....           | 189 |
| a. Evidentiary difficulties .....                                | 189 |
| b. Difficulties inherent in injunction proceedings .....         | 193 |
| c. Difficulties inherent in actions for damages .....            | 193 |
| d. Complexity of the law .....                                   | 199 |
| e. Costs and length of proceedings .....                         | 202 |
| III. The way forward .....                                       | 203 |

## **CHAPTER 10. ARTICLE 81(3) IN THE CONTEXT OF MODERNISATION – A LAWYER’S VIEW**

|  |     |
|--|-----|
| DR. FRANK MONTAG and THOMAS JANSSENS .....               | 209 |
| I. Introduction .....                                    | 209 |
| A. A competition culture within the Community .....      | 209 |
| B. Increased reliance on economic principles .....       | 211 |
| C. A continuing need for guidance? .....                 | 212 |
| II. Guidelines on the application of article 81(3) ..... | 214 |
| A. The Article 81(1) prohibition .....                   | 215 |
| a. Inter-brand and intra-brand competition .....         | 215 |
| b. Restrictions by object and by effect .....            | 217 |
| c. Market power .....                                    | 218 |
| d. Ancillary restraints .....                            | 219 |

|   |   |     |
|---|---|-----|
| B.  | The Article 81(3) exemption – General principles .....                        | 220 |
| a.  | Assessment of economic efficiency gains .....                                 | 220 |
| b.  | A market-specific standard? .....   | 221 |
| c.  | Fluctuating risks .....   | 222 |
| C.  | The Article 81(3) exemption – Conditions of application ..                    | 224 |
| a.  | Efficiency gains .....  | 224 |
| b.  | Indispensability .....  | 226 |
| c.  | Consumer pass-on .....  | 227 |
| d.  | No elimination of competition .....   | 229 |
| D.  | Practical consequences for the application of Article 81(3)                   | 230 |
| a.  | Challenges in applying the new economics-based methodology .....              | 230 |
| b.  | Discretion in the context of decentralised enforcement? .....                 | 232 |
| c.  | Discharging the burden of proof under Article 81(3)                           | 233 |
| d.  | Applying Article 81 in its entirety .....                                     | 235 |
| e.  | Increased legal uncertainty? .....  | 236 |
| III.  | The need for concrete guidance in individual cases .....                      | 237 |
| A.  | Guidance instruments .....  | 237 |
| a.  | Article 10 decisions .....  | 237 |
| b.  | Informal guidance letters .....   | 238 |
| B.  | The conditions for obtaining an informal guidance letter                      | 239 |
| C.  | Informal guidance letters – procedural aspects .....                          | 240 |
| IV.   | Conclusion .....  | 240 |
| <b>CHAPTER 11. THE COMMISSION'S NOTICE ON<br/>ARTICLE 81(3): AN ECONOMIC ASSESSMENT OF<br/>THE EFFICIENCY DEFENCE</b> |   |     |
| DEREK RIDYARD .....   |   | 243 |
| I.  | Introduction .....  | 243 |
| II.   | 81(1) and 81 (3) – What goes where? .....                                     | 243 |
| III.  | The vertical/horizontal distinction – One size fits all .....                 | 245 |
| IV.   | Horizontal agreements – The lessons from horizontal merger efficiencies ..... | 247 |
| V.  | Vertical agreements – Some measurement challenges .....                       | 249 |
| VI.   | Some key policy issues and conclusions .....                                  | 254 |

**CHAPTER 12. THE IMPACT OF MODERNISATION ON  
COMPANIES AND THEIR COUNSELS**

|  |     |
|--|-----|
| HENDRIK BOURGEOIS .....                  | 257 |
| I. Introduction .....                    | 257 |
| II. “You figure it out” .....            | 258 |
| III. “How should I figure it out?” ..... | 262 |
| IV. Burden of proof .....                | 266 |
| V. In-house legal privilege .....        | 268 |
| VI. Possible consequences .....          | 270 |

**CHAPTER 13. COMPETITION LAW IN THE NEW MEMBER  
STATES: WHERE DO WE COME FROM? WHERE DO WE GO?**

|  |     |
|--|-----|
| DAMIEN GERADIN and DAVID HENRY .....   | 273 |
| I. Introduction .....  | 273 |
| II. The Europe agreements .....  | 274 |
| III. The process of accession to the EU .....  | 277 |
| IV. Transposing the competition rules and creating institutions ..                           | 281 |
| A. Transposition of the rules .....  | 281 |
| B. Creation of competition authorities .....   | 285 |
| V. The enforcement of the rules .....  | 291 |
| VI. Impact of modernization on the competition authorities<br>of the new Member States ..... | 301 |
| VII. The need to establish priorities and develop an<br>enforcement agenda .....             | 304 |
| VIII. Fundamental issues to consider in the future .....                                     | 307 |
| IX. Conclusion .....   | 309 |

**CHAPTER 14. COMPETITION AGENCIES AND THE  
RESTRUCTURING OF FORMERLY PLANNED ECONOMIES:  
LESSONS FROM THE EXPERIENCE OF CENTRAL AND  
EASTERN EUROPE**

|   |     |
|---|-----|
| RUSSELL PITTMAN .....   | 311 |
| I. Introduction .....   | 311 |
| II. Competition agencies and privatization .....  | 312 |
| III. Abuse-of-dominance enforcement as a tool in privatization<br>and restructuring ..... | 314 |
| IV. The competition authority as sectoral regulator .....                                 | 316 |
| V. Conclusion .....   | 319 |

**CHAPTER 15. STATE AIDS AND ENLARGEMENT,  
SPECIFICITIES OF NEW MEMBER STATES**

|  |     |
|--|-----|
| MASSIMO MEROLA and RODRIGO BALLESTER .....   | 321 |
| I. Introduction .....  | 321 |
| II. First part: The prospect of accession: The key role played by Europe agreements in the implementation of the State aids <i>acquis communautaire</i> in the new Member States ..... | 323 |
| A. A brief picture of ex-communist countries in the early 90's: Economic and Institutional aspects in relation with State aids policy .....  | 323 |
| B. Europe Agreements: the benefits of long run and gradual implementation of EC State aids provisions .....  | 325 |
| a. A new approach of the EU towards candidate countries  | 325 |
| b. Europe Agreements: institutional, substantive and procedural provisions .....   | 330 |
| C. Conclusions .....   | 335 |
| III. Second part: State aids rules in new Member States: Current situation and forthcoming challenges .....  | 336 |
| A. Treaty of Accession: fully-fledged application of State aids provisions in new Member States? .....   | 336 |
| a. The Treaty of Accession .....   | 336 |
| b. Assessment: a high degree of implementation of EC State aids <i>acquis</i> in the Treaty of Accession and a major grey zone .....   | 346 |
| B. The remaining challenges: the implications of enlargement in EC State aids Policy .....   | 347 |
| a. Enlargement and Regional Policy .....   | 347 |
| b. Enlargement and Liberalised Markets .....   | 348 |
| c. Enlargement and other aspects of EC State aids Policy ..  | 350 |
| d. Enlargement and Modernisation of State aids Rules ..  | 352 |
| IV. Conclusion .....   | 354 |

**CHAPTER 16. STATE AID: THE SPECIFICITIES OF THE NEW MEMBER STATES**

|   |     |
|---|-----|
| ASGER PETERSEN .....  | 357 |
| I. Introduction: State aid. The road to accession for the new Member States ..... | 357 |
| II. Specificities as regards state aid procedures .....                           | 358 |
| III. Specificities as regards substantive state aid law .....                     | 361 |

|                          |     |
|--------------------------|-----|
| A. Aid instruments ..... | 361 |
| B. Aid objectives .....  | 362 |
| IV. Conclusion .....     | 365 |

## **CHAPTER 17. EU ENLARGEMENT AND MODERNISATION OF COMPETITION LAW: SOME NATIONAL EXPERIENCES**

|   |     |
|---|-----|
| DR. TIHAMÉR TÓTH .....  | 367 |
| I. Introduction .....   | 367 |
| II. The nineties: Preparation for EU membership .....   | 368 |
| A. Harmonisation or approximation/adaptation? .....   | 368 |
| B. Why did Hungary approximate its competition law<br>to EC competition law? .....  | 369 |
| C. Achievements and problems in competition law<br>approximation .....  | 371 |
| a. Identically worded laws .....  | 371 |
| b. Institutional aspects .....  | 372 |
| c. Different aims: vertical restrictions .....  | 372 |
| D. Implementation of the Europe Agreement, a real<br>“hungaricum”: constitutional problems and the dual<br>competition regime ..... | 373 |
| E. The EU accession negotiations of the competition chapter   | 376 |
| III. The millennium reform: Changes at the dawn of EU accession   | 376 |
| A. The procedural reform: a challenge for both old<br>and new Member States .....   | 376 |
| B. Single market – single law .....   | 377 |
| C. Exception instead of exemption .....   | 380 |
| D. Functioning of the European Competition Network .....  | 382 |
| E. The role of national courts .....  | 384 |