Civil Procedure Used for Enforcement of EC Competition Law by the English, French and German Civil Courts

By

George Cumming, Brad Spitz and Ruth Janal
# Table of Contents

**Preface**  xiii  

**Introduction**  1  

A. Doctrine of Effectiveness  2  
1. Balancing of National Principles and the Application of the Doctrine of Effectiveness  4  
2. Doctrine of Non-discrimination (Equivalence)  7  
3. Concept of Adequately Effective Enforcement  10  

B. Principles Underlying the Rules of Civil Procedure of the English French and German Ordinary Courts  14  

C. Principles of English Civil Procedure  14  
1. Fundamental Principles  14  
2. Overriding Objective and Underlying Procedural Principles  17  
   a. CPR 1 Provides the Rules Which Constitute the Overriding Objective  17  
   b. Underlying Principles of a Fair Trial and the Rectitude of the Decision  17  
   c. Explicit Principles of the Overriding Objective  18  
3. Competition Appeal Tribunal (CAT)  18  
4. Directions: Case Management (CAT)  19  

D. Principles of French Civil Procedure  19  
1. Guiding Principles  21  
2. Guarantees  21  

E. Principles of German Civil Procedure  22  
1. Competition Case Allocation  22  
2. German Civil Procedure and the Basic Law  23
3. The Relationship between Justice, Legal Certainty and Party Autonomy 23
4. Fundamental Rights of the Parties 24
5. The Principles of Concentration and Immediateness 25
6. Conclusion 26

Chapter 1
English, French and German Civil Procedure 27

A. EC Procedural Enforcement Problems 27
B. English CPR and the CAT Rules: Problems Concerning Enforcement of EC Competition 28
   1. Costs: The Indemnity Rule – Hourly Calculation of Legal Costs 28
   2. Conditional Fees 29
   3. Evidential Burden: Doctrine of Consistency 30
   4. Collective Actions 32
   5. Confidentiality: Confidential Information Pursuant to EC Reg. 1/2003 33
   6. Access to Evidence: Court Seeking Information of Its Own Motion 34
   7. Expert Evidence: Assessors 34
   8. Interim Injunctions 36
   1. Collective Actions 37
   2. Burden of Proof 37
   3. Interim Measures 38
D. German Civil Procedure: Problems of EC Competition Enforcement in Relation to the Commission Green Paper – Disclosure 39
   1. Access to Evidence 39

Chapter 2
English Procedure: Evidence 41

A. Burden of Proof 41
   1. Methods of Proof: First Method 42
   2. Crehan: Court of Appeal 43
   3. Crehan: House of Lords 45
   4. Consequences of the Judgment of the House of Lords in Crehan for the Enforcement of EC Articles 81 and 82 in Independent Actions 48
   5. Methods of Proof: Traditional Method 52
Table of Contents

B. Reallocation of Incidence of Proof Following the Doctrine of Effectiveness and Not Discrimination 53
C. Standard of Proof 55

Chapter 3
English Procedure: Conditional Costs 59

A. Conditional Fees in England 60
B. Inadequacy of the Current System of Judicial Cost Control 63
C. Breach of ECHR Article 6 65
D. Breach of EC Doctrine of Effective Enforcement by CFAs 66
E. Costs and Enforcement of EC Articles 81 and 82 in the UK 68

Chapter 4
English Procedure: Expert Evidence and Assessors 75

A. Access to Expert Evidence: High Court, Chancery Division CPR 75
B. Evaluation of Expert Evidence 80
   1. High Court, Chancery Division, CPR 80
   2. Assessors 81
   3. Assessors CPR 35.15 and Practise Direction 7 83
   4. Method of Intervention of the Assessor 84
C. Competition Appeal Tribunal 88

Chapter 5
English Procedure: Disclosure 91

A. Access to Information 91
   1. CPR: Implementation of EC Reg. 1/2003 Article 15.1 91
   2. CAT Rules 92
   3. Changes: Doctrine of Effectiveness 93
   4. Specific Changes to the CPR 94
      a. Court Request: Ex officio and/or at Party Request 94
      b. Scope 96
      c. Time: Pre-action 99
B. Privilege: Confidentiality 99
   1. Privilege of Confidentiality and the CPR 100
   2. Procedural Protection of Confidential Information by the CPR 101
   3. Procedure for the Protection of Confidential Information by the CAT 102
   4. Application of the Doctrine of Effectiveness to the CAT Rules and CPR Treatment of Confidentiality 104
## Table of Contents

### Chapter 6

#### English Procedure: Costs

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Costs and the CPR</td>
<td>129</td>
</tr>
<tr>
<td>B</td>
<td>Effect of Costs in English Enforcement Proceedings of EC Articles 81 and 82</td>
<td>131</td>
</tr>
<tr>
<td>C</td>
<td>Nature of the Costs Problem in English Litigation</td>
<td>134</td>
</tr>
<tr>
<td>D</td>
<td>ECJ Case Law: Possible Solutions to the Problem of English Costs in Conformity with EC Case Law</td>
<td>137</td>
</tr>
<tr>
<td></td>
<td>1. Principle of Effectiveness and the National Rules on Costs</td>
<td>137</td>
</tr>
<tr>
<td></td>
<td>2. Compliance of Costs Rules with Respect to EC Competition Law</td>
<td>138</td>
</tr>
<tr>
<td></td>
<td>a. Fixed Maximum and Minimum Legal Costs</td>
<td>138</td>
</tr>
<tr>
<td></td>
<td>3. Compliance with EC Competition Law and the Principle of Freedom of Services</td>
<td>140</td>
</tr>
<tr>
<td></td>
<td>a. Fixed Maximum and Minimum Costs in Out-of-Court Legal Services</td>
<td>140</td>
</tr>
<tr>
<td></td>
<td>b. Effect of Arduino, Macrino and Cipolla on a National Rule Fixing Legal Fees</td>
<td>140</td>
</tr>
<tr>
<td></td>
<td>c. Fixed Minimum Fees</td>
<td>142</td>
</tr>
<tr>
<td></td>
<td>d. Fixed Maximum Fees</td>
<td>149</td>
</tr>
<tr>
<td>E</td>
<td>Consequences of Arduino and Wouters Concerning Regulation of Legal Services in England</td>
<td>151</td>
</tr>
<tr>
<td>F</td>
<td>Application of the EC Doctrine of Effectiveness to Methods of Cost Control in the CPR</td>
<td>153</td>
</tr>
</tbody>
</table>
Chapter 7
English Interim Injunctions and Representative Actions

A. Interim Orders Pursuant to the CPR
   1. Doctrine of Effectiveness

B. Representative Actions

Chapter 8
French Civil Procedure

A. Case Allocations and Representative Actions
   1. The Specialisation of the French Courts
   2. *Locus standi*: Representative Actions

Chapter 9
French Procedure: Proof and Evidence

A. Burden of Proof
   1. Burden of Proof of an Infringement of Article 81(1) or of Article 82 of the Treaty
   2. Burden of Proof of Causation and Damage

B. Standard of Proof

C. Access to Evidence and Information
   1. The Investigation Powers of the French Judge and the Role of Parties
   2. Investigations before the Commencement of Legal Proceedings
   3. The Investigations during the Proceedings
   4. Inquiry Measures
   5. The Relationships of the French Judge with the Commission and Competition Council
      a. The Transmission of Information and Documents to the Courts
      b. The Opinions of the Commission and the Competition Council
      c. The Intervention of the Commission and the Competition Council

Chapter 10
French Procedure: Forms of Compensation and Costs of Actions

A. Forms of Compensation
   1. The Damages Awarded by the courts
2. Nullity 210
3. Injunctions and Interim Measures (Measures of Conservation) 212

B. Costs of Actions 216
1. Taxable Charges 216
2. Charges Not Included in the Taxable Charges 218
3. Legal Aid 220
4. Contingency Fees: Prohibition of ‘Quota litis’ Agreements 222

Chapter 11
German Procedure: Representative Actions and Binding Effect of Cartel Authorities Decisions 225

A. Private Enforcement of Competition Rules from a German Perspective 225
1. Obstacles to Private Enforcement Prior to the 7th GWB-Amendment 226
2. Changes Implemented by the 7th GWB-Amendment 227
   a. Competition Cases’ Allocation 228
   b. Locus standi 230
3. Representative Actions 231
   a. Organizations for the Promotion of Commercial Interests 231
   b. Consumer Organizations 232
4. The Binding Effect of a Decision Taken in Public Enforcement on the Civil Litigation Issues 233
   a. Binding Effect of the Commission’s and NCA’s Decisions 233
   b. Relevance of Competition Authorities’ Decisions in Other Instances 236
   c. Persuasive Value of Decisions Rendered by the Competition Authorities 237

Appendix: Competence Lose Allocation in Germany 240

Chapter 12
German Procedure: Evidence and Burden of Proof 241

A. Difficulties Entailed by the Non-inquisitorial Nature of Civil Litigation 241
B. The Concept of ‘Exploratory Evidence’ 243
C. Access to Evidence in the Sphere of the Opposing Party 244
1. Disclosure Under §§ 142, 144 Code of Civil Procedure (Zivilprozeßordnung – ZPO) 245
2. Disclosure of Information under §§ 242, 259 BGB 247
3. Hearing of the Opposing Party 249
Table of Contents

4. Privilege against Self-Incrimination 250
5. Witnesses 251
6. Expert Evidence 252
7. The Handling of Sensitive Data 252

D. The Commission and the Federal Cartel Authority Acting as Amicus curiae 253
1. Principles 253
2. The Doctrine of Party Presentation 255
3. Confidential Information and Business Secrets 257
   a. Exclusion of the Public 258
   b. Excluding Parties from Evidence 258
4. Effect of Legal Opinions Rendered by the Commission or NCA 259
5. Preliminary Conclusion Regarding the Access to Evidence 260

E. Burden of Proof 260
1. Article 2 Reg. (EC) 1/2003 260
2. Unresolved Questions 261
   a. De minimis Criteria in Civil Proceedings 261
   b. Line of Demarcation between Articles 81(1) and 81(3) EC 262

F. Standard of Proof and Legal Presumptions 262
1. Legal Presumptions under the German Act against Restraints on Competition 263
2. Alleviating the Standard of Proof 263
   a. Proving the Infringement 263
   b. Proof of Inapplicability under Article 81(3) EC 267

G. Calculation of Losses Sustained 268
H. Evidence and the Doctrine of Effectiveness 269

Chapter 13
German Procedure Costs and Limitation Periods 273

A. Costs 273
B. Limitation Periods 276

Chapter 14
Conclusion 279

A. National Principles 280
   1. English CPR and CAT Rules Relevant for the Application of the Doctrine of Effectiveness 280
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. French Principles Relevant for the Application of the Doctrine</td>
<td>281</td>
</tr>
<tr>
<td>of Effectiveness</td>
<td></td>
</tr>
<tr>
<td>3. German Principles Relevant for the Application of the</td>
<td>282</td>
</tr>
<tr>
<td>Doctrine of Effectiveness</td>
<td></td>
</tr>
<tr>
<td>B. English CPR and CAT Rules: Categories of Changes Required</td>
<td>282</td>
</tr>
<tr>
<td>by the Application of the Doctrine of Effectiveness</td>
<td></td>
</tr>
<tr>
<td>C. French Civil Procedure: Categories of Changes Required by the</td>
<td>286</td>
</tr>
<tr>
<td>Application of the Doctrine of Effectiveness</td>
<td></td>
</tr>
<tr>
<td>D. German Civil Procedure: Categories of Changes by the</td>
<td>287</td>
</tr>
<tr>
<td>Application of the Doctrine of Effectiveness</td>
<td></td>
</tr>
</tbody>
</table>

**Index**                                                                 | 295  |