# EXTENDED TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Contributors</th>
<th>xiv</th>
</tr>
</thead>
<tbody>
<tr>
<td>Table of cases</td>
<td>xix</td>
</tr>
<tr>
<td>Table of legislation</td>
<td>xxxiv</td>
</tr>
</tbody>
</table>

## INTRODUCTION

- Modernisation and Modernisation II .......................................................... 0.08
- The judicial route: the judgment of the Court of Justice in Crehan ............ 0.14
- The Commission's private enforcement initiative ......................................... 0.15
- Methodology ................................................................................................. 0.26

## 1. THE LEGAL CONTEXT OF EU COMPETITION LAW DAMAGES ACTIONS

### I. THE CASE-LAW OF THE CJEU ON REMEDIES

- Fixing the boundary between remedial rules and procedural rules sensu stricto 1.17

### II. THE MOVE FROM RIGHTS TO REMEDIES

- Application to damages actions for breach of EU competition law .............. 1.19

## 2. THE UNDERLYING RIGHT TO DAMAGES

### I. THE ESTABLISHMENT OF THE RIGHT TO DAMAGES AS A MATTER OF EU LAW

- Crehan: the ruling of the Court of Justice ...................................................... 2.01
  - The proceedings before the English courts .............................................. 2.11
  - The suitability of the case to establish the right to damages .................. 2.15
- Further developments: the Manfredi judgment and later jurisprudence of the Court of Justice ................................................................. 2.25

### II. NATIONAL LAW: LEGAL BASIS FOR A CLAIM FOR DAMAGES FOR BREACH OF EU COMPETITION LAW

- England and Wales ......................................................................................... 2.29
- Germany .......................................................................................................... 2.30
- Austria ............................................................................................................ 2.34
- France ............................................................................................................. 2.41
- Spain .............................................................................................................. 2.44

  - The distinction between tortious and contractual liability ....................... 2.52
  - The fault requirement ................................................................................. 2.63

### 3. INDIRECT PURCHASER STANDING AND PASSING-ON

- The nature of harm in antitrust litigation ...................................................... 3.04

### I. THE BASICS OF INDIRECT PURCHASER STANDING AND PASSING-ON AS A MATTER OF EU LAW

- Indirect purchaser standing ........................................................................... 3.12
- The passing-on defence .................................................................................. 3.15
  - The Directive and the term 'unjust enrichment' ....................................... 3.32
  - The burden of proving passing-on .............................................................. 3.40
    - Proving passing-on as a defence ............................................................. 3.46
    - Proving passing-on offensively ............................................................... 3.50
  - Presumption of passing-on ......................................................................... 3.53
EXTENDED TABLE OF CONTENTS

4. Partial passing-on: apportionment of loss at different levels of the supply chain 3.59

II. NATIONAL LAW

A. England and Wales 3.73
   1. Indirect purchaser standing 3.75
   2. The passing-on defence 3.79

B. Germany 3.87
   1. Indirect purchaser standing 3.87
      a. The burden of proof as regards indirect purchaser claims 3.94
      b. Umbrella purchasers 3.97
   2. The passing-on defence 3.101

C. Austria 3.106
   1. Indirect purchaser standing 3.106
   2. The passing-on defence 3.112

D. The Netherlands 3.124
E. Finland 3.141
F. Lithuania 3.143
G. France 3.144
H. Italy 3.152
I. Spain 3.163
   1. Indirect purchaser standing 3.163
   2. The passing-on defence 3.166
J. Portugal 3.168

II. INDIRECT PURCHASER STANDING AND PASSING-ON IN THE US 3.169

A. Antitrust injury 3.170
B. The passing-on defence under US law 3.172
C. Indirect purchaser standing: the rule in Illinois Brick 3.179
D. Exceptions to the rule in Illinois Brick 3.185
E. The efficiency of the rule in Illinois Brick 3.190

4. EVIDENCE I

I. DISCLOSURE OF EVIDENCE HELD BY A PARTY OR A THIRD PARTY: THE REGULATORY FRAMEWORK IN THE EU AND THE MEMBER STATES 4.01

A. Common law 4.12
B. Civil law 4.18
   1. Access to probative documents prior to initiation of proceedings 4.20
   2. Access to probative documents after initiation of proceedings 4.21
     Other civil law jurisdictions 4.24
C. Access to evidence under the Evidence Regulation 4.35
D. The rules contained in the Directive on disclosure of evidence held by a party or a third party 4.48

II. ACCESS TO EVIDENCE INCLUDED IN THE FILE OF A COMPETITION AUTHORITY 4.62

A. Access to the file of the Commission 4.62
   1. The legal framework 4.62
   2. Access to the file of the Commission through an application under the Access to Documents Regulation 4.67
B. An application to the court for disclosure of evidence included in the file of the Commission or an NCA 4.98
   1. The jurisprudence of the EU courts 4.98
   2. The rules introduced by the Directive 4.106
     Certain issues with the operation of Article 6(5) 4.133
   3. National law 4.136
      a. England and Wales 4.136
      b. Germany 4.150
      c. The Netherlands 4.157
      d. Finland 4.158
      e. Lithuania 4.159
      f. France 4.161
      g. Italy 4.179
EXTENDED TABLE OF CONTENTS

5. EVIDENCE II

I. THE EVIDENTIAL VALUE OF PRIOR ADMINISTRATIVE INFRINGEMENT DECISIONS
      Consideration of Article 16 by the national courts
         1. England and Wales
         2. The Netherlands
         3. Portugal
   B. NCA decisions: Article 9 of the Directive
   C. The evidential value of NCA decisions in national law
      1. United Kingdom
      2. Germany
      3. Austria
      4. The Netherlands
      5. Finland
      6. The Baltic States
      7. France
      8. Italy
      9. Spain
      10. Portugal

II. PUBLICATION OF INFORMATION RELATING TO AN INFRINGEMENT BY THE
    COMMISSION OR AN NCA
    A. Commission decisions
    B. NCA decisions
       Austria

6. ESTABLISHING PARAMETERS TO CLAIMS: CAUSATION

I. INTRODUCTION
   Conditio sine qua non
   Policy-orientated approaches
II. THE APPROACH TAKEN TO CAUSATION IN EU AND NATIONAL LAW
   A. General EU law
   B. EU competition law damages actions
   C. The approach taken by national courts in competition litigation
III. ALTERNATIVE MEANS OF ESTABLISHING PARAMETERS TO CLAIMS:
     QUANTIFICATION OF HARM

7. DAMAGE

I. SCOPE OF DAMAGE RECOVERABLE
   A. EU law
   B. National law
II. PRESUMPTION OF HARM
   A. EU law
   B. National law
      1. United Kingdom
      2. Germany
      3. Austria
      4. The Netherlands
      5. Finland
      6. Latvia
      7. France
### EXTENDED TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. Italy</td>
<td>7.45</td>
</tr>
<tr>
<td>9. Spain</td>
<td>7.48</td>
</tr>
<tr>
<td>10. Other jurisdictions</td>
<td>7.49</td>
</tr>
<tr>
<td><strong>III. QUANTIFICATION</strong></td>
<td></td>
</tr>
<tr>
<td>A. EU law</td>
<td>7.51</td>
</tr>
<tr>
<td>B. National law</td>
<td>7.55</td>
</tr>
<tr>
<td>1. England and Wales</td>
<td>7.55</td>
</tr>
<tr>
<td>2. Germany</td>
<td>7.58</td>
</tr>
<tr>
<td>3. Austria</td>
<td>7.66</td>
</tr>
<tr>
<td>4. Italy</td>
<td>7.67</td>
</tr>
<tr>
<td>5. Latvia</td>
<td>7.69</td>
</tr>
<tr>
<td><strong>IV. EXEMPLARY DAMAGES</strong></td>
<td></td>
</tr>
<tr>
<td>A. EU law</td>
<td>7.72</td>
</tr>
<tr>
<td>B. National law</td>
<td>7.73</td>
</tr>
<tr>
<td><strong>8. FURTHER SUBSTANTIVE ISSUES I</strong></td>
<td></td>
</tr>
<tr>
<td>I. ATTRIBUTION OF RESPONSIBILITY</td>
<td></td>
</tr>
<tr>
<td>A. EU law</td>
<td>8.01</td>
</tr>
<tr>
<td>B. National law</td>
<td>8.14</td>
</tr>
<tr>
<td>1. Germany</td>
<td>8.16</td>
</tr>
<tr>
<td>In personam liability</td>
<td>8.21</td>
</tr>
<tr>
<td>2. Austria</td>
<td>8.22</td>
</tr>
<tr>
<td>In personam liability</td>
<td>8.27</td>
</tr>
<tr>
<td>3. Finland</td>
<td>8.28</td>
</tr>
<tr>
<td>4. Latvia</td>
<td>8.38</td>
</tr>
<tr>
<td><strong>II. JOINT AND SEVERAL LIABILITY</strong></td>
<td></td>
</tr>
<tr>
<td>A. EU law</td>
<td>8.45</td>
</tr>
<tr>
<td>1. Contribution</td>
<td>8.46</td>
</tr>
<tr>
<td>2. The treatment of immunity recipients</td>
<td>8.47</td>
</tr>
<tr>
<td>3. Special rules for SMEs</td>
<td>8.52</td>
</tr>
<tr>
<td>B. National law</td>
<td>8.68</td>
</tr>
<tr>
<td>1. Germany</td>
<td>8.76</td>
</tr>
<tr>
<td>2. Austria</td>
<td>8.76</td>
</tr>
<tr>
<td>3. Finland</td>
<td>8.80</td>
</tr>
<tr>
<td>4. Latvia</td>
<td>8.85</td>
</tr>
<tr>
<td>5. Italy</td>
<td>8.88</td>
</tr>
<tr>
<td><strong>9. FURTHER SUBSTANTIVE ISSUES II</strong></td>
<td></td>
</tr>
<tr>
<td>I. LIMITATION PERIODS</td>
<td></td>
</tr>
<tr>
<td>A. EU law</td>
<td>9.01</td>
</tr>
<tr>
<td>B. National law</td>
<td>9.01</td>
</tr>
<tr>
<td>1. United Kingdom</td>
<td>9.25</td>
</tr>
<tr>
<td>2. Germany</td>
<td>9.25</td>
</tr>
<tr>
<td>3. Austria</td>
<td>9.37</td>
</tr>
<tr>
<td>4. The Netherlands</td>
<td>9.48</td>
</tr>
<tr>
<td>5. Finland</td>
<td>9.53</td>
</tr>
<tr>
<td>6. Sweden</td>
<td>9.57</td>
</tr>
<tr>
<td>a. Swedish competition law</td>
<td>9.64</td>
</tr>
<tr>
<td>b. The Competition Damages Act</td>
<td>9.69</td>
</tr>
<tr>
<td>7. The Baltic States</td>
<td>9.74</td>
</tr>
<tr>
<td>8. France</td>
<td>9.77</td>
</tr>
<tr>
<td>a. The starting-point of the limitation period</td>
<td>9.81</td>
</tr>
<tr>
<td>b. Interruption of the limitation period</td>
<td>9.83</td>
</tr>
<tr>
<td>c. Suspension of the limitation period</td>
<td>9.88</td>
</tr>
<tr>
<td>9. Italy</td>
<td>9.92</td>
</tr>
<tr>
<td>10. Spain</td>
<td>9.93</td>
</tr>
<tr>
<td>11. Portugal</td>
<td>9.98</td>
</tr>
<tr>
<td><strong>II. INTEREST</strong></td>
<td></td>
</tr>
<tr>
<td>A. EU law</td>
<td>9.100</td>
</tr>
<tr>
<td><strong>X</strong></td>
<td></td>
</tr>
</tbody>
</table>
1. The period in respect of which interest is due 9.113
2. Outstanding issues 9.117
   a. Late Payment Directive 9.118
   b. Non-contractual liability of the Union 9.121
   c. Recovery of illegally-charged levies 9.123
B. National law 9.126
   1. Germany 9.126
   2. Austria 9.127
   3. Finland 9.129
   4. Lithuania 9.132

10. PROCEDURAL ISSUES: PROCEDURES FOR RECOURSE TO THE EXPERTISE OF PUBLIC AUTHORITIES BY THE NATIONAL COURTS

I. EU LAW 10.01
   A. Consultation of the Commission 10.01
   B. Consultation of an NCA 10.14

II. NATIONAL LAW: CONSULTATION OF THE NCA 10.17
   A. United Kingdom 10.18
   B. Germany 10.20
   C. The Netherlands 10.21
   D. Finland 10.22
   E. The Baltic States 10.24
   F. France 10.28
      1. Intervention of the FCA 10.28
      2. Intervention of the ministre de l'économie 10.33
   G. Italy 10.35
   H. Spain 10.39
   I. Portugal 10.40

11. COLLECTIVE ACTION

I. INTRODUCTION 11.01
   The rationale for collective action 11.08
   Terminology 11.14
   Opt-in and opt-out collective action 11.15

II. COLLECTIVE ACTION AT EU LEVEL 11.32
   A. Collective action as a matter of EU law 11.32
      Theoretical considerations: the connection between collective action and the enforcement of substantive rights 11.40
      Sectoral approaches 11.48
         a. Consumer protection 11.49
         b. Intellectual property rights 11.56
         c. Environmental liability 11.58
         d. Other 11.77
   B. EU policy developments 11.78
      1. The Green Paper 11.82
      2. The White Paper 11.85
      3. The draft Directive 11.89
      4. The Commission's joint information note 11.93
      5. The Commission's 2011 consultation paper 11.95
      7. The proposal and the Directive 11.111

III. COLLECTIVE ACTION IN THE MEMBER STATES 11.115
   A. United Kingdom 11.116
      1. Representative actions 11.119
      2. GLOs 11.124
      3. Section 47B of the Competition Act (prior to 1 October 2015) 11.127
      4. Reform of the collective action regime 11.135
         a. 2006 DTI consultation 11.136
b. 2007 OFT recommendations 11.139
c. 2012 BIS consultation and 2013 BIS response 11.141
d. The Consumer Rights Act 2015 11.152
5. The collective action and collective settlement regime in the CAT 11.154
   a. Authorisation of the class representative 11.155
   b. Eligibility of claims for collective proceedings 11.157
   c. Collective settlements 11.160
   d. Damages and costs 11.162
   e. Collective proceedings in practice 11.164
B. The Netherlands 11.174
   1. Article 3:305a of the Dutch Civil Code 11.175
   3. Bundled claims 11.187
C. France 11.189
   1. Article L. 622–1 Code de la consommation: actions in joint representation ('action en représentation conjointe') 11.189
   2. Article L. 623–1 Code de la consommation: class actions ('action de groupe') 11.194
D. Germany 11.201
E. Sweden 11.205
F. Italy 11.214
G. Spain 11.218
H. Portugal 11.223
IV. CLASS ACTIONS IN THE UNITED STATES 11.227
   A. Rule 23 of the Federal Rules of Civil Procedure 11.228
   B. The Class Action Fairness Act of 2005 11.239
V. ASSIGNMENT OF CLAIMS 11.244
   A. EU law 11.254
   B. National law 11.260
      1. Germany 11.261
      2. The Netherlands 11.268

12. JURISDICTIONAL ISSUES
I. THE GOVERNING LAW: REGULATION (EU) NO 1215/2012 12.04
II. VARIETY OF CHOICES OF COURT 12.08
III. THE APPLICATION OF REGULATION (EU) NO 1215/2012 TO PARTIES DOMICILED OUTSIDE THE EU 12.11
IV. GENERAL JURISDICTION: ARTICLE 4(1) 12.15
V. JURISDICTION AGREEMENTS: ARTICLE 25 12.17
Arbitration clauses 12.40
VI. SPECIAL JURISDICTION: ARTICLE 7(2) AND ARTICLE 8(1) 12.46
   A. Founding jurisdiction in tortious actions: Article 7(2) 12.51
      1. The application of the Bier/Shevill jurisprudence to competition-based litigation 12.54
      2. The English authorities on Article 7(2) 12.64
      3. Article 7(2) as a basis for torpedo litigation 12.69
   B. Consolidation of claims: Article 8(1) 12.74
      1. The English authorities on Article 8(1) 12.87
      2. The application of Article 8(1) by the Dutch courts 12.98
VII. LIS PENDENS 12.102
   A. Lis pendens I: Article 29 12.104
   B. Lis pendens II: Article 30 12.112
      1. Irreconcilability for the purposes of Article 30(3) 12.115
      2. Connected but not identical actions 12.118
   C. The application of the rules on lis pendens to parties domiciled outside the EU 12.122
   D. The application of the rules on lis pendens to concurrent litigation brought outside the EU 12.124
   E. The application of the rules on lis pendens by the national courts 12.129
      1. The English authorities on Article 30 12.129
13. THE APPLICABLE LAW

   I. THE GOVERNING LAW: THE 'ROME II' REGULATION 13.03
   II. THE GENERAL RULE: ARTICLE 4 13.06
   III. COMPETITION-BASED LITIGATION: ARTICLE 6(3) 13.08
      A. The lex fori approach: Article 6(3)(b) 13.11
         1. The functioning of Article 6(3)(b) 13.12
         2. US law 13.20
         3. The desirability of the lex fori approach 13.23
      B. The effects-based approach: Article 6(3)(a) 13.29
         1. Problems with the effects-based approach: Mosaikbetrachtung 13.35
         2. Mosaikbetrachtung as a concurrent matter of jurisdiction and applicable law 13.39

14. QUANTIFICATION OF ANTITRUST DAMAGES

By Frank Maier-Rigaud and Ulrich Schwalbe

   I. INTRODUCTION 14.01
   II. DAMAGE CAUSED BY CARTELS AND ABUSIVE CONDUCT 14.05
      A. Damage caused by cartels 14.10
         1. Types of damage caused by cartels 14.10
         2. Economic actors damaged by cartels 14.20
            a. Upstream effects 14.24
            b. Downstream effects 14.27
            c. Effects on producers of complements 14.33
            d. Summary of effects analysis 14.34
         3. Illustration 14.37
      B. Damage caused by abusive conduct 14.47
         1. Types of damage caused by exploitative and exclusionary conduct 14.48
         2. Economic actors damaged by exploitative and exclusionary conduct 14.51
   III. QUANTIFICATION OF DAMAGES 14.54
      A. Quantification of damages in cartel cases 14.55
         1. Introduction 14.57
         2. Time series analysis 14.61
         3. Cross-sectional analysis 14.77
         4. Difference-in-differences method 14.81
         5. Simulated comparator markets 14.86
         6. Cost-based and profitability-based approaches 14.88
      B. Quantification of damages in abusive conduct cases 14.93
         1. Damage caused by abusive behaviour and the counterfactual scenario 14.93
            a. Exploitative abuse 14.94
            b. Exclusionary abuse 14.97
         2. Illustration: quantification of damages in case of an exclusionary abuse 14.103
            a. Phase one 14.105
            b. Phase two 14.107
            c. Phase three 14.109
      C. Further aspects of damages quantification 14.115
         1. Apportionment of damages 14.115
         2. Compounding and discounting damages 14.119
         3. Estimation of after-effects 14.124
         4. Accuracy of statistical methods 14.126
         5. Remoteness and causality 14.129
   IV. CONCLUSIONS 14.134

Bibliography 461

Index 467