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Citation for published version (APA):
Lankhorst, M. (2010). *Increasing the requirements to show antitrust harm in modernised effects-based analysis: an assessment of the impact on the efficiency of enforcement of Art 81 EC*. Amsterdam Center for Law & Economics.

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Some practices that come within the scope of the antitrust laws, such as price fixing by competitors, are by their very nature harmful to the interests of consumers. Generally firms that engage in them will try to conceal these practices and the work of the antitrust authorities will consist of discovering them. In legal proceedings concerning such cases, the harmfulness of the practice itself is seldom an issue of debate. The scope of the antitrust laws also extends over practices whose implications for consumers are much less obvious and very much dependent on the specifics of the market in which they are used. A joint venture, for example, may be a means to pool expertise and capacity that allows a better product to be introduced to the market at an earlier point in time. Yet it may also be used by parent companies to facilitate collusion. For such practices to be condemned under the antitrust laws, evidence must be produced of their actual harmful effects on consumers. This thesis presents an evaluation of the level of legal certainty offered by the method of investigation that the European Commission adopts to examine these more ambiguous practices. This must be seen against the background of the recent modernisation of the European Commission's interpretation of Article 81 of the EC Treaty (which prohibits agreements in restraint of competition). It is argued that these reforms, in particular due to the way they have been put into practice, have put pressure on firms' ability to predict whether their agreement will be challenged and found to have produced negative effects. It is examined, also, how legal certainty may be improved. Specifically, the costs and benefits of requiring the Commission to articulate more clearly what harm to consumers it expects from the restraint it challenges and to present more empirical evidence in support of this claim are considered.

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ISBN: 978 90 3610 157 8

Increasing the Requirements to Show Antitrust Harm in Modernised Effects-Based Analysis Marco Lankhorst

ACLE

Increasing the Requirements to Show Antitrust Harm in Modernised Effects-Based Analysis:

An Assessment of the Impact on the Efficiency of Enforcement of Art 81 EC

Marco Lankhorst

Research Series

UNIVERSITEIT VAN AMSTERDAM
Amsterdam Center for Law & Economics

Increasing the Requirements to show Antitrust Harm in Modernised Effects-Based Analysis

ISBN 978 90 3610 157 8

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INCREASING THE REQUIREMENTS TO SHOW ANTITRUST HARM IN MODERNISED EFFECTS-BASED ANALYSIS:

AN ASSESSMENT OF THE IMPACT ON THE EFFICIENCY OF ENFORCEMENT OF ART 81 EC

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor

aan de Universiteit van Amsterdam

op gezag van de Rector Magnificus

prof. dr. D.C. van den Boom

ten overstaan van een door het college voor promoties ingestelde

commissie, in het openbaar te verdedigen in de Agnietenkapel der Universiteit

op donderdag 21 januari 2010, te 10.00 uur

door Marco Lankhorst

geboren te Amsterdam

Promotores:	Prof. Dr. A.W.A. Boot Prof. Dr. J.A. McCahery
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Faculteit	Economie en Bedrijfskunde

Pour Muriel,

dreamtigers sur le Paraná

ACKNOWLEDGMENTS

I would want to start by thanking my parents, who have taught me to trust my own judgment and the importance of persevering, and my wife Muriel and my children Saro and Morane, who have given me the energy I needed to see this through to the end.

I owe many thanks to my *promotor* Joe McCahery, particularly for helping me improve my writing and argumentation, and I must also thank my *promotor* Arnoud Boot. Finally, I am thankful to the members of the *promotie commissie*, who all made comments that allowed me to considerably improve my work.

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PART 1

SETTING THE STAGE

CHAPTER 1

Introduction

1.1 Subject matter

European antitrust theory and practice is in a constant state of flux. Over the past ten years in particular, there have been a great number of reforms and revisions in all major fields of European antitrust policy.[1] The first area of competition policy to be affected by this modernisation wave was the law on agreements that are restrictive of the competitive process but also have the potential to generate efficiencies[2] (which are assessed under the so-called effects-based standard of Art 81 EC).[3] The objective of these reforms was to increase the reliance on economic analysis in the assessment of restraints. Whilst these reforms have been used as a point of reference in subsequent

[1] With regard to enforcement procedures, see Regulation 1/2003 ([2003] OJ L1/1) – which relates to the implementation of Artt 81 and 82 EC – and Regulation 139/2004 ([2004] OJ L24/1) – which relates to merger policy. With respect to substantive issues, the reforms of the way effects-based analysis is carried out under Art 81 EC can be mentioned. See i.a. Regulation 2790/99 on vertical restraints ([1999] OJ L336/21); Regulation 2658/00 on specialisation agreements ([2000] OJ L304/3), as well as the Guidelines on vertical restraints ([2000] OJ C291/1) and the Guidelines on horizontal co-operation ([2001] OJ C3/2). The proper framework for assessing the behaviour of dominant firms is also under review. In this regard, see the 2005 discussion paper on Art 82, published on the Commission's website. In the sphere of hardcore cartels, the European Commission's (Commission) leniency policy has been reviewed several times (see the Notice on immunity from fines, [2006] OJ C298/17). Finally, as regards state aid, see the State Aid Action Plan of June 2005, published on the Commission's website.

[2] Not all restrictions of competition are harmful to society and not all restrictions are caught by Art 81 EC. Harm is evident in a limited number of restrictive practices, but most restrictions may equally well produce beneficial effects. Antitrust law prescribes different methods of investigation for these categories of restraint. In the former case, evidence that the defendant engaged in such a practice provides sufficient grounds to find an infringement. If we are dealing with a restriction that has both restrictive and efficient tendencies, more is required. Then, the actual impact of the restraint of competition must be demonstrated. This assessment is referred to as effects-based analysis. See Chapter 2, Section 2.2, for a more detailed discussion of the distinction between practices that are considered *per se* illegal and practices that are subjected to effects-based analysis.

[3] The Commission started its policy overhaul in the second half of the 1990s by reviewing its policy in the field of effects-based analysis, which resulted in a number of regulations (i.a. the block exemption regulation no. 2790/99 on vertical restraints, [1999] OJ L336/21) and guidelines (i.a. the guidelines on vertical restraints, [2000] OJ C291/1). In 2003 a regulation setting out new enforcement procedures was adopted (Regulation 1/2003, [2003] OJ L1/1). For a more detailed discussion, see Chapter 2, Section 2.4.

discussions on modernisation in other fields,[4] today, effects-based analysis under Art 81 EC is not at the centre of the academic debate on antitrust. This thesis revisits the field of effects-based analysis under Art 81 EC and examines what has come of this first round of reforms in practice.

Before the turn of the century, effects-based analysis under Art 81 EC commanded considerable attention, both from policymakers and academics. In this period firms that wanted to implement restrictive agreements were required to seek the European Commission's (Commission) approval. In a bid to limit the scope of member state intervention in antitrust, the Commission – effectively backed by the European Court of Justice (ECJ) – adopted a very wide notion of restrictiveness.[5] As a result, large numbers of notifications were made to the Commission.[6] For obvious reasons these excluded plainly harmful agreements. This system was criticised for relying on outdated economic concepts in the analysis of restraints, for imposing high compliance costs on firms, and for holding the Commission back in detecting and punishing hardcore infringements.[7] Modernisation of its substantive approach and abolishment of the notification procedure finally freed the Commission's hands to intensify enforcement in other fields of antitrust.

This thesis suggests that, a decade later, there are strong reasons to re-open the debate on the regulation of the more numerous group of restrictive agreements that are not harmful and unlawful *per se*, but require close scrutiny under the effects-based standard. Whilst the Commission's increased reliance on rigorous economic analysis has been underlined in official statements, guidelines, and notices, day-to-day practice in this field continues to show considerable traits of the old expansionist approach. This raises questions about legal certainty, that is, about firms ability' to accurately predict whether their agreement might be challenged and found to violate Art 81 EC. These concerns are further increased by the new procedural arrangements, which require firms to assess the legality of their agreement independently in the face of possible intervention, rather than in a process of consultation with the Commission.

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[4] See e.g. speech no. 05/537 of 23rd of September 2005 on Art 82 EC reform delivered by Commissioner Neelie Kroes (available at the Commission's website), see also Gual et. al (2005).
[5] In this sense, see e.g. Gerber (1998: 334) and the discussion below in Chapter 2, Section 2.3.
[6] Wils (2002: 104) mentions the number of 40.000 notifications in the first years of the application of Regulation 17.
[7] References are provided in the more detailed discussion of this matter below in Chapter 2, Section 2.3.

The main objective of this thesis is, therefore, to evaluate the level of legal certainty in European effects-based analysis as reflected in the Commission's post-modernisation practice and to examine whether enforcement of agreements with the potential to generate efficiencies can be made more efficient (without adversely affecting enforcement in other fields of antitrust). For this purpose, a rigorous framework of analysis is developed that relies on existing law and economic theory on the functioning and performance of the legal standards in the enforcement of laws. The effects-based standard is, thus, conceptualised as the dividing line between permissible and impermissible restrictions of competition that firms may discern by looking at case law, decision practice, and guidelines. Given uncertainty about the precise location of the legal standard, firms may end up signing socially harmful or unnecessarily cautious agreements. This means that to the extent that uncertainty can be reduced, there is scope for improving the efficiency of enforcement.

1.2 Structure of the argumentation

This argument is developed in three major steps. First, this introductory chapter is complemented in Chapter 2 with essential background information on Art 81 EC. This includes a detailed review of the 'old' debate on European effects-based analysis and a discussion of the way in which and the reasons why the method adopted in this study differs (considerably) from the approach taken in earlier contributions. In addition, Chapter 2 addresses important issues of scope. Parts 2 and 3 contain the core of the analysis. Part 2 (chapters 3-5) is concerned with the evaluation of the current situation in effects-based analysis, whilst measures to improve the performance of the effects-based standard are considered in Part 3 (chapters 6-8).

Part 2

First, Chapter 3 develops a conceptual model (or analytical framework) that enables us to evaluate current performance by describing (1) the variables influencing the calibration of the legal standard and (2) the effects thereof on the behaviour of firms. Next, Chapter 4 uses this conceptual model as the framework for the comparison of European effects-based analysis with its US counterpart, the *rule of reason*. Expressing the differences in the way both systems conceptualise and apply this legal standard, in terms of the incentives they produce for potential offenders, opens up a

first perspective on the state of effects-based analysis in EU antitrust. In particular, this exercise shows that European antitrust imposes fewer requirements on the Commission to show that an agreement produces harmful effects, and, thus, affords it relatively more freedom to intervene in market behaviour. It must be expected, therefore, that in Europe firms perceive relatively more risk of intervention when they consider including a restriction in their contract with a reduced potential to enhance market power and, thus, to produce antitrust harm.

Chapter 5 examines the effects on legal certainty of two structural breaks in policy. The first major change examined is the modernisation of the Commission's policy in the late 1990s. These reforms sought to replace an over-inclusive, rule-based approach with the requirement that a full scale economic investigation be made of the effects of individual agreements. It is argued that, for firms, assessing the width of the new space opened up by these reforms is complicated by three factors. First, predicting the impact of an agreement on the market is inherently more difficult than determining whether it contains clauses that are black or white-listed. Second, this should be seen against the background of developments in economics, which suggest that, over time, uncertainty has increased about the circumstances under which practices with the potential for harm will actually produce such effects. Third, and crucial, self-assessment is complicated by the fact that there is a paucity of detailed infringement decisions reflecting the new learning, whilst the many of the Commission's exemption and commitment decisions tend to reflect the old and expansive notion of restrictiveness.

The procedural reforms of 2003 provide the second structural break examined in this chapter. It is argued that the replacement of a broad-scope *ex ante* system of enforcement with a system of selective *ex post* control significantly increases the importance for firms of having a substantial body of precedents from which the limits of the prohibition contained in Art 81 EC can be deduced with reasonable measure of certainty. This is because the former system depended to a large extent on negotiation with the Commission in order to fine-tune agreements and remove concerns, whereas currently firms have to assess the legality of their contracts independently. Therefore, the risk of inefficient behaviour resulting from a low level of legal certainty is larger under the new system. This effect is reinforced by the removal of the immunity from fines that firms were granted upon notification.

Part 3

Having found considerable indications that legal certainty is under pressure, the final part of this thesis examines how European effects-based analysis can be improved. Like Part 2, it commences (in Chapter 6) by creating a framework for the analysis. Arguing that to increase legal certainty the Commission should be required to show more conclusive evidence of harmful effects, this chapter examines the precise effects of improving the level of accuracy in the investigation of restraints. These are argued to be different depending on how firms respond to uncertainty. Incentives for firms that are already prone to cross the line would be strengthened if the increase in the Commission's burden leads to a lower level of enforcement. If firms are over-deterred, however, less but more focused enforcement is precisely what is needed.

Chapter 7 describes in detail how the legal standard should be adjusted to make European effects-based analysis more focused and rigorous. The way to achieve this, it is argued, is for the Courts – and in their wake, defendants – to insist that the Commission presents an intelligible theory of the harm that it expects from a restraint and as much empirical evidence as needed to render this claim sufficiently plausible before the burden can shift to the defendant. This will force the Commission to concentrate enforcement efforts on those cases of which we are more certain that harm has actually occurred. At the same time, it serves to ensure potential offenders that the less obvious it is to them that the contract they intend to sign will harm consumers, the less likely it is that it will be challenged. The second half of this chapter examines the compatibility of these changes with the division of the burden of proof set out in the Court of First Instance's (CFI) ruling in the case of *Métropole*.[8] and arguments to the effect that European antitrust was intended to protect against

A final chapter concludes.

[8] *Métropole v. Commission*, [2001] ECR II-2459.

CHAPTER 2

Background, Method, and Scope

2.1 Introduction

This chapter provides essential background information on Art 81 EC and the method that is adopted in this thesis to study the performance of the effects-based standard. The discussion is used, also, to indicate what portions of the law on Art 81 EC are and are not addressed in this work. The chapter begins, in Section 2.2, by providing a first introduction to European competition policy, its role in achieving the general objections of the EC Treaty, and several important elements in the text of Art 81 EC. Next, in Section 2.3, we zoom in on the law and literature concerning Art 81(1) EC (the European *rule of reason* debate). The economic objectives of EC antitrust and the basic economic insights that, after modernisation, guide the analysis of restraints under Art 81 EC are addressed in Section 2.4. The chapter concludes, in Section 2.5, with an exposition of the approach adopted in this thesis to study the functioning of the legal standard employed in Art 81(1) EC.

2.2 A first introduction to Community competition policy

European competition policy cannot properly be appreciated if seen in isolation from the general objectives of the European Community. For this reason, the present section starts by briefly placing competition policy in the broader context of the Treaty and of the conditions that prevailed in Europe at the time it was adopted (Section 2.2.1). With a view to the comparison made in Chapter 4 of EU and US antitrust laws, particular attention is paid to the role of US thinking in the conception

of European antitrust policies. Next, we consider the text of Art 81 EC and zoom in on its most important elements (Section 2.2.2). The section concludes with a brief discussion of instances where policy concerns that are not primarily related to the objectives of antitrust play a role in justifying anti-competitive behaviour (Section 2.2.3).

2.2.1 Competition policy and general community objectives

The creation of European Community and the introduction of a European competition policy should be seen against the background of the situation of severe economic and political disarray in which Western Europe found itself in the immediate aftermath of the Second World War.[1] There had been massive destruction of lives and goods. There were severe shortages of basic goods and raw materials. Houses, production capacity, and infrastructure had been destroyed. In the financing of their reconstruction efforts, liberated nations, like occupied Germany, were considerably dependent on the Marshall Plan set up by the US.[2] This dependency increased as tensions with the East grew, following the communist take-over in Czechoslovakia (1948), the blockade of Berlin (1948-1949), the Soviet Union's development of an atomic bomb (1949), and Mao's victory in China (1949).[3] It was in an effort to regain control over their destiny – to reduce dependency on the US and to protect themselves against the threat emanating from the East – that political leaders started a number of pan European initiatives.[4] Thus, the first decade after the war was characterised by a drive towards close political and military cooperation in the form of a European Political Community (EPC) and a European Defence Community (EDC).[5]

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[1] See e.g. Judt (2007), Calvocoressi (1997), and Eichengreen (1995) for an impression of the conditions that prevailed.

[2] On the Marshall Plan see e.g. Killick (1997), Ellwood (1992), Hogan (1987), or Wexler (1983). See also Gerber (1998: 168), who states that '[i]n this cauldron of uncertainty and shifting political currents, the political role of the United States was often as important as its economic aid and not dissociable from it. The war had put the United States in a commanding political and economic position. Like it or not, European governments depended on US economic and military aid for several years, and thus European politicians had to take US reactions into account in a wide range of domestic decisions.

[3] See e.g. Judt (2007).

[4] Id. See also Bermann et al. (1993: 2). Other initiatives worth mentioning that were started in this period are the creation of the Benelux Customs Convention (1948), the OEEC (1948, which was renamed the OECD in 1960), the Treaty of Economic Social and Cultural Cooperation and Collective Self-Defence (1948, signed by France the UK and the Benelux countries), the Council of Europe (1949), and the NATO (1949).

[5] See e.g. Urwin (1995), Gerber (1998: 335, 342) and Bermann et al. (1993: 6).

The European Coal and Steel Community

An urgent matter that had to be addressed before an accord could be expected on these overarching structures concerned the production of coal and steel. All agreed that these sectors were vital for European economic recovery. But at the same time there were serious concerns and conflicting views about the structuring of these industries that had been dominated by Germany before the war. Whilst France sought guarantees against a revival of this industrial supremacy and the military power that it had supported, the US and the UK saw a rearmed Germany as an effective bulwark against Soviet expansionism.[6] The solution found was to subject the production of these materials to a purposely created supra national legal regime, the European Coal and Steel Community (ECSC), established in 1951.[7] It is worth considering the ECSC in some more detail, since its competition provisions were to have a considerable effect on the provisions in the EC Treaty that are the focus of attention in this thesis.[8]

Evidently, rules on competition that would put limits on the behaviour particularly of German producers were essential to secure the objectives of the ECSC. These rules were provided in Art 65 ECSC, containing a prohibition of agreements that restrict competition, and Art 66 ESCS, concerning merger control and the abuse of economic power. It is important to note that the prohibition of restrictive agreements in Art 65 ECSC was without precedent in European law at that time. To be sure, since the end of the nineteenth century, several European countries had acquired experience with laws regulating competition. As a rule, however, these laws did not oppose cooperation between competitors, but sought to prevent that cooperation would be used as an instrument of abuse.[9]

There is some controversy as to why Germany, whose industry was likely to be most affected by Art 65 ECSC, agreed to this new approach. To a certain extent, this may have been the result of US influence. The US Sherman Act of 1892, the principle US antitrust statute, relies on a prohibition system similar to that instituted by the

[6] See Judt (2007) and Calvocoressi (1997).

[7] The following countries were the original signatories to the ECSC Treaty signed in Paris on April 18th of 1951: France, Germany, Italy, The Netherlands, Belgium, and Luxemburg.

[8] The ECSC Treaty eventually expired on the 23rd of July of 2003, which means that the coal and steel sectors are no longer governed by a special regime and are subject to Artt 81 and 82 EC. The Commission has published a Communication regarding some of the consequences of this transition ([2002] OJ C152/5).

[9] See Gerber (1998) for a detailed discussion of the development of competition ideas and competition laws in pre-war Europe. It is true that in Nazi Germany cartelisation had been actively encouraged and made obligatory in certain sectors of industry (id, at 147). The same applies to Fascist Italy (in this regard, see Amato, 1997: 40). Gerber's investigation clearly shows these to be exceptions, however.

ECSC (and later by the EC Treaty). As suggested, in this period the US wielded considerable influence in Europe, as one of the occupying powers in Germany and through the Marshall Plan elsewhere. This influence is often taken to have extended over the process of drafting the various Community treaties.[10] A telling example is the fact that a US antitrust professor was actively involved in the process of drafting the ECSC competition provisions.[11] But there are indications, also, that German thinking about the regulation of competition itself had changed.[12] That is, that reflection upon a decade and a half of Nazi industrial policies had made German policymakers susceptible to the idea that stronger safeguards where necessary to protect the competitive process.

The EC Treaty and Community competition policy

Although the ECSC, with its elaborate supra national institutional structure,[13] was intended as a first step towards European political and military unity, the EPC and the EDC never came of the ground.[14] Without participation by the UK, the French feared that these communities would become to be dominated by Germany and eventually withdrew support.[15] With these avenues closed off, proponents of integration shifted their attention towards the economic sphere. Nonetheless, the plan to create a European Common Market, laid down in the so-called 'Spaak Report' of 1956,[16]

[10] See e.g. Wils (2002: 122), who refers *inter alia* to the *Mémoires* of Jean Monnet, the French politician who was one of the principle propagators of the European idea; O'Donoghue and Padilla (2006: 10); and Gerber (1998: 337, 340).

[11] See Gerber (1998: 340). A further indication for such influence is the fact that the US occupation authorities had agreed to relinquish their regulatory competence over the German iron and steel industry in the event the ECSC became a reality. The office of the US high Commissioner for Germany, where Robert Bowie, the antitrust law professor in question had been working, oversaw the preparations of this regulatory transition. See Gerber (1998: 338).

[12] Gerber (1998: 340) and O'Donoghue and Padilla (2006: 9).

[13] In its original form, the ESCS provided for a High Authority (an administrative body that could take binding decisions without prior Member State authorisation), a Special Council of Ministers (representing the participating governments and responsible for advising the High Authority and preparing and enacting legislation), a Court of Justice, (that could be called to evaluate the implementation of the treaty and secondary legislation, as well as decisions of the High Authority), and a Common Assembly (composed of members of the national parliaments and empowered to dismiss the High Authority). Initially, the ECSC and the European Economic Community had separate institutional structures, apart from the shared Court of Justice. On the 1st of July of 1967 a shared Council and Commission (the latter replacing the High Authority) were instituted.

[14] See Urwin (1995), and Bermann et al. (1993: 6).

[15] Id.

[16] See Urwin (1995), Bermann et al. (1993: 6), and Gerber (1998: 342). Early in 1955 the Benelux countries prepared a memorandum that called for the creation of a common market. At a meeting in Messina (Italy) in June of that same year, this plan was endorsed by the foreign ministers of France, Italy, and Germany and Paul-Henri Spaak of Belgium was asked to coordinate a series of conferences to develop a design and strategy for European integration. The results were laid down in the Spaak

which provided the blueprint for the EC Treaty adopted the next year,[17] had clear political overtones.[18]

The main idea was that close economic cooperation might eventually create sufficient common interest to create the conditions necessary to reach political unity. In any case, it would bind the countries of Western Europe together in a way that would once and for all remove their interests to wage war upon one and other. [19] Of course, it was also expected that economic integration would increase prosperity.[20] It must be realised that at the time the Western European market was highly segmented. Quota and tariff barriers were in place that effectively consigned firms to their home market and, thus, seriously limited their growth potential. Removal of these obstacles would benefit European consumers, since exposure to foreign competition would stimulate firms to increase and improve production.[21] Thus, the drafters of the EC Treaty sought to create the basic conditions for free competition on the Common Market by commanding the Member States to ensure that goods, services, labour and capital can move freely across national borders.[22]

Yet, competition carries within it the seeds of its own destruction. The benefits of integration would not be obtained if firms were left completely free to behave as they want on this newly created market; if, for instance, they would be able to replace the abolished tariffs and quota with private barriers to trade by forming cartels that would segment the Common Market along the lines of national borders, or if economically powerful firms were allowed to manipulate trade flows or to abuse their strength by limiting the commercial freedom of smaller firms. The provision made in Art 3(g) EC for the institution of a system ensuring that competition in the Common Market is not distorted appears to have been primarily motivated by these concerns.[23] This mixture

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report of 1956. Subsequently, an intergovernmental conference chaired by Spaak produced a draft text for a treaty.

[17] The Treaty establishing the European Economic Community (EEC) Treaty was signed in Rome on the 25th of March of 1957 by the same six nations mentioned in footnote 7. The EEC was renamed the European Community (EC) by the Treaty on European Union (EU), signed in Maastricht on the 7th of February of 1992. This reflects the extension of European cooperation to politically oriented terrains (justice and foreign policy) to which the Member States agreed in the EU Treaty.

[18] See Gerber (1998: 343).

[19] Id.

[20] Id.

[21] It was expected, also, that this would allow European firms to acquire sufficient size to compete effectively on world markets, notably against US firms. In this regard, see Gerber (1998: 348).

[22] In this sense, see Bermann (1993: 628).

[23] See Gerber (1998: 343).

of generic and integration-related objectives is one of the key distinguishing characteristics of European competition policy.[24]

The system to protect competition put in place by the EC Treaty consists of several components. First come two provisions directed at private undertakings, which form the core of European competition policy. Art 81 EC (then Art 85) prohibits firms from concluding anti-competitive agreements and Art 82 EC (then Art 86) prohibits dominant undertakings from abusing their market power. Next, Art 86 EC (then Art 90) subjects public undertakings and undertakings to which member states grant special or exclusive rights to the rules on competition, in as much as the application of those rules does not obstruct the performance of public tasks assigned to them. Finally, Artt 87 – 89 EC (then Artt 92 – 94) are directed at the Member States, since competition may also be distorted when governments grant certain firms subsidies that give them an advantage over other firms. The provisions directed at private undertakings form the core of European competition policy and are the focus of attention in this thesis. The following sections zoom in on Art 81 EC, discussing its text, its application in practice over the past 50 years, and related reforms of substantive and procedural law. Art 82 EC is discussed more briefly at the end of this chapter.

2.2.2 Art 81 EC, its components, and the scope of this work

Art 81 EC follows the basic structure of Art 65 ECSC. It starts with a broadly stated prohibition in its first limb.[25] Art 81(2) EC determines that all agreements that fall foul of the first paragraph are automatically void.[26] Art 81(3) EC provides for an exception to the prohibition.[27] The full text of the article reads as follows:

> 1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which

[24] In this regard, see Hildebrand (2002: 12), Whish (2003: 20), Amato (1997: 40), Bermann et al. (1998: 630), Gerber (1998: 347) and the contributions by Ehlermann and Hawk in Ehlermann and Atanasiu (1998). A more detailed discussion of the generic antitrust objectives underlying EC competition policy follows in Section 2.4.

[25] As compared to Art 65(1) ECSC, however, it is more detailed, providing a number of specific examples of the type of agreements that are prohibited. According to Gerber (1998: 344) this greater level of precision is the result of German influence on the drafting process of the EC Treaty.

[26] The counterpart of this provision in the ECSC Treaty is Art 65(4).

[27] A similar exception was provided by Art 65(2) ECSC.

have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

a) directly or indirectly fix purchase or selling prices or any other trading conditions;

b) limit or control production, markets, technical development, or investment;

c) share markets or sources of supply;

d) apply dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage;

e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

It follows that the application of Art 81 EC depends on the assessment of a whole range of issues. For the prohibition of Art 81(1) EC to apply (1) the entities concerned must be considered to be undertakings, (2) they must have concluded or behave according to some form of agreement, (3) which may have an impact on trade between Member States and (4) which affects competition. Moreover, it follows from the case law of the European Courts that (5) the restriction of competition must be appreciable if it is to be caught and that, even if all the conditions stated above are satisfied, a restriction may still fall outside the scope of Art 81(1) EC if (6) it is deemed necessary to bring about a legitimate commercial operation to which it is ancillary or (7) to achieve some regulatory objective of a public nature. This thesis

deals with only one aspect in this complex assessment; the question whether there is a prevention, restriction or distortion of competition. For the sake of completeness, the remaining aspects of Art 81(1) EC are briefly introduced.

The elements of the assessment under Art 81(1) EC that are not addressed

Art 81 EC (like Art 82) is addressed to undertakings. Neither the EC Treaty nor the case law of the European Courts offers a clear definition of the term undertaking.[28] The European Court of Justice (ECJ) tends to adopt a functionalist approach to the matter, looking at whether the entity concerned engages in *economic activity* and not at its formal status under national law.[29] Problems of interpretation arise mainly where organisations with a public character display market-like behaviour or, conversely, where private entities carry out tasks that appear to be of a public nature.[30] As a general matter it can be said the provision applies to all *entities*, mostly referred to as firms in this thesis,[31] that offer or purchase goods or services.[32] If, however, the activity is best characterised as the exercise of public authority or if its sole purpose is social in nature, the entity in question is not an undertaking and the competition provisions in the Treaty do not apply.[33]

Where Art 82 EC deals with unilateral behaviour, there must be some form of an agreement between two or more undertakings for Art 81 EC to apply. In this regard, the terms agreement, decisions by associations of undertakings, and concerted

[28] See e.g. Wesseling (2005: 65) who states that the 'application of the concept 'undertaking' in the sense of Articles 81 and 82 EC is unclear and in a state of development'.

[29] See notably *Höfner v. Macrotron* (Case C-41/90, [1991] ECR I-1979, at para 21): 'the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed.' Individuals may constitute an undertaking in the sense of Art 81 EC (see e.g. *Remia v. Commission*, Case 42/84, [1987] ECR 2545). The fact that an organisation lacks a profit-motive does not disqualify it as an undertaking (see e.g. *Van Landwyk v. Commission*, Cases 209/78, [1980] ECR 3125, at para. 88), nor that it does not have an economic purpose (see e.g. *Italy v. Sacchi*, Case 155/73, [1974] ECR 409, at paras. 13-14.

[30] For a detailed discussion, see e.g. Wesseling (2005: 62) and Whish (2003: 82).

[31] In those parts of this work where an economic analysis of antitrust enforcement is offered, the terms 'potential offender' and 'defendant' are also frequently used. This is done to distinguish between firms that consider signing and implementing an agreement with possible antitrust implications and that are not yet involved in formal antitrust proceedings, from firms whose agreement has been challenged.

[32] In this sense, see Wesseling (2005: 62).

[33] See *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, Case C-309/99, [2002] ECR I-1577, at para 57, where the ECJ stated that the competition rules in the EC Treaty 'do not apply to activity which, by its nature, its aim and rules to which it is subject does not belong to the sphere of economic activity […] or which is connected with the exercise of the powers of a public authority […]'. See also Wesseling (2005: 65) and the discussion below in Section 2.2.3 regarding the introduction of the *rule of reason* developed in free movement law into EC antitrust.

practices are used. All have been interpreted expansively by the Community Courts.[34] An agreement may be oral,[35] and it does not have to be adopted in a form that renders it legally enforceable.[36] Circulars sent by a manufacturer to its distributors may be treated as part of the general agreement that exists between them.[37] The constitution of a trade association may be seen either as an agreement or as a decision.[38] A recommendation made by such an organisation may qualify as a decision.[39] Concerted practices, in turn, are forms of cooperation (substituting competition) based on an understanding between firms that need not have been expressed in words and may be brought about by indirect contact.[40] Arguably, of the three, this is the most problematic category. This is because such subtly coordinated conduct may be very difficult to distinguish from independent behaviour that firms may display in an oligopoly setting.[41] For obvious reasons, cartel members will take great care to destroy or at least conceal all evidence that might directly point to their cooperation, such as meetings entered in an agenda, or correspondence. This may force the Commission to rely substantially on indirect evidence, for instance, of parallel behaviour on the market. It may be, however, that such behaviour is the result of each firms' individual and rational analysis of market conditions.[42]

The requirement that the agreement may affect trade between Member States is of a jurisdictional nature. It serves to mark the boundary between the areas respectively covered by Community law and the law of the Member States.[43] Historically the Courts and the Commission have construed this notion very broadly, thus expanding the scope of Community competition policy.[44] The case law holds that it must be

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[34] See e.g. Whish (2003: 91) for a detailed discussion.
[35] See e.g. *Tepea v. Commission*, Case 28/77, [1978] ECR 1391.
[36] See e.g. *ACF Chemiefarma v. Commission*, Case 41/69, [1970] ECR 661.
[37] See e.g. the Commission's decision in the case of *Volkswagen*, [2001] OJ L262/14.
[38] See *Nuovo CEGAM*, [1984] L99/29; and *ASPA*, [1970] OJ L148/9.
[39] See e.g. *Vereeniging van Cementhandelaren v. Commission*, Case 8/72, [1972] ECR 977.
[40] See *ICI v. Commission*, Cases 48/69 etc., [1972] ECR 619, at para. 64, where the ECJ stated that a concerted practice is 'a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'.
[41] See e.g. Whish (2003: 99).
[42] It follows that this is an issue that concerns the detection and prosecution of hard-core cartels. This type of behaviour, intentionally aligning prices or volume output, is not at issue in this thesis. As is explained directly below (see the text following footnote 52), we are concerned with forms of agreement that are more ambiguous in their effects and which, at least in theory, offer the potential for efficiencies.
[43] See *Hugin Kassaregister v. Commission*, Case 22/78, [1979] ECR 1869, at p. 1899.
[44] See Faull (1990), Wesseling (1997), and Gerber (1998: 353) who comments that 'The Court consistently expanded this concept of 'effect on trade', and it relied on integrationist goals in justifying

possible to foresee with a sufficient degree of probability that the agreement may have a direct or indirect influence on inter-state trade patterns.[45] This requirement is satisfied even if the agreement clearly leads to an increase in trade volumes,[46] which underscores that we are dealing with a technical issue here. The anti-competitive implications of an agreement are assessed under the heading discussed next: the restriction on competition.

The object or effect to restrict competition

The crucial substantive issue in Art 81(1) EC is the question whether an agreement amounts to a restriction on competition. In this regard, the provision distinguishes between agreements that have the 'object' or 'effect' to restrict competition. A good understanding of this distinction is important to be able to gauge the scope of this work, since we will be dealing exclusively with agreements that fall in the latter category.

The distinction turns on the degree to which it is obvious that the type of agreement at issue is incompatible with the integration imperative or with the more generic competition objectives of European law. Its inclusion in Art 81 EC reflects the fact that not every agreement that affects competition in the Common Market is necessarily to be avoided. That is, not every restriction of the competitive process, in the literal sense of the word, is a restriction of competition in the sense of the Treaty. The less obvious it is that an agreement is harmful, the more detail is required in its assessment. Two ECJ rulings adopted in the summer of 1966 are of relevance here. In the case of *Consten and Grundig* the Court indicated that if it is evident by looking at the agreement itself (its form or clauses) that its 'object' is to limit free competition in a way that frustrates the integration of the economies of Member States, there is no need to take account of the actual market impact of the agreement in order to bring it under the ban of Art 81(1) EC.[47] In its preliminary ruling in the case of *Société*

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this expansion. […] The effect was to increase the jurisdictional prerogatives of the Commission and to reduce those of the Member States.' Wilks and McGowan (1996: 238) make the same argument. Whish (2003: 137), however, interprets the ECJ's ruling in the case of *Bagnasco v. BNP* (Case 215/96, [1999] ECR I-135, at paras. 50-53) and a recent Commission decision as signs of contraction. He notes that now that most Member States have actively enforced domestic competition laws modelled upon Art 81 and 82 EC there is less need for the Community institutions to assert jurisdiction on such a broad basis (and less scope, also, given the principle of subsidiarity (Art 5 EC).

[45] See *Société Technique Minière v. Maschinenbau Ulm*, Case 56/65, [1966] ECR 235, at p. 249.

[46] See *Consten and Grundig v. Commission*, Case 56 and 58/64, [1966] ECR 299, at p. 341.

[47] Id.

Technique Minière the Court elaborated on the type of assessment required if the agreement at issue is not evidently harmful in this sense.[48] The relevant indicators that are mentioned in this decision suggest that the investigation of the 'effects' of the agreement depend more on a broad economic appraisal of its impact on competition than on the analysis of its legal form.[49] The facts of the former case can serve to illustrate the reasons behind this differentiation.

Grundig, a German producer of consumer electronics, had appointed Consten to be its sole distributor in France. As part of this agreement Grundig promised to keep its other resellers from exporting to Consten's territory. To further protect its territory, Consten registered a trademark (GINT) under French law. In 1961, when French trade barriers were lowered, the French firm UNEF started buying GINT products from German wholesalers and selling them in France. Consten and Grundig brought a case against UNEF before a French court for trademark infringement. UNEF, in turn, requested the Commission to declare the agreement between Consten and Grundig to be in breach of Art 81 EC, which it did.

Before the ECJ, Consten and Grundig argued that their agreement had to be subjected to a wide-angled investigation of the economic effects of the agreement, which would show that it in fact served to invigorate competition with other producers of the same kind of product in France. The ECJ brushed this argument aside. It was sufficient for the Commission to show that the agreement was intended to prevent other resellers from importing Grundig products in France and, thus, acted as an impediment to the integration of the economies of these two Member States. The same method of analysis, focused almost exclusively on the agreement itself, has been

[48] Supra, footnote, 45.

[49] Id., at p. 249, the Court stated that where an analysis of the clauses of the agreement 'does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is […] necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent.' On the next page it added the following: 'The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute. […] Therefore, in order to decide whether an agreement granting an exclusive right of sale is to be considered prohibited […] it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionnaire on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation.'

used to assess other categories of agreements that are evidently harmful to European consumers, such as price fixing and market sharing.[50]

But let us now consider the implications of exclusive dealing in the event that the restriction does not directly touch on cross border trade. A manufacturer could, for example, award an exclusive territory in a portion of the member state from where it operates[51] and allow somewhat more scope for the independent actions of other resellers.[52] In that case, it is decidedly less obvious that the agreement should be caught. An exclusivity clause of this kind does limit the commercial freedom of the supplier and, in that sense, it is restrictive of the competitive process. Yet, at the same time, such restrictions on competition between resellers of the same brand of products (intra-brand competition) may have a beneficial invigorating effect on competition with other brands (inter-brand competition). This is because they can play a crucial role in securing the distributor's willingness to invest in advertisement and in improving the quality of the product by offering a high level of pre- and after-sales services. Without protection against discounters the distributor risks loosing money on such efforts.[53] Whether, indeed, the effects on inter-brand competition materialise and outweigh the effect on intra-brand competition depends on whether the supplier faces sufficient competition by other producers of the same or similar goods. Evidently, this question is not answered by examining only the terms or the nature of the agreement. A broader investigation is required that includes the market context in which the restraint operates. This is what is generally referred to in European antitrust as effects-based analysis (as opposed to object-based analysis).

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[50] See e.g. *ACF Chemiefarma* (supra, footnote 36); *Cementhandelaren* (supra, footnote 39); *Suiker Unie v. Commission*, Cases 40/73 etc., [1975] ECR 1663; and *Polypropylene*, Cases C-51/92 etc, [1999] ECR I-4235.

[51] The requirement that the agreement – as opposed to the restriction – must affect interstate traffic (see the text accompanying footnote 43) might then be satisfied if this producer competes on its home market with a manufacturer shipping from another Member State.

[52] In *Consten and Grundig* (supra, footnote 46) Grundig undertook to supply only Consten on the French market and to prevent similar national distributors in other Member States from shipping goods to France. Consten, in turn, agreed not to re-export any GINT products to other Member States where Grundig had installed a distributor. Such a sequence of obligations tightly seals the distribution network along national lines and prevents any parallel trading in the product at issue that might contribute to driving its price down. A less restrictive alternative that would allow for some arbitration would have been for Grundig to undertake the obligation not to sell to anyone else to resell its product in France.

[53] This was, in fact, exactly the argument that Consten and Grundig (supra, footnote 46) presented in support of their agreement.

The investigation of restrictions, countervailing benefits and ancillary restraints

European antitrust relies on a series of tests to determine whether an agreement that restricts the competitive process – but which does not pose an unmistakable threat to free competition on the Common Market – may escape the ban of Art 81(1) EC. Two of these are predominantly economic in nature and form the core of effects-based analysis. First there is the question whether the restrictions on competition contained in the agreement somehow create the risk or contribute to the risk that one (or more) of the contracting parties becomes insufficiently constrained by the forces of competition. This investigation is carried out under the scope of Art 81(1) EC. Art 81(3) EC provides an additional way out to agreements that are found restrictive in this sense. If the agreement offers material economic benefits to European consumers that outweigh the negative effects of the restriction – if, in terms of our example, the positive effects on inter-brand competition of the improvements in quality are deemed more important than the effect of the exclusivity on intra-brand competition – the agreement will be cleared. Much of the investigation in this thesis will centre on the proper boundary line between these two economic tests, to which Sections 2.3 and 2.4 will provide an introduction.

A third test is of a predominantly legal nature. It involves the question whether the challenged restriction is directly related, indispensable, and proportionate to the implementation of a larger operation that pursues legitimate objectives.[54] If so, the restriction, like the general agreement, is not caught by Art 81(1) EC. This so-called ancillary restraints doctrine applies exclusively to restrictions that are needed to bring about the general agreement of which they are part, which inevitably implies a relatively abstract investigation. The CFI has expressly indicated that it does not provide scope for clearing restrictions that, in view of the competitive situation in the relative market, can be said to be necessary for the commercial success of such an operation.[55] Given our focus on the examination of restrictions on the basis of economic insights, this doctrine will not feature prominently in this work.[56] The same applies to instances where policy concerns unrelated to the objectives of antitrust play

[54] See in particular the CFI's ruling in the case of *Métropole Télévision v. Commission*, Case T-112/99, [2001] ECR II-2449, at para. 104 a.f.
[55] Id., at para. 109.
[56] A number of important earlier rulings concerning ancillary restraints will be discussed in Section 2.3. This is because before *Métropole* (supra, footnote 54) there was not necessarily a clear distinction between a legal test applied to ancillary restraints and a more economic test applied under Art 81(1) EC to restrictions that did not qualify as such.

a role in justifying anti-competitive behaviour. Here, too, economic insights do not take centre stage in the assessment. The following discussion of these matters is therefore no more than a brief and incomplete introduction.

2.2.3 Art 81 EC and non-competition related objectives

Other Community objectives than those directly concerned with competition policy have been used as a point of reference in the analysis under Art 81(3) EC with some frequency.[57] This includes objectives relating to industrial policies,[58] employment policies,[59] and environmental policies.[60] As a general matter, however, it can be said that in the context of this provision such concerns will not override the objectives of competition policy but run in parallel with them.[61] Yet, recent case law shows that restrictive agreements between undertakings that are reasonably necessary to achieve such objectives may fall outside scope of Art 81(1) EC. There is a basic resemblance between this case law and what is known as the doctrine of inherent restrictions. As will be explained in more detail in Section 2.3, this doctrine holds that restrictions of competition that are objectively necessary to come to an otherwise acceptable or even pro-competitive agreement are not caught by Art 81(1) EC. [62] Traditionally, this type of reasoning was applied to restrictions necessary in relation to some form of commercial transaction.

A first example of the application of the inherent restrictions doctrine to agreements by which objectives of a regulatory or public policy nature are pursued is provided by the case of *Drijvende Bokken*.[63] This case involved a collective agreement by workers and employers to set up a pension fund. The Court interpreted this to be an agreement between undertakings capable of restricting competition. It

[57] In this respect, it should be noted that a number of provisions in the Treaty (such as Artt 6, 153(2), and 157(3)) require that specific objectives are taken into consideration in the formulation and implementation of Community policies and initiatives in other fields.
[58] See e.g. the Commission's decisions in *BPLC/ICI*, [1984] OJ L212/1, at para. 37, and *Bayer/BPLC*, [1988] OJ L150/35, at para. 27.
[59] See e.g. *Metro SB-Grossmärkte v. Commission*, Case 26/76, [1977] ECR 1875, and *Remia* (supra, footnote 29) at para.42.
[60] See e.g. the Commission's decision in *CEDED*, [2000] OJ L187/47, at paras. 30-37.
[61] See *Matra Hachette*, Case T-17/93, [1994] ECR II-595, at para 139, *Metro* (supra, footnote 59) at para. 43, and the Commission's Notice on the application of Art 81(3) EC, [2004] OJ C101/97, at para. 42. For a detailed discussion, see Monti (2002: 1069).
[62] Important cases in this regard are *Gøttrup-Klim v. Dansk Landbrugs Grovvareselskab*, Case-250/92, [1994] ECR I-5641, and *Oude Luttikhuis v. Coberco*, Case C-339/93, [1995] ECR I-4515.
[63] Case C-219/97, [1999] ECR I-6121. For a more detailed discussion see Wesseling (2005: 68). Other relevant cases are *Albany Investments v. Bedrijfspensioenfonds*, Case C-67/96, [1999] ECR I-5751, and *Brentjens*, Cases 115-117/97, [1999] ECR I-6025.

also noted, however, that in a case as this account had to be taken of other the objectives of Community law and, in particular, those relating to social policies and employment. These would be seriously undermined if the outcome of collective negotiations were subject to Art 81(1) EC. Such agreements were therefore held to fall outside the scope of this provision. The ECJ's went considerably further in its *Wouters* ruling, when it gave overriding importance to national rather than Community policy objectives.[64]

This case involved a rule promulgated by the national bar association of the Netherlands, which was vested by a national law with the authority to regulate the legal profession. The rule in question prohibited lawyers from entering into partnerships with accountants and was aimed at protecting the quality of legal services rendered to consumers by preserving the independence and professional secrecy of legal service providers. It was feared that these important principles might be compromised if lawyers belonged to an organisation which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon. Mr Wouters, who wished to practise as a lawyer in a firm of accountants, challenged the validity of this rule before a national court. The national court of appeals requested the ECJ to give a preliminary ruling on a number of questions relating to the compatibility of the regulation with European antitrust law. In its analysis of these questions the ECJ relied to a considerable extent on notions developed in the law on free movement, which will have to be introduced here.[65]

Art 28 EC prohibits all quantitative restrictions of trade in goods between Member States, and measures having equivalent effect. The concept of 'measures having equivalent effect' has been construed broadly by the ECJ. It includes both measures that explicitly distinguish between foreign and national goods[66] and measures that apply indistinctly.[67] Indistinctly applied measures are, for example, regulations on food safety standards. These do not explicitly distinguish between foreign and

[64] Supra, footnote 33. For more detailed discussions on this ruling and the convergence between competition rules and free movement rules, see Monti (2002), O'Loughlin (2003), Wesseling (2005), Van de Gronden (2005), and Whish (2003: 120).
[65] For a detailed discussion, see e.g. Bermann et al. (1998).
[66] *Procureur du Roi v. Dassonville*, Case 8/71, [1974] ECR 837.
[67] *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein*, Case 120/78, [1979] ECR 649.

national goods, but could have this effect.[68] Art 28 EC therefore catches all rules enacted by member states which are may hinder intra-community trade.[69] Art 30 EC provides an exception to this rule, listing a number of public policy objectives that can justify such restrictions. Amongst these are public morality, public security, and the protection of health and life of humans. The exception provided by Art 30 is interpreted narrowly in the case law.[70] In particular, the list of legitimate concerns must be seen as limitative.[71]

The broad interpretation of Art 28 EC and the narrow view taken of the exception provided by Art 30 could lead to unsatisfactory results for indistinctly applied measures. Differently so than openly discriminating measures, which almost always have a protectionist aim, such measures may well serve to protect reasonable concerns of public policy. Amongst these are many that are not covered by the explicit justifications listed in Art 30 EC. In the case of *Cassis de Dijon* the ECJ broadened the possibilities to justify not explicitly discriminating government measures.[72] More specifically, it indicated that obstacles to trade resulting from disparities between national laws relating to the marketing of products could take preference over the rules on free movement in so far as those provisions are necessary in order to satisfy mandatory requirements relating to the defence of the consumer.[73]

The acceptance of indistinct measures in restraint of inter-Member State trade that can be said to be reasonably necessary to protect state interests not explicitly listed in the Treaty is often referred to as the *rule of reason* in European law. This approach has also been applied in relation to the other freedoms,[74] including, in *Reisebüro*

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[68] This was the case for example with the German 'Reinheitsgebot', at issue in *Commission v. Germany*, Case 178/84, [1987] ECR 1227, which systematically excluded beer from the German market from countries that allowed more than a limited number of specific ingredients for beer.

[69] See e.g. *France v. Jacques Pistre et al*, Cases C321 and 324/94, [1997] ECR I-2360.

[70] See *Bauhuis v. The Netherlands*, Case 46/76, [1977] ECR 5; *Tedeschi v. Denkavit*, Case 5/77, [1977] ECR 1555; and *The Queen v. Ministry of Agriculture, Fishing and Food, ex parte H. Lomas*, Case C-5/94, [1996] ECR I-2604.

[71] *Commission v Ireland*, Case 113/80, [1981] ECR 1625.

[72] Supra, footnote 67.

[73] Id., at para. 9. The term 'mandatory requirement' is a somewhat awkward translation of the French 'exigences impératives', which has later also been translated as 'imperative state interests'. Later cases confirmed this approach: see e.g. *France v. Rémy Schmit*, Case C-240/95, [1996] ECR I-3179 (again consumer protection); *Industrie Diensten Groep v. Beele Handelsmaatschappij*, Case 6/81, [1982] ECR 707 (fair business practices); *Abbink*, Case 134/83, [1984] ECR 4097 (efficacy of fiscal checks); and *Aher Waggon v Germany*, Case C-389/96, [1998] ECR I-4483 (environmental protection).

[74] See e.g *Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media*, Case C-288/89, [1991] ECR I-4007 (in relation to services), *Commission v. Netherlands*, Case C-353/89, [1991] ECR I-4069 (idem), *Säger v. Dennemeyer*, Case C-76/90, [1991] ECR I-4221 (idem), *Bachmann v. Belgium*, Case C-204/90, [1992] ECR I-249 (in relation to free movement of workers),

Broede, to the provision of legal services.[75] Moreover, in a number of rulings involving obstacles to free movement in the form of sports regulations issued by private organisations, it has been accepted that, like states, private parties may invoke the *rule of reason*.[76] That is, their regulations will not be held to infringe the rules on free movement where they are inherent in the proper functioning of the activity at issue. This brings us back to the case of *Wouters*.[77]

The ECJ started its assessment of the regulation prohibiting partnerships between lawyers and accountants by indicating that it appeared to have an adverse effect on competition.[78] The prohibition of a partnership between lawyers and accountants prevents the introduction in the market of a bundle of services from which clients could benefit substantially. Contrary to what we might expect, however, the Court did not go on to suggest that the agreement would therefore have to be examined under the scope of Art 81(3) EC. It extended the assessment under the first paragraph by stating the general principle that not every agreement between undertakings which restricts the freedom of action of the parties necessarily falls within the prohibition laid down in Art 81(1) EC.[79] For the purposes of application of that provision, it continued, account has to be taken of the purpose of the agreement and the overall context in which it produces its effects.[80] Having reviewed the reasons advanced by the bar organisation for adopting this rule, and referring to the decision in *Reisebüro Broede*,[81] the ECJ indicated that the regulation at issue was not caught by Art 81(1) EC as it could reasonably be considered necessary in order to ensure the proper practice of the legal profession. In so doing the Court appears to have integrated the *rule of reason* known from the law on free movement in European antitrust law.[82] As we will see in the next section, however, this *rule of reason* should be sharply distinguished from the sort of *rule of reason* that European competition lawyers are

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Commission v. Belgium, Case C-300/90, [1992] ECR I-305 (idem), and *Gebhard v. Consiglio dell Ordine degli Avvocati e Procuratori di Milano*, Case C-55/94, [1995] ECR I-4165 (with regard to free movement rules in general), and *Alpine Investments v. Minister van Financiën*, Case C-384/93, [1995] ECR I-1141 (idem).

[75] Case C-3/95, [1996] ECR I-6511.

[76] See *Union Royale v. Bosman*, Case C-415/93, [1995] ECR I-4921, *Deliège*, Cases C-51/96 and C-191/97, [2000] ECR I-2549, *Lethonen*, Case C-176/96, [2000] ECR I-2681.

[77] Supra, footnote 33.

[78] Id., at paras. 86-94. In paras. 95 and 96 it also indicated that the agreement appeared to affect trade between Member States.

[79] See footnote 62 and accompanying text.

[80] Compare the ECJ's considerations in *Société Technique Minière*, cited above in footnote 49.

[81] Supra, footnote 75.

[82] In this sense, see Monti (2002: 1088), O'Loughlin (2003), and Van de Gronden (2005: 84).

used to discuss and which concerns the dividing line between the economic tests of Art 81(1) and (3) EC.

2.3 The dividing line between Art 81(1) and (3) EC

The line of demarcation between the analyses carried out under the scope of the first and the third paragraph of Art 81 EC has long been one of the primary controversies in European antitrust. The origin of the debate on this matter can be traced back to a combination of (1) the institutional set-up chosen in 1962 for the enforcement of Art 81 EC and (2) the substantive approach adopted to the analysis under Art 81(1) EC by the Commission in particular. The present section starts by considering and explaining these early choices (Section 2.3.1). Next (in Section 2.3.2), we discuss both the academic debate on this matter, which broke loose right at the start of EC antitrust enforcement, and the string of ECJ case law that contributed to keeping it alive over an extended period of time. This allows us to identify with precision the question of law that will be at issue in this thesis. Finally (in Section 2.3.3), we consider a number of fundamental differences in the environment in which the European competition system currently functions *vis-à-vis* the circumstances that prevailed at the start of the European project and which determined the early choices.

2.3.1 Regulation 17/62 and freedom of trade

It is important, when discussing the enforcement of EC antitrust policy, to note that the EC Treaty does not contain provisions that are specific as to the way the antitrust provisions are to be enforced. Artt 81 and 82 EC are silent on the matter.[83] There is only Art 83 EC, which confers on the EC Council the duty and power to adopt regulations or directives to give effect to the principles stated in these provisions. This open framework was the result of the inability of the founding states to reach agreement on the method of enforcement within the brief period of time in which the Treaty was drafted.[84] The first five years that followed the entry into force of the

[83] As regards Art 81 EC, there is a difference with the corresponding provision in the ECSC. Art 65(4) ECSC specified that the High Authority had sole jurisdiction to determine whether agreements were compatible with that provision.

[84] In this regard, see Wils (2002: 102), who notes that France favoured a system of 'exception légale' under which Art 81(1) and (3) EC would both be directly applicable, whereas Germany preferred a system that would require firms to seek authorisation for restrictive agreements. Below, the latter option and its implications are discussed in more detail. See also Gerber (1998: 346 a.f.) as to the effects of competing visions of competition law in the different Member States.

Treaty in 1958 the Commission's Directorate General IV (Competition) devoted much of its attention to the process of producing such implementing legislation. The process involved extensive and sometimes difficult negotiations with Member States and the different Community institutions.[85] The result came in 1962 with the adoption by the Council of Regulation 17/62.[86] Before that, apart form some activity by certain national authorities, the antitrust provisions in the Treaty remained largely inoperative.[87]

The principle objective that the Commission sought to achieve by means of Regulation 17/62 was to turn antitrust policy into an effective instrument for integrating the economies of the member states. There were a number of obstacles to be overcome.[88] Recall that a prohibition of restrictive agreements was without precedent in pre-war Europe. Certain member states had even encouraged or obliged firms to cartelise. The precise meaning and status of these provisions still had to be negotiated, therefore. In this regard, opinions differed considerably across member states. Some viewed them as law and others merely as guidelines for the Commission's decision making in general. Decentralised policymaking would therefore have involved the risk that the antitrust provisions would be significantly shaped by national concepts and preferences and might, thus, be subject to protectionist influences. The difficulties were not limited to the development and application of the antitrust provisions by member state organs, however. Certainty would have to be provided to firms about the implications of the rules for the legality of their agreements. Moreover, given the more permissive way industries were regulated before, firms could not be trusted to respect the new limits imposed on their ways to make profit.

To deal with these issues, Regulation 17/62 centralised the development and application of antitrust policy in the hands of the Commission and urged firms to present restrictive agreements to the Commission for scrutiny and approval. This was made possibly by distinguishing between the way in which Art 81(1) and (3) EC would be applied. Art 1 of the regulation provided that Art 81(1) EC would have

[85] See Gerber (1998: 349).
[86] Regulation 17/62, [1962] JO 13/204.
[87] See e.g. Holley (1993: 670). On pre-1962 enforcement activities by Member State authorities, see Wilks and McGowan (1996: 231) and Gerber (1998: 349).
[88] In this regard, see Forrester and Norall (1984: 18), Gerber (1998: 347), and Wils (2002: 102).

direct effect.[89] This means that the prohibition (and its effects in terms of Art 81(2) EC) applied directly to agreements implemented by firms active on the Common market. This part of the provision could therefore be invoked in proceedings before a national court or by member state competition authorities. Art 81(3) EC was subjected to a very different regime. Art 9(1) made the application of this exception dependent on authorisation. The combined effect was that agreements which fell under the scope of the prohibition were invalid unless they had been notified and expressly exempted. Crucially, the power to grant an exemption was vested exclusively in the Commission. This effectively disqualified national courts and competition authorities as efficient *fora* to resolve suits based on EC competition law.[90] The scope for member state involvement in European antitrust was further reduced by Art 9(3), which determined that national authorities would have to stop their enforcement activities related to conduct that was made the object of an investigation by the Commission.[91] Art 4(1) made exemption contingent on notification of the agreement to the Commission.[92] It was sought to encourage firms to notify as early as possibly by determining, in Art 6(1), that exemption decisions could not take effect at a date earlier than the date of notification and, in Art 15(5), that no fines would be imposed relating to conduct engaged in after notification.

The extent to which the Commission's monopoly on the application of Art 81(3) EC would allow it to control developments depended, of course, on the volume of cases in which this stage of the investigation would be reached. Consequently, the Commission adopted a very wide and undiscriminating notion of restrictiveness in the analysis under Art 81(1) EC, leaving more serious economic analysis for the assessment under Art 81(3) EC. Early evidence of its approach came during the proceedings leading up to the ECJ's preliminary ruling in the case of *Société Technique Minière*, when it observed that this provision catches any agreement

[89] It stated that for an agreement to be prohibited by Art 81(1) EC 'no prior decision to that effect' was required. See also *BRT v. SABAM*, Case 127/73, [1974] ECR 62, at para. 16. In this sense the EC went considerably further than the ECSC did. Art 65 ECSC did not have direct effect. In this regard, see *Banks v. British Coal Corporation*, Case C-128/92, [1994] ECR I-1209.

[90] As they could examine justifications based on Art 81(3) EC, proceedings would have to be stayed until such time that the Commission would have decided whether to grant an exemption. This meant that the route of filing a complaint with the Commission was by far preferable for those harmed by restrictive arrangements.

[91] The Commission's autonomy was limited only by the institution of an advisory committee (Art 10(3) of the regulation) that reflected member state views.

[92] There was, however, no obligation to notify restrictive agreements. In this regard, see *MDF v. Commission*, Cases 100/80 etc., [1983] ECR 1825, at p. 1902.

whereby the freedom of action of one or more of the contracting parties is limited and the position of a third party is affected.[93] In its argument to the ECJ in the case of *Consten and Grundig* the Commission added that the interference with the position of third parties had to be more than theoretical.[94] In practice, however, it would very easily consider this requirement fulfilled.[95]

The case of *Davidson Rubber* provides a good example of the way in which the Commission applied Art 81 EC.[96] Davidson had developed a process for making arm rests for cars that had been successfully launched in the US. In Europe Davidson had granted exclusive manufacturing licenses to three firms. The Commission considered that the licenses restricted competition in the sense of Art 81(1) EC, since they prevented Davidson from licensing to any other firms established in the three territories (France, Germany-Belgium-Luxembourg, and Italy). It went on, however, to exempt the agreement. It considered that the licensees, whose sales were not restricted to their territory, had come to supply a considerable part of the arm rests for cars in the Common Market and that this important process would not have been introduced there without the protection offered by manufacturing exclusivity. It follows from the Commission's own analysis in this case that the restriction found under Art 81(1) EC was more of a hypothetical nature.[97]

The expansive interpretation by the ECJ of the requirement in Art 81(1) EC that an agreement must affect trade between member states had the same effect of increasing the jurisdictional prerogatives of the Commission and reducing those of the Member States.[98] In the next section we discuss the impact of this system and the reactions it provoked.

[93] Supra, footnote 45, at p. 235.
[94] Supra, footnote 46, at p. 326.
[95] See Forrester and Norall (1984: 23) and Waelbroeck (1987: 697) and more generally on this matter Korah (1981), Schechter (1982), Korah (1986), Venit (1986), and Hawk (1995).
[96] [1972] JO L143/93. Other early examples are the decisions in *Blondel* ([1965] JO L2194/65) and *Hummel* ([1965] JO L2581/65. In Chapter 4, more recent examples of this approach will be discussed in detail.
[97] In the same sense, see Korah (1986: 94) and Siragusa (1998: 653).
[98] See footnotes 43-46 and the accompanying text.

2.3.2 The *rule of reason* debate in EC antitrust

The impact of the notification system

The immediate effects of the introduction of Regulation 17/62 and the use of a wide notion of restrictiveness are well known. The number of agreements notified to the Commission soon exceeded its capacity to close every file by means of a formal decision.[99] The vast majority of notifications concerned exclusive dealing arrangements.[100] Over the years that followed a number of measures were taken to avoid total system failure. In 1965 the Council gave the Commission the power to exempt whole categories of agreements by means of regulation rather than individual decisions.[101] Two years later the Commission issued the first block exemption regulation on distribution agreements,[102] which was later to be followed by a number of other block exemptions for specific types of agreements.[103] The Commission also developed the practice of doing away with cases by means of 'comfort letters'. These were non-formal decisions reflecting either the view that the agreement did not infringe Art 81(1), or that the conditions of Art 81(3) seemed to be satisfied, and that the Commission therefore intended to close file. Such a comfort letter was issued if the information contained in the notification gave the Commission little cause to conduct extensive investigations.[104]

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[99] Holley (1993: 684) and Wils (2002: 104) report that the Commission received approximately 40.000 notifications during the first couple of years. Ehlermann (2000: 541) refers to some 34.500 notifications.

[100] According to Holley (1993: 684) and Korah (1997: 194) about 30.000 of these notifications involved exclusive dealing arrangements.

[101] Regulation 19/65, [1965] OJ 533. These broad powers to legislate without Council approval are unique in EC law.

[102] Regulation 67/67, [1967] OJ 849/67. This regulation settled the bulk – over 25.000 – of the cases referred to in footnote 100. See Holley (1993: 684).

[103] See Regulation 3604/82, [1982] OJ L376/33 (specialisation); Regulation 1983/83, [1983] OJ L173/1 (exclusive distribution); Regulation 1984/83, [1983] OJ L173/5 (exclusive supply); Regulation 2349/84, [1984] OJ L219/15 (patent licensing); Regulation 418/85, [1985] OJ L53/5 (research and development); and Regulation 4087/88, [1988] OJ L359/46 (franchising). During this period the Commission also issued a number of notices intended to provide more legal certainty. These covered areas such as patent licensing, agency, and cooperation agreements. All of these regulations and notices have since been replaced. The current generations of block exemption regulations and notices are discussed below in Section 2.4.3.

[104] Two other factors that have helped the notification system function can be mentioned. The first concerns increases in the Commission's work force, which grew from around 80 in 1962, to 110 in 1984, and 411 in 1993; see Wilks and McGowan (1996: 237) and Forrester and Norall (1984: 19). It should be taken into account, however, that the EC grew considerably over the same period with the accession of Denmark, Ireland, the UK (in 1973), Greece (1981), Spain, and Portugal (1986). Throughout this period, commentators continued to complain that DG IV was seriously understaffed; see e.g. Forrester and Norall (1984: 19) and Wilks and McGowan (1996: 236). The second point to be made is that the Commission did, to a certain extent, reduce the scope of its interpretation of the

These measures were only partially effective. Whilst, as we will shortly see, the Commission and the Court also worked on the substantive side of the law to limit the scope of the prohibition contained in Art 81(1) EC, the system continued to invalidate large amounts of seemingly innocuous agreements, which had to be notified and exempted if they were to be made enforceable.[105] The Commission's backlog of cases was steadily reduced, but never eliminated.[106]

The main critiques centred on consequences in terms of transaction costs and legal certainty.[107] Particularly since the introduction of the revised Form A/B in 1985,[108] the process of completing a notification (together with possible prior or subsequent contacts with Commission officials) could be time consuming and costly.[109] Still, very few notifications would actually lead to a formal exemption.[110] There would generally be no more than a dozen of such decisions every year.[111] Unless the notification raised concerns, a lot of time could go by before any form of response came and it was not uncommon that no response came at all.[112]

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prohibition contained in Art 81(1) EC. This matter is discussed in detail below, together with the relevant case law of the Courts.

[105] Compare with Forrester and Norall (1984: 24). Initially, it was thought that notification suspended the nullity provided under Art 81(2) EC for agreements caught by Art 81(1) EC. However, in *Brasserie de Haecht II*, Case 48/72, [1973] ECR 77, the ECJ indicated that this was not the case. On the concept of provisional validity, see Korah (1981).

[106] In 1989 there was a backlog of 3.239 notifications (see the Commission's XIXth report on competition policy). Five years later, in 1994, there was a backlog of around a thousand cases (see the Commission's XXIVth report on competition policy). Since then, the backlog remained broadly the same (see Ehlermann, 2000).

[107] See Hawk (1995: 983), who suggested that the overbroad application of Art 81(1) EC generated extraordinary legal uncertainty whose practical consequences could not be exaggerated and (on the following page) that the principle effect of the notification system was to increase transaction costs and transfer income from firms to outside antitrust lawyers. See also Forrester and Norall (1984), and Korah (1981, 1986, 1992), Schechter (1982), Kon (1982), and Siragusa (1998). Towards the end of the 1990s a third element of concern became increasingly important: the fact that the notification system forced the Commission to spend the bulk of its resources on processing relatively harmless agreements and prevented it from concentrating on more harmful practices, such as horizontal cartels, which were unlikely to be notified and costly to detect. In this regard, see e.g. Ehlermann (2001) and the discussion below, in Section 2.3.3.

[108] [1985] OJ L240/1.

[109] See Holley (1993: 680), Siragusa (1998: 658), and the survey data presented by Neven et al. (1998).

[110] In this sense, see Korah (1986: 95), Forrester and Norall (1984: 14), and Holley (1993: 678 and 704). In this regard it should be noted, also, that Regulation 17/62 (supra, footnote 86) contained no provision binding the Commission to a time limit for taking a decision on a notified agreement. Case law on this point required a decision to be taken within a 'reasonable' period of time. See e.g. the case of *Dutch Cranes* (joined cases T-213/95 and T-18/96, [1997] ECR II-1746), where the CFI held that in the circumstances of the case 46 months was a reasonable period of time.

[111] See the very useful summary statistics provided in Carree (2008: 4 a.f.) and notably their figures 1, 2 and 3. They report an average number of 15 formal decisions per year over the period 1964-2001. This figure includes Art 82 EC decisions.

[112] See Carree et a. (2008: 8) for an overview of the average number of months required to reach a formal decision and fluctuations therein (over the period 1964-2001). See also Forrester and Norall (1984: 14) and Holley (1993: 678).

It is obvious, then, that, apart from burdening them with costs, the system also left notifying firms relatively uncertain as to the legality of their contracts. The nullity provided for in Art 81(2) EC made unexempted agreements vulnerable to challenges in national courts.[113] Where this was a serious concern, assurances could be sought in the form of a comfort letter.[114] Recall, however, that these were informal decisions that were not binding on national courts.[115] If such a letter indicated that, according to the Commission's assessment, the agreement was not caught by Art 81(1) EC, this will have provided a reasonable measure of certainty. A letter indicating that the agreement merited exemption, however, would have been of little use to firms in such a situation, since this terminology implied that the agreement did infringe Art 81(1) EC.[116] Several scholars with extensive experience as practitioners indicated, also, that the system induced firms seeking certainty to choose a form of agreement that was sub-optimal for their commercial purposes but which could benefit from a block exemption regulation.[117]

Finally, it has been suggested that the legal certainty was affected in a broader sense, relating to the development of the law and the possibility for firms to orientate themselves on existing practice to assess the legality of their intended agreements.[118] As indicated before, the system produced relatively few formal decisions.[119] The decisions available were frequently marked by formalistic reasoning that failed to

[113] The case of *Pronuptia v. Schillgalis*, Case 161/84, [1986] ECR 353, which will be discussed in more detail below, provides an example. Mrs. Schillgalis, a franchisee, had failed to pay royalties to her franchisor, Pronuptia. Pronuptia sued Schillgalis who, in defence, argued that the franchise agreement were void under German and EC antitrust law. The appellate court of Frankfurt found that the agreement was not prohibited by German cartel law, but that several exclusivity clauses in the agreement did restrict competition in the sense of Art 81(1) EC. Since the agreement was not exempted, it held that the agreement was null and void under Art 81(2) EC. Note, however, that the risk that the competition laws would be used in this way to undermine the validity of contracts will not always have been great. There are good indications that chose simply not to notify their agreements (in this regard, see Forrester and Norall, 1984, and Holley, 1993).

[114] Comfort letters became one of the principle methods of closing files. See e.g. Holley (1993) and Carree et al. (2008: 6) who report that the ratio of the number of cases dealt with using an informal procedure compared to the number of formal antitrust decisions in the period 1997-2001 ranged from 324 : 54 in 2001 to 490 : 27 in 1997.

[115] Notably, in *Procureur de la République v. Guerlain*, Case 253/78, [1980] ECR 2328, the ECJ indicated that comfort letters may be taken into account by a national court asked to enforce the agreement, but do not bind it.

[116] See Siragusa (1998: 663) and Korah (1986: 96).

[117] See e.g. Korah (1986: 96), Hawk (1995: 983), Holley (1993: 687), and Siragusa (1998: 662).

[118] In this sense, see Holley (1993: 702-704).

[119] Holley (1993: 701) mentions a total number of 340 formal decisions taken by the Commission until the month of July of 1992. This includes both Art 81 and 82 EC cases. For reasons explained below and in the Appendix A, the present study will work on the basis of a smaller set of Commission decisions that (1) date from 1998 or after (2) concern Art 81 EC, and (3) apply the effects-based standard.

provide an economic analysis that could explain what material negative effects might ensue that could justify the application of Art 81(1) EC.[120] And, to conclude, comfort letters and press releases were seldom detailed enough to provide guidance of a general nature.[121]

The call for a US-style rule of reason in Art 81(1) EC

Before the end of the 1990s, very few critics proposed the more radical solution of altogether abandoning the enforcement system based on prior administrative authorisation.[122] Instead, most authors called for the prohibition in Art 81(1) EC to be interpreted more narrowly,[123] starting with René Joliet in his influential treatise published in 1967.[124] Drawing inspiration from US antitrust, they envisaged a scenario in which a *rule of reason* would be applied in the analysis under Art 81(1) EC. Given that this is a very different kind of *rule of reason* than the one applied in European law on free movement and in the case of *Wouters*,[125] it is necessary that we discuss some basics of US antitrust.[126]

The principle antitrust statute in US federal law is the Sherman Act of 1890.[127] This act was originally introduced as a complement to the common law restraint of trade doctrine,[128] which was applied in the US by the state courts, mainly in the field

[120] See Hawk (1995: 985).
[121] See Holley (1993: 701).
[122] Kon (1984) is an exception.
[123] See Forrester and Norall (1984), Korah (1981, 1986, and 1992), Schechter (1982), Hawk (1995), and Siragusa (1998).
[124] See Joliet (1967). Waelbroeck (1987: 694) and Schöter (1987: 647) report that even earlier on, in 1962, Ernst Wolf argued in favour of the introduction of a *rule of reason* in Art 81(1) EC, in an article called 'La législation contre les cartels et les monopoles: Son application dans la CEE, in: *Juris-Classeur Périodique (La semaine juridique)*, part I, no.1718. This publication was unavailable to the author.
[125] Supra, footnote 45.
[126] A more detailed introduction to the matters that follow is provided in Chapter 4, Section 4.2.2.
[127] 15 U.S.C.A. §1.
[128] On the common law doctrine with regard to contractual restraints of trade see Trebilcock (1986). This doctrine has a long history, dating as far back as the year 1414, with the *Dyer's Case* (Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1414)) In this case a promise by one dyer to another to refrain from practicing his trade, was determined to be illegal at common law. As would happen in cases that followed in the 16th century (*Moore K.B.* 115, 72 Eng. Rep. 477 (Q.B. 1578), and *Blacksmiths of South-Mims* 2 Leo. 210, 74 Eng. Rep. 485 (C.P. 1587)), the court refused to consider the reasonableness of the scope of the restraint. In *Colgate v. Bacheler* (Cro. Eliz. 872, 78 Eng. Rep. 1097 (Q.B. 1602)), the court ruled that it would be against the benefit of the Common-wealth for someone to be abridged of his trade and living. This is generally seen as the first reflection in the law of a public policy reason for invalidating restraints (Blake (1960)). The famous case of *Mitchel v. Reynolds* (1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711)) of 1711 marks a fundamental change in the doctrine. The case concerned the transfer of a bakery to a new owner, which was accompanied by a promise by Renolds (the seller) not to compete with Mitchel for a period of five years. The court explained that such restraints were met with a presumption of illegality. To motivate this presumption the court referred to the negative effects

of tort law. The economic turmoil caused by rapid industrialization, the rise of the modern firm, the dramatic increase in scope of many markets due to the advent of railroads and steamships, and the consequent rise of business trusts made this approach inadequate. An important aim of passing the Sherman Act was to complement these private actions based on the restraint of trade doctrine before State Courts, by Federal suits brought (also) upon the initiative of a public prosecutor, so as to make fighting trusts more effective.[129]

Section 1 of the Sherman Act prohibits 'every' contract in restraint of trade, much like Art 81(1) EC does. In the earliest cases applying this provision, such as *Trans Missouri Freight*, the US Supreme Court appeared to take the text of this provision on its face.[130] A defense based on the common law restraint of trade doctrine that the price-fixing agreement at issue pursued a reasonable aim was not accepted.[131] It will be easily appreciated that this would have been a problematic interpretation of the statute if applied to something as innocuous as a non-compete obligation in a partnership agreement. In 1911 the Supreme Court provided further clarity on the way restraints must be examined under the Sherman Act. In its opinion in the case of

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both for the promissor and society as a whole of the loss of his work. But a reasonable restraint ancilliary to the transfer of a business could overcome this presumption, as to refuse it would mean that a craftsman ready to retire would either have to continue, or sell out cheaply. In the course of the 19th century, and culminating in *Nordfelt v. Maxim Nordfelt Guns & Ammunition Co* ([1894] AC 535) of 1894, the *rule of reason* in the restraint of trade doctrine developed into a tool to balance the benefit of freedom of trade, against the freedom of contract, both as between the parties, and society as a whole. Freedom of trade includes and is dependent on the freedom for any to engage in contracts to further his commercial goals. But this same freedom of contract also carries within itself the risk of elimination of competition. The result was a division of restraints in two classes: ancillary, and otherwise. Ancillary are reasonable restraints necessary to achieve the beneficial objective of the agreement as a whole (as in the case of the transfer of the bakery for example); that is, cases in which competition is beneficially restricted by means of a contract, as opposed to where this is to the detriment of one of the parties, or society.

[129] See Thorelli (1955). It should be noted, however, that antitrust law evolved into a distinct field of law with similar but different objectives. What clearly distinguishes the application of the *rule of reason* in antitrust, from the purpose it served in the common law, is that the test is not aimed at satisfying whether the restraint is reasonable as between the parties in the dispute. The reasonableness between the parties (which at least in a publicly prosecuted case will all be on the side of the defense) is not a relevant factor in antitrust. Here only the benefit to society as a whole of preserving competition from restrictive contracting is taken into account. See Chief Justice Warren in *Brown Shoe Co v. US*, 370 US 294, 320 (1962): "Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors, (…)"; which was repeated in the same words in *Brunswick Corp v. Pueblo Bowl-O-Mat Inc*, 429 US 477, 488 (1977); and in different words e.g. in *Spectrum Sports Inc v. McQuillan*, 506 US 477, 485 (1993): "The purpose of the Act is not to protect business from the working of the market; it is to protect the public from the failure of the market."

[130] *US v. Trans-Missouri Freight Association*, 171 US 505 (1898), other cases to be mentioned here are *US v. Joint Traffic Association*, 171 US 505 (1898), and *Addyston Pipe & Steel Co v. US*, 175 US 211 (1899).

[131] See footnote 128. It must be added that in *Addyston Pipe* (supra, footnote 130) Justice Taft concluded that even under the restraint of trade doctrine the price fixing at issue could not be termed reasonably necessary.

Standard Oil it indicated that, in conformity with the common law restraint of trade doctrine, 'every' restraint of trade must be understood as 'every unreasonable' restraint of trade.[132] The agreements at issue in the earlier cases were so evidently unreasonable – that is, so inherently irreconcilable with the goals of the antitrust laws – that they required no elaborate investigation.[133] Where this is not the case, however, the reasonableness of a restraint must be established by reference to a fully factual inquiry into the conduct at issue (the agreement), the alleged harm, and the causal relationship between the two. Here, the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed, are essential elements of the analysis.[134]

In light of what was said above concerning US influence and policy in post-War Europe and the implications for the drafting of the Treaty, it appears reasonable to assume that Art 81 EC was intended to codify these US experiences and, more specifically, that Art 81(3) EC was meant as an explicit recognition of the exception based on the reasonableness of the restraint that had been developed by US courts.[135] It should be realised, however, that the call for the introduction of a *rule of reason* in European antitrust centred exclusively on Art 81(1) EC.

Proponents argued that application of a more rigorous economic test in the investigation under that provision – one that would require examination of the actual anti-competitive and pro-competitive effects of the agreement – would benefit the functioning of the notification system in several ways. To begin, this would have reduced the number of agreements subject to the notification requirement.

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[132] *Standard Oil Co v. US*, 221 US 1 (1911). This case was in fact brought under §2 of the Sherman Act, which concerns monopolization. It should be noted, however, that Chief Justice White's argumentation regarding the applicability of the *rule of reason* explicitly includes Section 1 (see para. 30).

[133] In this regard, see para. 32 of the opinion (supra, footnote 132).

[134] *National Society of Professional Engineers v. US*, 435 US 679, 692 (1978). See also Areeda (1986: 574), who points out that in thinking about *rule of reason* and *per se*, it is important to disaggregate the following two differences between these methods of analysis. *Rule of reason* analysis differs from *per se* analysis not only in that arguments will be heard in defence of the challenged practice. It also requires that the effect of the agreement be shown, whereas proof of conduct of a certain nature alone, is sufficient to find a *per se* violation. Like effects-based and object-based analysis in EC antitrust, therefore, the *rule of reason* and *per se* rules are in fact methods of analysis, that differ in the width of the range of facts considered relevant in deciding whether an agreement restricts competition. If the alleged conduct is of a kind that with sufficient certainty can be said to lead to restrictive results, then the analysis that prepares for the application of a *per se rule* is limited to verifying that the conduct at issue indeed falls within this category. No exculpation is heard and no actual effects are looked at. If on the other hand the effects of an agreement are not so obvious, then the *rule of reason* is applied, in which on the basis of micro-economic insights and by reference to all available relevant facts, both the negative and positive effects of the agreement on the market are examined and balanced.

[135] In this sense, see Wils (2002: 123).

Enforcement and compliance costs would therefore have dropped, and the Commission would have been able to dispense with cases more speedily and to turn some of its attention to other fields. At the same time, for those affected by an infringement of Art 81 EC, commencing civil proceedings in a national court would have become an alternative to filing a complaint with the Commission. In this view, Art 81(3) EC would come into play where non-competition related policy objectives justify an exemption despite the competitive harms.[136]

On the other hand, several authors stressed the need for caution. They argued that the adoption of a *rule of reason* in the analysis under Art 81(1) EC was difficult to reconcile with the text and structure of the provision as a whole, that the Commission's interpretation of Art 81(1) EC assured that the law on restraints of trade would be applied uniformly throughout the Community, and, finally, that formalism provided more legal certainty than case by case analysis.[137] As can be expected, they found the Commission and the Court on their side.

From very early on, the Commission indicated that it would not consider any restriction of competition to fall foul of Art 81(1) EC. It soon became clear, however, that the exceptions that it was willing to make to this basic rule were of limited scope. In a number of respects, the ECJ appears to have been somewhat more progressive. This resulted in a certain divergence between the approaches adopted by the principle agents in EC antitrust. But, on the whole, the Court, like the Commission, did not go so far as to fully adopt a *rule of reason* in the assessment under Art 81(1) EC. The following discussion of the case law and decision practice is intended to provide an impression rather than a complete overview of developments until the year 2001. As will be discussed below (in Section 2.3.3), around that time the Commission launched a comprehensive overhaul of its substantive policies. For the purposes of this thesis, it is the decision practice following this modernisation process that is primary importance.

[136] See e.g. Hawk (1995: 988) and Schechter (1982: 13).
[137] See Waelbroeck (1987: 696) for an overview of these arguments.

The rule of reason in practice

One of the first exceptions to the basic rule recognised by the Commission involved non-compete obligations imposed on the vendor of business as a going concern.[138] The 1976 decision in *Reuter/BASF* made clear that this argument may be advanced in the assessment under Art 81(1) EC where the sale includes know-how or goodwill and where the restriction is necessary to preserve the value of the firm for the buyer and does not go beyond what is necessary to protect his interests.[139] A number of decisions in which the Commission took issue with the duration of a non-compete obligation show that it generally gave a narrow meaning to the necessity-criterion.[140] In its *Remia* ruling, the ECJ indicated that it would not be likely to intervene in such cases by forcing the Commission to adopt a more permissive approach.[141] Over time, the Commission showed itself to be willing to apply the ancillary restraints doctrine more generally, to include restrictions necessary in the formation of a joint venture or a concentration.[142] But as was suggested above, when we discussed the case of *Métropole*,[143] the balancing act performed in such cases depends on a rather narrowly conceived legal test and does not provide scope for an economic analysis of the benefits produced by an agreement.[144] The ECJ came closer to proposing such a more broadly construed test in its preliminary rulings in *Gøttrup-Klim*[145] and *Oude Luttikhuis*,[146] where it suggested that restrictions that are necessary for the *operation* of a joint venture (which are therefore not ancillary in the strict sense) may escape the ban of Art 81(1) EC.[147]

Arguably, it was in the evaluation of selective distribution agreements that the Commission and the Court came closest to weighing pro-competitive effects under Art 81(1) EC. Not all products can be sold over the counter. Costly or complex

[138] See *Frères/Vitapro*, [1964] JO 136/2287. See Schöter (1987: 677) for a discussion on developments until that year.
[139] [1976] OJ L254/40.
[140] See the decisions in *Reuter/BASF* (supra, footnote 139); *Tyler/Linde*, XXIth report on competition policy; and *Remia/Nutricia*, [1983] OJ L376/22.
[141] Supra, footnote 29, at para. 34. It noted that in assessing the merits of such clauses the Commission has to appraise 'complex economic matters' and that for that reason judicial review would have to be limited to an evaluation of whether there has been a manifest error of appraisal.
[142] In 1990 the Commission published a Notice on ancillary restraints ([1990] OJ C203/5), which was replaced in 2001 by a Notice on restrictions directly related and necessary to concentrations ([2001] OJ C188/5.
[143] Supra, footnote 54.
[144] See the text accompanying footnotes 54 and 55.
[145] Supra, footnote 62.
[146] Id.
[147] The Commission applied the same reasoning in the case of *P & I Clubs*, [1999] OJ L125/12.

products may require extensive pre or after-sales service. In a selective distribution scheme, the manufacturer selects those distributors allowed to resell his product and imposes a prohibition on resale to non-authorised outlets. Since 1970, the Commission takes the view that such restrictions do not infringe Art 81(1) EC, provided that the selection is based on objective criteria of a qualitative nature.[148] This approach was upheld by the Court in the case of *Metro I*.[149] The underlying reasoning appears to be that the positive effects of qualitative selective distribution on inter-brand competition outweigh their restrictive effects on intra-brand competition.[150]

In comparison, territorial restraints, such as exclusive distribution and licensing, were dealt with much more harshly, at least by the Commission.[151] It has consistently held such arrangements to restrict commercial freedom and to fall under the ban of Art 81(1) EC.[152] By doing so, it deviated from the path marked by the Court.[153] As we saw in discussing the case of *Davidson Rubber*, the Commission's approach implies that defences based on the argument that exclusivity may be the only means to penetrate the market of another member state are dealt with under the scope of Art 81(3) EC.[154] Already in 1965, however, in the case of *Société Technique Minière*,[155] the Court had indicated that it was doubtful whether an exclusive dealing contract interferes with competition if it is necessary for the penetration of a new geographical market[156] and as long as it does not confer absolute territorial protection like the agreement in the case of *Consten and Grundig*.[157] Similarly, in *Nungesser*, it held that an 'open exclusive license', which does not eliminate all competition from third parties, need not infringe Art 81(1) EC.[158] Without such protection, it argued, a

[148] See the decision in the case of *Kodak*, [1970] OJ L147/24.
[149] Supra, footnote 59.
[150] Id. at paras. 21 and 22, where the Court discusses the effect of the agreements in terms of maintaining a certain price level in the light of its positive effects on other (qualitative) parameters of competition.
[151] In this sense, see Waelbroeck (1987: 711-712), Korah (1986: 98), and more generally Hawk (1995: 982)
[152] See e.g. the decisions in *Blondel* (supra, footnote 96); *Hummel* (supra, footnote 96); *Burroughs*, [1971] OJ L13/50; *Davidson Rubber* (supra, footnote 96); *Neumeyer*, [1975] OJ L222/34; AOIP, [1976] OJ L6/8; and *Maize Seed*, [1978] OJ L286/23.
[153] In this sense, see Waelbroeck (1987: 711-712).
[154] Supra, footnote 96. It is worth mentioning that where horizontal agreements between small and medium-sized enterprises were concerned, the Commission has, on several occasions, accepted the market penetration defence in the investigation under Art 81(1) EC. In this regard, see e.g. the decisions in *Safco*, [1972] OJ L13/44; *Socemas*, [1968] OJ L201/4; and *Intergroup*, [1975] OJ L212/23.
[155] Supra, footnote 45.
[156] Supra, footnote 45, at p. 250.
[157] Supra, footnote 46.
[158] *Nungesser v. Commission*, Case 258/78, [1982] ECR 2015.

licensee might be deterred from accepting the risk of further developing and marketing the product and, as a result, competition between the new product and similar existing products would fail to materialise.[159] In its preliminary ruling in the case of *Coditel II*, the ECJ appeared to go further by holding that an exclusive copyright license to exhibit a film in a member state would not necessarily infringe Art 81(1) EC, even though transmission from a neighbouring member state would be blocked to protect the investment of the licensee.[160] And in *Pronuptia* the ECJ held that restrictions necessary to protect the intellectual property rights of a franchisor and to maintain the common identity of his network fall outside Art 81(1) EC. [161] It added, on the basis its decision in *Consten and Grundig*,[162] that restraints imposed on other franchisees to open a second shop in an allocated territory would be caught. But it expressly limited the scope of this observation to cases where the use of the franchisor's trademark is already widely spread.[163] Tight territorial protection might therefore fall outside Art 81(1) EC where the franchisor is a new entrant on the market.[164]

Understandably, the chequered image that emerged from the case law left much room for debate about whether and, if so, how much room there was in the investigation under Art 81(1) EC to consider pro-competitive effects.[165] The debate on the *rule of reason* came to an end only in 2001, when the Court of First Instance (CFI)[166] delivered its ruling in the case of *Métropole*.[167] The case involved an agreement setting up a joint venture active on the French pay-tv market, which was heavily dominated by an incumbent provider. The agreement included a clause granting the joint venture 10 years of exclusive access to content produced by its parents. In its decision, the Commission had found this clause to go beyond what was

[159] Id. at para. 57. For criticisms of the practical implications of the ECJ's distinction between open and closed exclusivity, see Korah (1986: 98) and Schröter (1987: 714).
[160] *Coditel v. Ciné Vog Films*, Case 262/81, [1982] ECR 3381.
[161] Supra, foontnote 113.
[162] Supra, footnote 46.
[163] Supra, footnote 113, at para. 24.
[164] In this sense, see Venit (1986).
[165] See e.g. Venit (1986: 217), Caspari (1987), Holley (1993: 689), Schöter (1987: 686), Waelbroeck (1987: 708).
[166] The CFI was created in 1989, *inter alia* to alleviate the workload of the ECJ. It hears competition cases in first instance. Since its institution, scrutiny of the legality of the Commission's fact finding falls in the domain of the CFI, as subsequent appeal to the ECJ is possible on points of law only.
[167] Supra, footnote 54. Other factors also played a role, notably the substantive and procedural overhaul of the Commission's enforcement. These are discussed in the following sub-section 2.4.

necessary to penetrate the market and limited the duration of the exemption to three years.[168]

Métropole and the other parents argued before the Court that the Commission's investigation under Art 81(1) EC should have included an economic analysis of the restraint seen in its market context. Application of such a *rule of reason* would have shown that the clause served to facilitate the penetration of a market that was heavily dominated by an incumbent. According to Métropole, the Commission should have concluded that the agreement promoted competition, instead of lessening it, which would have obliged it to grant negative clearance. In its findings, the Court considered that there is no room in the analysis under that provision to weigh the pro and anti-competitive effects of a restriction, as this would make Art 81(3) EC lose much of its effectiveness.

In support of their claim the applicants had argued that the existence of a *rule of reason* under Art 81(1) EC had already been confirmed by the ECJ. In particular, they pointed to the rulings in *Société Technique Minière*,[169] *Oude Luttikhuis*,[170] *Nungesser*,[171] *Coditel*,[172] and *Pronuptia*,[173] where, as we have seen, it had refused to adopt *per se*-like reasoning in the investigation of restrictions necessary to create new competition. The CFI explained that these cases cannot be interpreted as establishing the existence of a *rule of reason* in the investigation under Art 81(1) EC.[174] They should rather be seen as part of a broader trend in the case law according to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Art 81(1) EC.[175]

The survey presented above tells us that this trend includes restrictions of commercial freedom that are necessary to sell a business or to create new competition. And the treatment of selective distribution agreements suggests that the

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[168] See the Commission decision in the case of *TPS*, [1999] OJ L90/6.
[169] Supra, footnote 45.
[170] Supra, footnote 62.
[171] Supra, footnote 158.
[172] Supra, footnote 160.
[173] Supra, footnote 113.
[174] Supra, footnote 54, at para. 76. Literally, it stated that those judgments cannot be interpreted as establishing the existence of a *rule of reason* in 'Community competition law'. It will be clear that this cannot be taken to mean exactly what it says. As we saw above (in the text accompanying footnote 133), the analysis of the effects produced by a restraint as it is spread out over Art 81(1) EC and Art 81(3) EC mimics the basic structure of the *rule of reason* as it is applied in US antitrust.
[175] Id.

category of agreements that escape the prohibition is wider still and includes restrictions of the freedom of trade that may not be strictly necessary, but which are commercially very useful and can be said to intensify competition on the market. On the other hand, it is by no means so that such agreements falling in one of these categories are always in the clear. It is this question of the legal standard used in individual cases to determine what evidence must be shown in order to establish that the agreement produces the type of anti-competitive effects that bring it within the scope of Art 81(1) EC, which is at the centre of attention in this thesis.

As will be shown in Chapters 4 and 5, case law that is instructive as to the method to be followed in examining negative effects is rather scarce. Still, it is evident that the Courts generally require an investigation of the implications of the competitive structure of the market (notably, the number and relative size of actual and potential buyers and sellers of the same and similar products).[176] Although there were small signs of change, the Commission continued to be criticised during the 1990s for persisting in its rigid approach based on the concept of commercial freedom.[177] One of the reasons why the Commission was able to do so must clearly be that the practice was limited to exemption proceedings, where chances of an appeal were reduced.[178] This part of the *rule of reason* debate – which did not

[176] See the discussion in Chapter 4, Section 4.3.1.2, of the cases of *Völk v. Vervaecke*, Case 5/69, [1969] ECR 295; *Stergios Delimitis v. Henninger Bräu*, [1991] ECR I-935; *European Night Services v. Commission,* [1998] ECR II-3141; and *Glaxo v. Commission*, judgment of 27 September 2006 in Case T-168/1. As regards the examination of market structure, see also the discussion in Section 2.4.

[177] See e.g. Siragusa (1998), Neven et al. (1998), Amato (1997: 117), Faull (1997), Bright (1996), and Hawk (1995). See also the following Commission decisions. In *Eco System/Peugeot* ([1992] OJ L66/1), the Commission relies wholly on the fact that a circular issued by Peugeot to its authorised dealers was designed to prevent imports to France, combined with a showing in practice that this clause had had an effect on Eco System. The wider impact of the practice on the market, in which Peugeot had a 20% share, was not discussed. In *Astra* ([1993] OJ L20/23), regarding a joint venture between British Telecom and SES, a Luxemburg based satellite operator, the Commission spent more effort on examining the clauses of the agreement, and their implications, than on clearly a market and studying how it would be impacted. In *Langnese Iglo* ([1993] OJ L183/19), although the German market for ice cream was examined in detail, the Commission's legal assessment was wholly clause driven.

[178] Two interesting rulings by the CFI that should be mentioned in this regard are *Langnese Iglo v. Commission* (case T-7/93, [1995] ECR II-1533, and *Schöller v. Commission* (case T-9/93, [1995] ECR II-1615. In both cases the Commission was faulted for not following the applying the analytical framework set out in the case of *Stergios Delimitis v. Henninger Bräu* (supra, footnote 176). Before that, however, the Commission was never seriously faulted for its approach. In this regard, it should be realised that the ECJ may, in a sense, have benefited from the Commission's expansive approach. Particularly in the early period the Court shared the Commission's interest in limiting member states influence. If competition law would be enforced primarily at the national level, this would affect the Court's ability to engineer the development of European antitrust policy. In that case, the ECJ would have been primarily dependent on requests for preliminary rulings by national courts. Whether there is an issue of European law to be clarified, however, is a matter that national courts decide for themselves. Tolerating the Commission's form-based approach offered the Court more secure access to a stream of cases that would enable it to have a serious impact on developments.

concern the scope for taking positive effects into account in the investigation under Art 81(1) EC, but the prior question of the basic requirements for showing a negative effect – more or less abated in the face of a comprehensive overhaul of the Commission's substantive approach, based on more thorough economic analysis, and the abolishment of the notification procedure, which took place roughly around the same time that the *Métropole* ruling was given.[179]

2.4 Modernisation and the generic objectives of EC antitrust

The modernisation of the Commission's antitrust policies should be seen in the light of the evolution (over the past 50 years) of the objectives of EC antitrust. Our discussion of the modernisation process therefore starts (in Section 2.4.1) with a brief introduction to the dynamics of this evolution. Next (in Section 2.4.2), we zoom in on the generic antitrust objectives of EC competition policy, which are of particular importance to the Commission's modernised approach to effects-based analysis. This is followed (in Section 2.4.3), by an overview of the substantive reforms.

2.4.1 An overview of recent developments

At the start of EC antitrust policy, and for a long time thereafter, integration of Member State economies was the main unifying theme in the case law and decision practice. More recently, however, 'generic' antitrust objectives, those related to the creation and exercise of private economic power, have become more important, to a point where they can be said to be pre-eminent or, at least, to be on equal footing with the integration imperative. In addition to contributing to major changes in the substance of the law, these developments have had an effect on the procedural framework surrounding Art 81 EC and have altered the roles played by the different actors in the antitrust field.

The relative decline of the integration imperative has been attributed to the progress that has been made over the years in establishing the Single Market.[180] Particularly after '1992', when most law-based obstacles to intra-community trade were removed, it became less apparent that integration should be the most important

[179] Supra, footnote 54.
[180] See e.g. Ehlermann (1998: x), Schaub (1998: 126), Gerber (1998: 374-376), and Wilks and McGowan (1996).

immediate policy aim of EC antitrust.[181] In response to these and other developments, the Commission began to re-evaluate the foundations for its decision-making in the mid-1990s. This resulted in a major overhaul of its substantive approach that included several new block exemption regulations and guidelines. As we will see below, these documents, particularly as regards their treatment of the analysis under Art 81(3) EC, reflect an more economic approach that is focused on the actual effects produced by restraints and, in particular, the effects on consumers.

To be sure, even under the new approach absolute territorial protection remains *per se* illegal.[182] There are indications, however, that the scope of this ban has somewhat narrowed.[183] Regulation 2790/99, for example, includes exclusive distribution agreements in the block exemption provided for vertical restraints, as long as they do not contain restrictions on so-called 'passive' sales to customers originating in a territory awarded to another member in the distribution network.[184] A sale is passive if the initiative for the transaction was taken by the customer in question. This means that under the new regime manufacturers may legally require their distributors to refrain from actively approaching customers in another reseller's territory.[185] The CFI's recent ruling in the case of *Glaxo v. Commission* is also of importance in this regard.[186] This case involved an agreement with wholesalers that required them to pay higher prices for medicines which they exported than for products resold on the Spanish market. The aim was to prevent these resellers from taking advantage of differences in the prices for these same products set by health insurance schemes in other Member States, notably the UK. Glaxo argued that such parallel trading undermined its capacity to develop new products. Despite the fact that such an

[181] For a discussion of the objective set in 1985 to unify the European market by the 1st of January 1993 and of its implications or EC antitrust in particular, see Gerber (1998: 369).
[182] The continued importance of the integration imperative is evidenced by such cases as *JCB,* [2002] OJ L69/1, and *Volks Wagen,* (supra, footnote 37), where the Commission imposed fines of €40 and €102 million, respectively. In the latter case these fines were later reduced by the CFI to 90 million ([2000] ECR II-2707).
[183] This interesting topic is not exhaustively dealt with in this work. Our focus is on the application of the effects-based standard to individual cases (i.e. those involving agreements that cannot benefit from a block exemption regulation). On the whole, restrictions of parallel trade remain prohibited *per se*, meaning that to show that they infringe Art 81 EC it is sufficient that the existence of an agreement with such a purpose is shown. Since effects are generally not examined, the issue of restrictions on parallel trade falls outside the scope of this work.
[184] See Art 4(b) of Regulation 2790/99, [1999] OJ L336/21.
[185] See para. 49 and following of the Commission's guidelines on vertical restraints, [2000] OJ C291/1. For commentary on these matters, see Korah (2002), Bishop (2002), Ridyard and Bishop (2002), and Whish (2000).
[186] Supra, footnote 176.

agreement would ordinarily be subjected to the object standard,[187] the Court determined that a more broadly construed investigation was called for. In particular, it required that the effect of the agreement on consumers be taken into account. The reason the court adopted this stance is that, in the context of the heavily regulated market for pharmaceuticals, it was not obvious that restrictions on parallel imports would have the effects that could normally be presumed.[188]

Roughly around the same time that the Commission revamped its substantive approach, Regulation 17/62[189] was replaced by Regulation 1/2003.[190] This regulation, which entered into effect on the 1st of January 2004, introduced two major changes that removed most of the causes for the debate on a *rule of reason* in Art 81(1) EC. Firstly, by abandoning the notification requirement, the whole of Art 81 was given direct effect. It is important to realise that this implies a shift in the timing of legal intervention. A system of enforcement that relied mainly on ex ante screening was substituted by a system solely dependent on the deterrent effect of ex post interventions. In principle, firms can no longer notify and obtain an explicit endorsement by the Commission at the time the contract is signed; the responsibility to assess the legality of the agreement is left over to firms and their legal counsel. Secondly, the Commission's monopoly to investigate whether an agreement satisfied the conditions of Art 81(3) was abolished. This opened the way for additional public enforcement by national competition authorities and for private enforcement in national courts.[191]

One of the main reasons advanced for the system-change, which had not featured prominently in the *rule of reason* debate and can be taken as a clear sign of the reorientation on generic antitrust objectives, was that the Commission needed to free its hands so that it could concentrate enforcement efforts on more serious types of

[187] In this regard, it referred i.a. to the rulings in *Consten and Grundig* (supra, footnote 46) and Miller, Case 19/77, [1978] ECR 131.
[188] Supra, footnote 176, at paras. 110-134. For commentary on this ruling, see Korah (2007) and Junod (2007).
[189] Supra, footnote 86.
[190] [2003] OJ L1/1. In Chapter 5 these procedural reforms are discussed in more detail.
[191] Not surprisingly, given the fact that the need to create a uniform system was one of the major arguments to keep member states at bay in the formative period, the fact that over the course of the ensuing 40 years a 'culture of competition' had taken root in Europe features prominently amongst the reasons advanced by the Commission for sharing these powers (see the White Paper on Modernisation of the rules implementing articles 85 and 86 of the EC Treaty, [1999] OJ C132/1, at point 8).

infringements that would never be notified.[192] This should be understood as follows. In the early period, the Commission (and the Court) saw restraints on trans-border trade as the primary threat to be countered by means of the antitrust provisions in the Treaty.[193] This led to a strong focus on vertical restraints, largely because they represent the most obvious and frequently used obstacles to trade.[194] As generic antitrust objectives became more important, the Commission began to devote more serious attention to horizontal cartels and joint ventures.[195] This is because, in general, agreements between competitors have a greater potential to distort the competitive process (on an integrated market) than agreements between firms operating at different levels of the distribution chain. The notification system acted as a break on this policy shift, however, since it compelled relatively large numbers of firms to notify largely innocuous vertical agreements and, thus, forced the Commission to devote part of its resources to processing these notifications. Note, also, that with the promise of a more thorough economic approach and the abolishment of the notification requirement, most of the problems that led to calls for a *rule of reason* appeared to be solved.

Finally, it should be noted that these developments coincided with subtle changes in the roles played by the different actors in the antitrust field.[196] The modernisation process allowed the Commission to assume a position of intellectual leadership. Particularly in the first three decades, it was the Court that fulfilled the leading role in the development of EC antitrust.[197] Many of its rulings contained broad teleological statements that guided the Commission in its attempts to expand the substantive scope of competition policy and to use it as a means to foster integration.[198] The Court's

[192] See e.g. para. 13 (executive summary) of the Commission's white paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, of 28 April 1999, published on the Commission's website.
[193] See the discussion above in Section 2.3.1.
[194] See Gerber (1998: 354), Amato (1997: 47), Holley (1993: 672), and Wilks and McGowan (1996: 228).
[195] This process started very slowly in the late 1970s and gathered speed in the 1990s. For a discussion, see Gerber (1998).
[196] In this regard, see Gerber (1998: 371-381).
[197] See Gerber (1998: 351) and Wilks and McGowan (1996: 238).
[198] Here one can think of the broad language used in cases such as *Société Technique Minière* (supra, footnote 45); *Consten and Grundig* (supra, footnote 46); *Continental Can* (Case 6/72, [1973] ECR 215), where it opened the road to challenging acquisitions under Art 82 EC; *Commercial Solvents* (Cases 6 and 7/73, ECR 357), concerning the application of Art 82 EC to refusals to deal; and *Metro I* (supra, footnote 59).

mode of adjudication is reported to have gradually changed, however.[199] With a well developed body of case law to rely on, the Court has increasingly come to apply existing concepts and tends to stay relatively close to the facts of the case before it. Arguably, the institution of the CFI has solidified this situation. It has frequently been argued that the CFI subjects the Commission's fact-finding to more intense scrutiny than the ECJ did.[200] Some have pointed out, however, that it is not in a very good position to take bold new steps on matters of substance, since it has to manoeuvre within the framework of the case law developed by the ECJ.[201] It should be noted, also, that the re-orientation on generic antitrust objectives works in the same direction. This follows from the ECJ's ruling in the *Remia* case that was discussed above.[202] In principle, where the Commission has to appraise 'complex economic matters', judicial review is limited to an evaluation of whether there has been a manifest error of appraisal. The larger the role played by economics in antitrust analysis, the less scope there is for the Courts to exercise leadership.[203] In the next section we will zoom in on these generic objectives of EC antitrust, since they are of primary importance in trying to understand the evidentiary requirements imposed by the modernised effects-based standard.[204]

2.4.2 Generic antitrust objectives

Ultimate objectives

In discussing the goals of EC antitrust it is useful to distinguish between ultimate and intermediate objectives. The ultimate objectives can be thought of as the general benefits that are expected from competition policy. At this rather abstract level, there

[199] See Gerber (1998: 371), who notes that the impending evaporation of the integration imperative is likely to have played a role in this less 'activist' stand, and, more generally, Rasmussen (1986).
[200] See e.g. Nehl (1999), Van der Woude (1992), and Wilks and McGowan (1996: 238), who all note that the same applies to the evaluation of procedural shortcomings.
[201] See Gerber (1998: 375) and Brent (1995). We return to this issue below in Chapter 7, Section 7.4, where these arguments are examined in the light of more recent CFI case law.
[202] Supra, footnote 29.
[203] In this sense, see Gerber (1998: 373).
[204] Again, this is not to say that the role of the integration imperative in EC antitrust is played out. In this regard, see footnote 182 and the accompanying text. As noted by Amato (1997: 48), however, impediments to integration are generally considered so nefarious in the European context that they are subjected to object-based (*per se*) analysis (the CFI's judgment in the case of *Glaxo v. Commission*, supra, footnote 176, provides an exception to this rule). In effects-based analysis – the focus of this thesis – it is mainly the generic antitrust objectives that are of importance, therefore.

seems to be a fair amount of consensus.[205] The basic thought is that competitive markets produce benefits that are lost under private monopoly (or state control). Competition, in this context, must be seen as a process of rivalry between several firms in a market for the business of customers. Under monopoly there is only one firm supplying the market. The social advantages of choosing competition over monopoly are generally divided into three groups: allocative benefits, productive benefits and dynamic benefits.[206]

To begin, competition tends to temper prices. This is because a firm that imposes a price increase that is not matched by an improvement in quality risks loosing profits, as customers may decide to buy the lower-priced products offered by competing firms. A monopolist is not constrained in this way and may, thus, charge a higher price. This will lead a number of customers that would buy the product in question for the lower price charged in the competitive situation to spend their money on other types of products. Under monopoly, therefore, society will allocate resources to the production of goods that consumers favour less. In addition, under competition firms will have an incentive to bring their costs of production down. This is a way for them to lower their price and make more profits by expanding their output at the expense of less efficient rivals. A monopoly will also benefit from bringing down costs. But its managers, accustomed to sizable profits, may pursue this cause with less vigour. Competition, therefore, is a way to ensure that as little of society's resources are consumed in the production process as necessary. Finally, it is often suggested that competition may give incentives to firms to expand the range of choices available to consumers by developing new and better products, whilst monopolists may be slow to innovate.[207]

Naturally, none of these benefits is absolute. Although costs reductions may be held back by managerial inefficiency, monopolies may well be in a position to take advantage of economies of scale that are unattainable under competitive conditions.

[205] See the contributions by Ehlermann, Schaub, and Hawk in Ehlermann and Atanasiu (1998). See also Whish (2003: 2), Bishop and Walker (2003: 11), Hildebrand (2002: 107), and Van Cayseele and Van den Bergh (2000).
[206] For a more detailed discussion of these matters, see e.g. Scherer and Ross (1990).
[207] Note that at this basic level there is no conflict between the integration objective and the generic objectives. The Treaty aims to establish an efficiently functioning trans-national market with no barriers to cross-border trade and where firms can take maximum advantage of scale economies. It is at the intermediate level where these objectives might conflict. In this regard, see the contributions by Schaub, Forrester and Kirchner in Ehlermann and Atanasiu (1998).

This implies that productive efficiency need not be impaired by monopoly.[208] Similarly, it can be argued that some measure of supra-competitive profits is needed or, at least, very helpful to fund the research and development that goes into the marketing of a new or improved product.[209] Still, the adoption of antitrust provisions in the Treaty reflects the judgment that, on the whole, an economy based on competitive markets appears to be preferable to one characterised by monopolies.

Intermediate objectives

It will be evident that these very general notions offer only limited practical guidance in interpreting the implications of the broad language contained in Art 81 EC for individual agreements. This is where intermediate objectives come in. These may be thought of as translations of the ultimate objectives into more concrete criteria for law enforcement that indicate what type of effects we must look for to determine whether a restriction of competition falls foul of the antitrust laws and why these are considered harmful.[210]

Any inquiry into the intermediate objectives of EC antitrust is complicated, however, by a number of factors. As we saw, judgments by the Courts tend to stay relatively close to the facts of the case at bar.[211] The more broadly applicable statements in cases such as *Société Technique Minière* indicate only the type of facts that may be of relevance in determining whether a restriction of the competitive process is caught by Art 81 EC.[212] They do not offer generalised statements about the reasons why prohibited behaviour is considered harmful. The Commission's guidelines offer more insights on these matters.[213] It should be remembered, however, that these do not necessarily reflect the position of the Courts and, as we will see in the chapters that follow, even the Commission may not always apply the framework

[208] For a broader discussion, see e.g. Scherer and Ross (1990: 97) and Van Cayseele and Van den Bergh (2000).
[209] This argument is most closely associated with the work of Joseph Schumpeter. For a discussion, see e.g. Hildebrand (2002: 125 and 165).
[210] This definition is taken from the contribution by Schaub in Ehlermann and Atanasiu (1998).
[211] See footnote 195 and accompanying text.
[212] Supra, footnote 45. The same applies for the cases mentioned in footnote 176 (*Völk v. Vervaecke*; *Stergios Delimitis v. Henninger Bräu*; *European Night Services v. Commission*; and *Glaxo v. Commission*).
[213] See the discussion below on the Commission's notice on the application of Art 81(3) EC (supra, footnote 61).

set out in the guidelines in a consistent manner.[214] This leaves considerable room for discussion about the operational objectives of EC antitrust.[215]

The most debated issue, at this time, concerns the width of EC antitrust's generic antitrust objectives.[216] More specifically, it is asked whether EC antitrust focuses exclusively on restrictions of competition that directly harm consumers, or whether it protects a larger class of interests and is therefore aimed at a wider range of restrictions.[217] Note that this question does not concern the scope in EC antitrust for the non-competition related policy objectives of the Treaty (employment, environment, etc).[218] Nor are we dealing with the scope of the integration imperative.[219] Rather, the question is whether restrictions of the competitive process that do not directly hurt consumers may be caught because they disrupt the functioning of the market in a way that could cause damage for the economy (and consumers) in the long term. Here one can think of an agreement between firms that is used to exclude a third company from the market. It has been suggested that allowing such behaviour in cases where there is no noticeable effect on prices, volumes, or quality may eventually act as a disincentive for new firms to participate in the market process.[220] This view appears to find at least some support in our discussion above of the case law concerning the *rule of reason*.[221] There, we saw that, generally, the focus is on the effects of a restraint on the competitive process and not so much on the effects for consumers. On the other hand, the Commission's substantive modernisation programme and, in particular, its 2004 notice on the application of Art 81(3) EC[222] (hereafter: Notice) seems to indicate that the intermediate objectives of EC antirust, as far as the application of Art 81 EC is concerned, have narrowed over the past years.[223]

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[214] See Chapters 4 and 5.
[215] See, for instance, Ehlerman and Laudati (1998), which contains a total of 34 contributions on this topic.
[216] The Commission's plans for reform of its approach under Art 82 EC (in this regard, see the Commission's 2005 staff paper on exclusionary abuses of dominance and the 2008 draft guidelines on abusive exclusionary conduct by dominant undertakings, both published on the Commission's website) have worked to intensify the debate on this topic. See e,g, Gual (2005), Gerber (2008b), Ahlborn and Padilla (2008), and Zimmer (2008).
[217] On these matters, see e.g. Hildebrand (2002), Fox (2001), Zimmer (2008), Gerber (2008b), and Ahlborn and Padilla (2008).
[218] In this regard, see Section 2.2.3.
[219] In this regard, see Section 2.3.2.
[220] See Zimmer (2008).
[221] See Section 2.3.2.
[222] Supra, footnote 61.
[223] In this sense, see in particular Lugard and Hancher (2004) and Marsden and Whelan (2006)..

This Notice defines the objective of Art 81 EC as protecting competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.[224] The focus on consumer welfare is reflected in the criteria advanced by the Commission for the assessment under Art 81(1) EC. If they do not fall in the object-category, restrictions of (inter and intra-brand) competition are caught if they affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods can be expected 'with a reasonable degree of probability'. Clearly, then, the Commission did include a 'consumer harm requirement' in the assessment under Art 81(1) EC. Sadly, this does not mean that it solves the question at issue in the fundamental debate mentioned above. This is because the Commission considerably qualifies this requirement by stating that harm should be made plausible. And at the same time, it provides fairly little information as to how this determination of plausibility is to be made: what evidence can be relied on and what standard (measure of probability) will be used. It provides only two indications. The first is that a mere restriction of commercial freedom is insufficient evidence to presume that such effects will ensue.[225] The second is that firms must possess market power if they are to adversely affect competition in a way that violates Art 81(1) EC.[226] Before we continue our discussion of the Notice and the way in which it changes competition analysis, it is important that we examine this concept market power in more detail. For this purpose, we must return to our discussion of the economic analysis of competition.

Market Power

When free agents engage in a commercial transaction, we must assume that they attribute different values to the goods exchanged. For the deal to pull through, each party will have to put a higher value on the good delivered by his counterpart than on the good he surrenders. The value that different customers in a market will assign to the commodity in question (their reservation price) will depend on their circumstances and needs. For people living in an isolated part of the countryside or for those who have to travel frequently for work, owning a car may be a necessity. By comparison,

[224] Supra, footnote 61, at paras. 13 and 33.
[225] Id., at para. 24. In this regard the Commission remarks that a mere restriction of commercial freedom is insufficient evidence to presume that such effects will ensue.
[226] Id., at para. 25.

city dwellers that can easily get to work by bike or metro will attach a lower value to having a car. Economists use the term consumer surplus to refer to the combined satisfaction in excess of the price paid that all customers on a market derive from the product bought. Firms' combined profits are called the producers' surplus.

Market power is the capacity of a firm (or a combination of firms) to capture part of the consumer surplus in a market by restricting competition, that is, to transfer wealth away from consumers. This can be understood as follows. If the market price increases, the total number of units sold will generally go down. This is so, because the market price will come to exceed certain customers' reservation price. The effect on producers' profits depends on exactly how sensitive buyers are, as a group, to the price increase. If demand is inelastic, that is, if there is but a limited reduction in the quantity sold and the extra revenue secured by the price increase more than compensates for the associated loss in revenue, producer surplus will expand at the expense of consumer surplus. It is important to realise that in a competitive market the demand faced by an individual firm will tend to be more elastic than the demand faced by an industry as a whole. If other manufacturers are able to supply the same product in the same area at the lower price, a firm's unilateral attempt to exploit consumers will most likely fail. In such a context, where individual firms lack market power, a joint effort by producers to reduce collective output will be required to increase profits.

The exercise of market power will not only result in the transfer of wealth to producers. In the process, some wealth will be lost altogether. This is because consumers who leave the market will derive less satisfaction from second-choice products and producers will make a relatively smaller margin in producing these.[227] In economic theory such a pure loss for society is often called a deadweight loss.[228] Note, also, that this deadweight loss may be larger still. This is because a monopolist or a cartel may need to invest part of its extra profits in the maintenance of their

[227] If their reservation price for this other product had been higher than the reservation price for the product in the market where competition is restrained, it would be wrong to count them amongst the customers they

[228] An alternative to the consumer welfare standard defined by the Commission its Notice would be the so-called total welfare standard. As we saw, the consumer welfare model asserts that the pre-eminent goal of antitrust should be to prevent restrictions of the various dimensions of output that lead to decreased consumer welfare due to the exercise of market power by firms. According to the alternative view the main objective of antitrust is to prevent that the exercise of market power leads to the reduction of welfare in society as a whole. Restrictions of competition that lead to harm to consumers that is fully off set by gains in terms of producer surplus are not caught in this model. For a discussion, on this matter see Van den Bergh and Camesasca (2001).

market power (rent seeking behaviour). Potential entrants that would provide customers with an opportunity to satisfy their demand for the product at a lower price will have to be kept off the market. Cartel members also face the threat that insiders might defect. They will need to erect an infrastructure that allows members to communicate and monitor each other's behaviour. Such investments to protect future monopoly profits do not contribute to the production process and represent an additional waste of social resources.

Thus far, we have considered the effects of a reduction of the volume of production combined with a price increase. In actual markets, the exercise of market power can also be manifested in other dimensions of output. Producers may, for example, reduce the quality of the product, whilst continuing to sell it at the same price. This will enable them to reduce their costs of production and, thus, to increase profits. Consumers are left with a product that gives them less satisfaction. Alternatively, the restriction may affect the range of choice available to consumers (product variety) or impose limits on the resources devoted to pursuing innovation.

Ways to identify market power: structure or conduct

The final step in making the ultimate objectives operational is to link the intermediate objective of preventing the exercise of market power to types or categories of evidence that may be relied upon in substantiating a claim that Art 81 EC has been violated.[229] In this regard, we must realize that harm to consumers will seldom present itself as a self-evident fact. It tends to be spread out over numerous unidentified persons, who may be affected differently (some may buy at the higher price; others might spend their money on products that they value less). In addition, to understand how they are affected, if harm has indeed been done, it is necessary to construe a hypothetical image of the world without the restraint; that is, an image that shows how consumers would have fared in the absence of the restriction. The so-called Structure-Conduct-Performance framework is highly important in understanding what general form such evidence may take.

[229] At this level, the Commission's other guidelines are of importance. See, notably, the Commission's Notice on the definition of the relevant market for the purposes of Community competition law, [1997] OJ C372/03; the Guidelines on the applicability of Article 81 to horizontal co-operation agreements, [2001] OJ C3/2; and the Guidelines on Vertical Restraints (supra, footnote 185).

This framework, one of the pillars of the Industrial Organization branch of economics,[230] tells us that market structure and certain basic conditions have an important bearing on the conduct displayed by firms and, ultimately, on how well a market performs from the perspective of consumers and society as a whole.[231] More specifically, it is argued that performance depends on the conduct of sellers in terms of pricing, advertising, inter-firm cooperation, investments in research and development or production facilities, etc. Conduct, in turn, depends on the structure of the market, that is, on such factors as the number and relative size of sellers and buyers, the degree of differentiation between competing sellers' products, and the presence or absence of barriers to the entry of new firms. And, finally, market structure is influenced by a variety of basic conditions. On the supply side, for instance, the ownership of essential raw materials, the nature of the relevant technology, the durability of the product and the value/weight ratio of the product may be of importance, whilst on the demand side price elasticity will be of primary importance. To be sure, not all influences flow from basic conditions and market structure in the direction of performance. There are important feedback effects. Profits may, for example, be used to intensify research and development efforts or to increase advertisement. The former may alter the basic technologies used in the industry, whilst high advertising expenditures may raise barriers to entry.

In effects-based analysis, there are, thus, several options open to parties that set out to gather evidence to support their claim that Art 81 EC has been violated. One option would be to focus on the competitive structure of the market. It could be argued, for example, that the agreement at issue alters the structure of the market by allowing formerly independent operators to act in concert and that their combined mass and the absence of potential entrants affords them the possibility to exploit consumers. In its Notice the Commission indicates that evidence concerning market structure will generally play an important role in the assessment under Art 81(1)

[230] This conceptual framework was developed in the Harvard tradition of Industrial Organization, where it was used as a theoretical basis for empirical studies into the relationships between structure, conduct and performance in real-life industries. As we will see in Chapter 5, Section 5.3.1.1, the policy agenda based on the work done in this tradition was later criticised by members of a different school, originating at the university of Chicago, who were more oriented towards theoretical analysis. Note, however, that their criticism did not centre on the basic framework itself. The price theory models used by Chicagoans are also structured according to the number and relative size of sellers and buyers, for instance.

[231] For a more detailed discussion of the Structure-Conduct-Performance framework, see e.g. Scherer and Ross (1990) and Hildebrand (2002).

EC.[232] Another option would be to focus more on conduct. An enforcer might build his case on evidence concerning lower volumes and higher prices that are not explained by exogenous factors such as an increase in the prices for inputs. The Notice makes reference to this type of evidence as well. A third alternative, not explicitly discussed by the Commission, would be to combine both types of evidence. Apart from these brief and abstract statements on market structure and direct evidence, however, the Notice is mostly silent on how, in the analysis under Art 81(1) EC, it can be shown with a reasonable degree of certainty that an agreement will produce a negative impact on consumers (through prices, output, innovation or the variety or quality of goods or services).

Arguably, the discussion in the Notice on the assessment under Art 81(3) EC provides some indications on the required level of substantiation. As noted, the assessment under Art 81(3) EC is concerned with countervailing benefits produced by the challenged agreement. Naturally, these may occur in the same dimensions of output as the negative effects: price, volume, innovation or the variety or quantity of goods or services. The Notice holds defendants to quite an exacting test for showing efficiencies. They have to substantiate their claims by providing verifiable data that allows the Commission to determine with a sufficient degree of certainty – note the similarity with the terminology used in the part of the Notice on Art 81(1) EC – that these effects have materialised or will materialise. In principle, there is no reason why the accusing party should be held to a different standard of the evidence than the defendant, that is, why plausible should mean something else in the assessment under Art 81(1) EC than in the assessment under Art 81(3) EC. Moreover, if the Commission requires defendants to provide as much quantitative evidence on efficiencies as possible (particularly where cost efficiencies are concerned) in order to allow them to be balanced in an insightful way with negative effects, then, by implication, the Commission must proceed accordingly in the assessment under Art 81(1) EC.

It will be evident that the approach described in the Notice represents a considerable departure from the Commission's practice prior to substantive modernisation that was described above. Notice, however, that these statements in the Notice are best understood as guidelines on the conceptual framework underlying

[232] Supra, footnote 61, at para. 27.

competition analysis. As we will see in subsequent chapters, in practice these levels and methods of substantiation are seldom witnessed. In the next section we take a closer look at the Commission's remaining notices and guidelines, which offer more concrete and relevant information about the basic type of facts – of a structural or other nature – that the Commission looks at in assessing the effects produced by restraints.

2.4.3 An overview of substantive modernisation

The first component of the substantive modernisation process was a notice on market definition, issued in 1997.[233] In the following years the Commission issued a new block exemption regulation[234] and guidelines[235] concerning vertical restraints, block exemption regulations regarding specialisation agreements[236] and research and development agreements,[237] guidelines on horizontal co-operation in general,[238] and, finally, the notice on the application of Art 81(3) EC.[239] The framework of analysis to be applied in individual cases that emerged from these documents involves a number of sequenced inquiries: (1) classification of the agreement as a vertical or horizontal restriction of the competitive process;[240] (2) definition of the relevant market; (3) examination of the structure of this market; (4) identification of the negative effects produced by the restraint in this market; (5) identification of efficiencies; and (6) balancing of the two effects. In what follows, we will first consider the approach adopted in defining relevant markets. Next, we will discuss the guidelines on vertical restraints and horizontal cooperation, which are particularly informative on points 1 and 3-5. Finally, we return to the notice on Art 81(3) EC which is informative about the method adopted in balancing positive and negative effects. Together, these

[233] Commission Notice on the definition of the relevant market for the purposes of Community competition law (supra, footnote 229).
[234] Commission Regulation 2790/99, on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (supra, footnote 184).
[235] The Guidelines on Vertical Restraints (supra, footnote 185).
[236] Commission Regulation 2658/2000, on the application of Article 81(3) of the Treaty to categories of specialisation agreements, [2001] OJ L 304/3.
[237] Regulation 2659/2000, on the application of Article 81(3) of the Treaty to categories of research and development agreements, [2001] OJ L 304/7.
[238] Guidelines on the applicability of Article 81 to horizontal co-operation agreements (supra, footnote 229).
[239] Supra, footnote 61.
[240] This phase involves the question whether the agreement must be subjected to the object or the effects standard. The pattern laid out here only applies to effects-based analysis.

documents suggest that the new regime is intended to be more permissive, that is, that the prohibition contained in Art 81 EC catches fewer agreements.[241]

We have seen that the Commission's approach prior to the reforms was predominantly form-based. If an agreement contained clauses tending to restrict the commercial freedom (the ability to make decisions independently), there was a good chance that it would be found to violate at least Art 81(1) EC. The market affected by the restraint at issue would often be addressed, but the results of such inquiries would seldom play a decisive or even explicit role in the determination of legality.[242] This has changed with modernisation. Market definition is seen as a crucial preliminary step in assessing market power and, thus, the effects produced by a restraint. Its purpose is to get an impression of the competitive environment of the undertakings involved in a case, which can act as the background against which their actions can be examined. The investigation centres on the products sold by the undertakings concerned and the possible substitutes for these products that are available to their customers.[243] Before 1997 potential substitutes would be examined in terms of their physical characteristics, their intended end-uses, and their prices, to determine whether they should be included in the relevant market.[244] The focus was therefore mainly on the demand side.[245]

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[241] The relaxation in the application of Art 81(3) EC, the centre of gravity of the reforms, is most clearly evidenced by the block exemption of Regulation 2790/99 (supra, footnote 184), which extends to all possible forms of vertical agreements rather than just a few listed ones. This contrasts starkly with the older block exemption regulations in this field (supra, footnote 103) applied to certain specified forms of vertical agreements and typically contained white lists of clauses that could safely be adopted in such agreements and black lists of prohibited clauses.

[242] Joint ventures may also produce effects that are assessed within the framework of concentration control. A considerable amount of market structure analysis would be engaged in to determine whether the agreement was concentrative or cooperative in nature. For a detailed discussion on pre-modernisation treatment of joint ventures, see Vogelaar (2001: 130).

[243] Substitutability is examined both in absolute terms (to see what inherent competitive relationship exists between the product of the companies and other products) and in a spatial sense (which involves an inquiry into the expanse of the geographical area surrounding the companies in which the pressures arising from the existence of such other products is sufficiently strong to be taken into account).

[244] See the cases *United Brands v. Commission*, Case 27/76, [1978] ECR 207; *Hoffman-La Roche v. Commission*, Case 85/76, [1979] ECR 461, and *Aerospatiale-Alenia/de Haviland*, [1991] OJ L334/42. This approach was often criticised for being impressionistic. In this regard, see Van den Bergh (1996); Ridyard and Bishop (1999: §3.17-37); Camesasca (2001); and Kauper (1997).

[245] In most cases supply side substitution was given much less attention. A number of cases concerning a joint venture form an exception. It has been suggested, however, that the Commission seems to have used supply side arguments mainly for the purpose of defining separate markets where demand side considerations would suggest a single market, that is, in order to let these agreements be caught by Art 81(1) EC rather than to clear them straight away (Bishop and Ridyard, 2002: §3.23). For an example, see the Commission's decision in the case of *KSB/Goulds/Lowara/ITT* (OJ [1991] L19/25).

The Commission's notice on market definition aims to describe a more rigorous process.[246] In the first place, it expands the scope of the investigation vis-à-vis the old approach. In addition to demand side substitution, supply side substitution[247] and potential competition[248] may also be taken into account.[249] Secondly, the examination of substitutability is structured by means of a hypothetical experiment that is referred to as the SSNIP-test, which stands for a small but significant non-transitory increase in price. The experiment tries to identify all products that should be considered to be in the same market as that of the undertaking involved. It starts by supposing that the undertaking involved is a monopolist (i.e. the only supplier of the product, without there being substitutes), and tries to confirm this by imposing a SSNIP. If indeed the firm is a monopolist, it should be able to raise its price profitably. If not, the market was defined too narrowly and the product to which consumers have turned must be included. The process of including other products must continue until a SSNIP is profitable.[250] The notice indicates that the Commission follows an open approach as to the empirical evidence which it considers fit to give substance to this hypothetical experiment.[251] The starting points are physical characteristics and intended end-use of the product, but it considers the analysis thereof insufficient to give full proof of substitutability (or lack thereof). In this regard the Commission will especially give attention to evidence of substitution in the recent past, econometric and statistical tests, and views of customers and competitors. When in this way the relevant market has been defined, we enter the next phase of the analysis: the examination of the structure of this market and the effects thereon produced by the restraint. Here, the guidelines on vertical restraints and horizontal cooperation become relevant.[252]

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[246] For commentary on this notice, see e.g. Veljanovski (1998); Baker (1998); Camesasca and Van den Bergh (2001); Harbord and von Graevenitz (2001); Furse (1997); and Desai (1997).

[247] Here, one must think of manufacturers that are not yet established in the market but which are able to enter and start providing the same products on short notice and without incurring significant and unrecoverable costs or risks.

[248] This relates to the more distant threat that emanates from firms that do face such obstacles and could therefore enter the market only with significant delay.

[249] Demand side substitution is regarded by the Commission as the most immediate and effective of these constraints, and substitution on the supply side is considered only when its effects are equally strong. Potential competition is not taken into account when defining the relevant market, but will be considered if necessary in the later phase of the competition analysis, when assessing the impact on competition of the act under scrutiny. See paras 7-24 of the Market Notice (supra, footnote 229).

[250] Id., at paras. 15-19.

[251] Id., at paras. 25-27 and 36-43.

[252] For discussions on the new approach to vertical restraints, see Whish (2000), Bishop (2002), Bishop and Ridyard (2002: 35), Peeperkorn (2002), Hughes (2001), and Van den Bergh and Camesasca (2001). See Griffiths and Nüesch (2000) and Vogelaar (2002) for discussions of the new approach to horizontal cooperation.

The examination of market structure and of the position of the firm in question on the market serves as an indication of their capacity to exploit their customers. The main focus of attention, at this stage of the analysis, will be on the market shares of the defendant and his competitors, on possible barriers to entry on the market and on the market position (countervailing power) of buyers.[253] Even if significant indications are found that the firm in question enjoys a position of strength, this is not in itself sufficient to conclude that Art 81(1) EC has been violated, however. First, the impact of the agreement on the relevant market must be studied.[254] The restrictions of inter-brand competition contained in horizontal agreements[255] may facilitate collusion and may affect prices, output, innovation or the variety or quality of goods and services.[256] Vertical restraints,[257] in turn, may lead to restrictions of inter and intra-brand competition and can lead to foreclosure effects that raise barriers to entry.[258] Both sets of guidelines also identify a number of potential efficiencies that may be generated by means of these types of arrangements. Horizontal cooperation may produce economies of scale, it may lead to improvements in production technologies and it may allow firms to launch products sooner.[259] Vertical restraints will often serve to rationalise distribution by helping to solve certain problems that may arise in the relation between a seller and his reseller. The Commission sums up eight examples of such problems.[260] In this regard, the Commission emphasises the need to calculate or estimate the value of cost efficiencies as accurately as reasonably

[253] See para. 121 a.f. of the Vertical Guidelines (supra, footnote 185), paras. 53-55 of the Market Notice (supra, footnote 229), and paras. 28-30 of the Horizontal Guidelines (supra, footnote 229).
[254] See para. 103 a.f. of the Vertical Guidelines (supra, footnote 185). This is evident, also, in the discussion of the effects of the various forms of horizontal agreements covered by the Horizontal Guidelines (supra, footnote 229).
[255] A horizontal agreement is an agreement between undertakings operating at the same level of the production or distribution chain.
[256] See paras. 19 and 27 of the Horizontal Guidelines (supra, footnote 229). See also chapter 3 of these guidelines, where the Commission advances the following criterion to judge whether this risk of undue coordination occurs in a specific case. In order for there to be a risk of coordination, the parties normally need to cooperate with regard to a significant part of their activities in order to achieve a substantial degree of *commonality of cost*. In other words, if the joint production agreement covers a substantial part of the parties' production process, their interests become so intertwined, that coordination especially in the form of alignment of prices or output, becomes likely.
[257] A vertical agreement is an agreement between undertakings which operate at different stages of the production chain, and which relates to the conditions under which the parties may purchase, sell or resell goods or services. See Art 2 section 1 of Regulation 2790/99 (supra, footnote 184).
[258] See para. 119 a.f. of the Vertical Guidelines (supra, footnote 185).
[259] See e.g. paras. 3, 32, 67, and 102 of the Horizontal Guidelines (supra, footnote 229).
[260] See paras. 115-118 of the Vertical Guidelines (supra, footnote 185).

possible.[261] In the case of claimed efficiencies in the form of new or improved products and other non-cost based efficiencies, the undertakings claiming the benefit of Article 81(3) must describe and explain in detail what is the nature of the efficiencies and how and why they constitute an objective economic benefit.[262] If an agreement produces both negative effects and benefits, these have to be weighed against each other to see which effect is stronger.[263]

The final section of this chapter discusses the approach that will be adopted in the rest of this work to examine how this modernised analytical framework is applied in practice and what its implications are in terms of legal certainty. This approach is distinguished form the approach adopted in the earlier *rule of reason* debate.

2.5 Approach and scope

Legal certainty: modernisation as applied in practice

Legal certainty was an important theme in the debate on the scope for applying a *rule of reason* in the investigation under Art 81(1) EC. We may summarise our discussion of this matter in Section 2.3.2 as follows. There were two related sets of problems. The first related to the ability to enforce contracts. Harmless agreements, in as much as they were caught by Art 81(1) EC, were not valid from the moment of their implementation. They needed to be expressly exempted. Such authorisation was very hard to obtain, however, which, to a certain extent, made contractual relations and related investments vulnerable. In addition, there were problems with legal certainty in a broader sense. The Commission, for a considerable period of time, regarded formalism as a way to provide certainty about the implications for firms of this new and rapidly evolving field of law. As a consequence, however, there were serious problems as regards forms of agreement that did not fit into any of the rigid categories set forth in the block exemption regulations of the day. The low volume of fully reasoned formal decisions produced by the over-burdened system made it hard to

[261] See para. 56 a.f. of the Notice on the application of Art 81(3) (supra, footnote 61). 'In the case of claimed cost efficiencies the undertakings invoking the benefit of Article 81(3) must as accurately as reasonably possible calculate or estimate the value of the efficiencies and describe in detail how the amount has been computed. They must also describe the method(s) by which the efficiencies have been or will be achieved. The data submitted must be verifiable so that there can be a sufficient degree of certainty that the efficiencies have materialised or are likely to materialise.'
[262] Id., at para. 57.
[263] Id., at para 83 a.f.

predict whether and, if so, under which circumstances such agreements might, as a matter of law, benefit from an individual exemption or not.[264] Particularly towards the end of the century, a growing number of antitrust scholars took the position that economics (and, thus, economics-oriented objectives) provides better analytical tools than formalism to reach predictable, well reasoned results in European antitrust.[265] The Commission's reform of its substantive policies indicates that, in principle, it now shares this view.

The reform of the regime for the enforcement of Art 81 EC has also generated debate about legal certainty. It has frequently been noted that the shift to *ex post* control has eliminated or reduced firms' options to obtain *ex ante* (that is, prior to implementation) certainty about the legality of their contracts.[266] The argument has also been made that there is a risk that decentralised application might lead to a loss of coherency in the substance of the law.[267] Finally, it has been suggested that the implications for the Commission's fining practice remain unclear.[268] Generally, these works focus on the features of the reforms as described by the Commission; which is understandable given that most date from before or very shortly after the reforms took effect. Despite the strong relation between substantive and procedural reforms, also, their effects on legal certainty are mostly examined in isolation.[269] Lastly, the effects of reduced levels of certainty that might be caused by the reforms are not examined as to their precise implications for firm behaviour, that is, it is not examined how compliance by firms is affected.[270] The objectives of this thesis are to examine (1) how well the way in which the Commission has put both forms of modernisation into

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[264] See e.g. Holley (1993: 687).

[265] In addition to the literature cited in Section 2.3.2, see the contribution by Barry E. Hawk in Ehlermann and Atanasiu (1998: 333). See also the contribution by Jonathan Faull in the same volume, who (at p. 503), states the following: 'The balance between legal certainty and economic analysis, which all competition policies strive to achieve, must be redefined. We must look again at the best way to provide for market-sensitive analysis in a predictable, transparent legal system designed for an imperfect single market among Member States of very different sizes, traditions and economic circumstances.'

[266] See the Commission's summary of the observations submitted to its white paper for reform of Regulation 17/62 (of 29 February 2000, published on the Commission's website) and e.g. Pirrung (2004), Hawk and Denaeijer (2001), Jenny (2001), Bartosch (2001), Gustafsson (2000), Holmes (2000), Möschel (2000), and Paulweber (2000).

[267] See e.g. Siragusa (2001), Immenga (2001), and Hawk and Denaeijer (2001). See also Wils (2003b).

[268] See Hawk and Denaeijer (2001) and Barros (2002).

[269] Concerning these links, see the discussion above in Section 2.4.1 and Gerber (2008a).

[270] Here the works by Neven (2001) and Barros (2002) should be mentioned. They both explicitly address the effects of procedural modernisation on firm behaviour. It should be realised, however, that the element of the reforms on which they focus is the effects of the increased likelihood of the imposition of fines after modernisation. They do not consider the issue of legal certainty (i.e. the effect of the reforms on firms' capacity to assess the legality of their intended agreements).

practice serves to guide firms in assessing the legality of their intended agreements, (2) to examine the possible effects of reduced levels of certainty, and (3) to explore avenues for making improvements.

It should be emphasised that the purpose of this exercise is not to re-open debate on the appropriateness of either form of modernisation. Rather, the effects of modernisation on legal certainty are examined so that we may form an image of the possibilities to improve the efficiency of enforcement by adjusting the calibration of the effects-based standard to the new situation. Note, also, that the important question concerning the effect on legal certainty of decentralising the enforcement system, which might result in inconsistent application by national courts or competition authorities, is not addressed here. We look exclusively at modernisation as put into practice by the Commission.

Making the effects of uncertainty visible

In contemplating the research objectives stated above, it is important to realise that there are inherent difficulties in making the effects of reduced legal certainty visible. What we are concerned with is conduct by firms who – either because the law does not speak clearly in their case or because they reckon that it will be misapplied – end up signing agreements that are harmful (under-deterrence) or, instead, agreements that are made less restrictive than is ultimately necessary to avoid harm (over-compliance). All that is readily available to us for study are decisions finding infringements. For obvious reasons, it is more complicated for researchers to gather information about undetected violations or about equally unscrutinised agreements that, out of fear of intervention, are designed in an unnecessarily cautious way.

The complexities of unearthing direct evidence of such inefficiencies are reflected in the fact that, despite the existence of a large body of literature that models the various circumstances of uncertainty under which under-compliance or over-compliance may occur,[271] not so much can be found in the way of studies applying these insights to the realities of legal practice.[272] Notably, the approaches adopted in the small branch of empirical literature directly measuring inefficiencies generated by antitrust enforcement is not easily adapted to the circumstances of effects-based

[271] This literature is discussed in Chapter 3, Section 3.4.
[272] Outside the field of antitrust one may look for such literature particularly in the area of tax law. For a discussion, see Kaplow (2000: 507).

analysis under Art 81 EC. Generally, this line of work depends on the identification of an independent variable with which the quality or effect of enforcement action can be evaluated. Such an approach is difficult to adapt to our context, firstly, because the list of decisions to be studied, particularly formal infringement decisions, is very short.[273] And for the following reasons comparable independent variables, assuming that sufficient information could be obtained, are difficult to operationalise in the field of effects-based analysis.

The work on hard-core cartels tends to concentrate on data regarding pricing mark-ups to assess the effects of enforcement.[274] A major problem, here, is that such data is generally absent in the type of cases examined under the effects-based standard. As we will see in Chapter 4, at best, decisions contain data concerning market-structure; overcharges are hardly ever the focus of the investigation.[275] A number of studies in the field of merger policy look at stock market data to learn about the post-merger exercise of market power.[276] One problem here is that most of the Commission's recent decisions in the effects-based field concern horizontal cooperation, in the form of non-listed joint ventures, often between large numbers of firms.[277] Another problem is that the profit and stock market effects of concluding (often nationally-based) agreements assessed under the effects-based standard of Art

[273] See the list of formal effects-based decisions adopted since 1998 in Appendix A. There are but four infringement decisions amongst these. The remainder are exemption or commitment decisions. Understandably, these are generally much less elaborate in terms of the underlying reasoning.

[274] See e.g. Feinberg (1980); Block et al. (1981); Block and Feinstein (1986); and Clark and Evenett (2003). Also in the cartel context are empirical studies by Arlman (2005) and Brenner (2005, 2006) who study the effectiveness of leniency programmes (in this regard, see also Spagnolo, 2007). See Schinkel et al. (2008) for references to other empirical work done on EC and US antitrust enforcement.

[275] The decision in the case of *Master Card* (of 19 December 2007, published on the Commission's website) provides an exception. Note, however, that, despite their importance to the Commission, the price effects at issue in that case can be interpreted both in an anti-competitive and in a pro-competitive way. In this regard, see the discussion of this case in Chapter 4, Section 4.3.2, and Chapter 7, Section 7.2.

[276] See e.g Duso et al. (2006c) and Duso et al. (2006b), which contains an elaborate discussion of the available literature on this matter. Another method is to rely on accounting data. For a discussion and comparison of the two methods, see Duso et al. (2006a).

[277] This applies to two more than 50% of the 32 effects-based cases listed in Appendix A. It applies to two of the four infringement decisions: *EATA*, [1999] OJ L193/23, *Morgan Stanley / Visa* (decision of 3 October 2007, published on the Commission's website - note that in the year after this latter decision Visa did launch an initial public offering). It also applies 15 of the exemption and commitment decisions in the Appendix as well. Examples are: IMA (EPI), OJ [1999] L106/14; P&I Clubs, OJ [1999] L125/12; *Reims II*, OJ [1999] L275/17; *CEDED* (supra, footnote 60); *Eurovision*, OJ [2000] L187/47; *EcoEmballages*, OJ [2000] L151/18; *Visa MIF*, OJ [2002] L318/17; *IFPI Simulcasting*, OJ [2003] L107/58; *RevisedTaca*, OJ [2003] L26/53; *UEFA*, OJ [2003] L291/25; *Reims II Renewal*, OJ [2004] L56/76; *Argec / ARA*, OJ [2002] C250/3; *DFB* (decision of 19 January 2005, published on the Commission's website); *Premier League* (decision of 22 March 2006, published on the Commission's website); and *Cannes*, (decision of 4 October 2006, published on the Commission's website).

81 EC can be expected to be much less pronounced than those of a merger announcement.[278] In addition, it would be problematic to distinguish the increase in profits caused by the efficiency effects of a transaction from the profits generated by the exploitation of consumers. With regard to mergers, this is often accomplished by considering the effect on the stock price of competitors. In European effects-based analysis, however, the vast majority of decisions that are currently being taken are so brief that they do not contain a sufficiently in-depth description of the relevant market to systematically identify competitors.[279]

A further problem with both types of works (relying on pricing and stock market data) is that they focus on the effects of antitrust intervention on the conduct the firms directly affected, that is, those which are alleged to have already violated the law. They do not consider the possibly divergent effects on potential offenders, that is, on firms in the stage of designing and implementing a new agreement. In a system based on selective ex post control, such as the one instituted for the enforcement of Art 81 EC by Regulation 1/2003,[280] it is the effects on potential offenders that are of far greater concern. This is particularly so in our context, since it is common knowledge that the type of vertical and horizontal agreements assessed under the effects-based standard are very widely used in the production and distribution of goods. Some studies do consider such wider effects, notably by looking at how enforcement action affects the subsequent number of notified mergers.[281] Apart from the fact that the move away from notification would present a serious obstacle to adapting such a frequency-based approach to the study of the effects of enforcement of Art 81 EC, it should be noted that the composition effects of enforcement are not captured at all. That is, firms who respond to enforcement action by implementing needlessly cautious agreements (over-deterrence) are not brought into focus. In conclusion, it can be said that the possibilities of gathering useful direct evidence of inefficient firm behaviour appear to be limited in the field of effects-based analysis under Art 81 EC.

[278] In this regard, consider, for example, the case of *Van den Bergh Foods*, OJ [1998] L246/1. This is the fourth infringement decision listed in Appendix A. This decision concerns the effects of a network of distribution agreements relied upon by a Unilever-daughter on the Irish market for impulse ice cream. It is hard to see how the modifications required to these distribution contracts could have a serious impact on the stock market performance of this large multinational firm.
[279] In this regard, see the discussion in Chapter 5, Section 5.3.1.2.
[280] Supra, footnote 190.
[281] See Seldesachts et al. (2007).

An alternative approach

This thesis adopts an alternative and more qualitative approach. Instead of searching for direct evidence of inefficiencies, it concentrates on properties of the enforcement system that can be expected to lead to such outcomes. To do so, it combines two important methods of modern legal studies: the economic analysis of law, and comparative legal analysis. The principle weakness of this approach, as compared to the work in other fields of antitrust that was just discussed, is that it does not provide us with a quantitative indication of the seriousness of the problems that are detected.

The investigation is based on the construction (in Chapter 3) of a layered analytical framework that describes: (1) the variables that influence the calibration of the legal standard and the division of the burden of proof; and (2) the effect of this calibration of the legal standard on parties in litigation and firms in the market. This framework is used to examine the relevant case law and all effects-based decisions on Art 81 EC taken since the beginning of the substantive reforms in 1998. This makes it possible to interpret the implications of the legal standard as it emerges from practice and official documents for the behaviour of firms. This analysis proceeds along the following lines.

The analytical framework suggests that the legal standard influences the decisions of potential offenders primarily by way of its impact on legal certainty – that is, the ability to predict whether the Commission will qualify an agreement as legal or illegal. A low level of certainty can lead firms to sign inefficient contracts. Three contrasts are examined to determine whether the levels of uncertainty generated by the current legal standard might be excessive. First (in Chapter 4), the results of the study of European effects-based analysis are compared to the legal standard as employed in *rule of reason* analysis under the US Sherman Act Section 1. This analysis shows that there are considerable differences in the design of the investigatory process, which are argued to result in relatively more uncertainty for European potential offenders. Next (in Chapter 5), the effects of the substantive and procedural reforms discussed above are examined. This exercise, comparable to an events-study, indicates that the combined effect of these reforms has been to increase uncertainty. A survey of the observations made by major law firms, consultancies and industry groups in response to the Commission's recent call for submissions

evaluating the performance of the current enforcement regime appears to give considerable support for this finding.[282]

A final note on the scope of this work

This work centres on the effects-based standard as applied to individual cases. The core of effects-based analysis, we saw, is the investigation of market power. In this regard, it is important to emphasise that the evaluation of restraints on the basis of rules set out in block-exemption regulations falls outside the scope of this work. Recall that these regulations apply the exemption of Art 81(3) EC to whole classes of agreements that are not restrictive by object. Notably, modern block exemption regulations make application of Art 81(3) EC dependent on the combined position of the parties to the agreement not exceeding certain market share caps, which are used as a proxy for the absence of market power.[283] If the parties do not exceed the relevant cap, the effect of their agreement on consumers is assumed to be neutral or beneficial. No assessment of the actual impact on the market is necessary in such cases. Essentially, then, even though block exemption regulations are supported by effects-based reasoning, they contain *per se* rules (rules of legality, though) akin to those applied in object-based analysis. Since no inquiry is made into the actual exercise of market power, such cases will not be discussed in the chapters that follow.

[282] See the discussion in Chapter 5, Section 5.4.

[283] See Regulation 2790/99 on vertical restraints, (supra, footnote 184); Regulation 2658/2000, on specialisation agreements (supra, footnote 237); and Regulation 2659/2000, on research and development agreements (supra, footnote 238). The same does not apply to Regulation 240/96 on technology transfer agreements, [2004] OJ L123/11.

PART 2

EVALUATING THE CURRENT STATE OF EFFECTS-BASED ANALYSIS

CHAPTER 3

Economic Analysis of the Effects-based Standard

3.1 Introduction

The Commission's decision practice applying the effects-based standard cannot properly be evaluated without a clear view of the function of this standard within the antitrust enforcement system as a whole. Its primary roles are to signal to firms what contracts they are permitted to sign and to determine what evidence each of the parties in litigation must bring forward in order to achieve the results they seek. This chapter presents an economic analysis of these core features of the legal standard.[1] The analysis has two layers.

First, in Section 3.3, we adopt a policymaker's perspective and consider the optimal calibration of the legal standard. It is natural for students of antitrust to assume that economic concepts determine the shape of substantive rules. What approach should be adopted under the antitrust laws towards a certain type of restrictive practice does not only depend on its potential to cause harm, however. To be sure, the costs that will be incurred in showing such an effect and the costs of errors that may be produced will also affect the optimal calibration of the legal standard. This is a key insight that allows us to structure the examination that is engaged in the following chapters, by focusing on these three variables: priors about

[1] That is not to say that it informs the reader about the content of the rule contained in Art 81 EC, that is, the types of economic behaviour it permits and prohibits, and why. A first impression of these matters was given in Chapter 2, Sections 2.3 and 2.4, and a more comprehensive discussion follows in Chapter 4. The present chapter concentrates on the calibration of the legal standard and the way in which it influences the behaviour of firms and litigants, and the effects this has on the performance of the system as a whole. With a view to the comparison of EU and US antitrust made in Chapter 4 it should be mentioned, also, that the analysis presented in Sections 3.2; 3.3.1; and 3.5 is purported to apply in equal measure to the functioning of the *rule of reason* in US antitrust.

the potential to cause harm, enforcement costs, and error costs in European effects-based analysis.

Next, in Section 3.4, in order to deepen our understanding of the error costs that may be generated in enforcement, we study how the legal standard influences the decisions of firms that consider concluding a restrictive contract with possible antitrust implications.[2] This leads us to examine the role of legal certainty. In the antitrust literature on *per se* analysis, it has been shown that uncertainty about whether an intended agreement will be caught may result in under-compliance (see e.g. Schinkel and Tuinstra, 2006). By contrast, it is argued here that the characteristics of vertical restraints and joint ventures – the types of agreement subjected to the effects-based standard – are such that uncertainty about the precise location of the legal standard may, on occasion, also result in over-compliance. This, too, is important for the analysis pursued below, since over-compliance must be addressed by different means than under-deterrence.

To prepare for these discussions, Section 3.2 provides an introduction to the general principles that underlie the enforcement system as a whole, the role played by the legal standard within this system, and some basic concepts of decision theory.

3.2 Efficient enforcement, the legal standard, and decision theory

The system as a whole

The operation of the enforcement mechanism is best explained in relation to the objective of Art 81 EC. This provision is meant to prevent firms from adopting restrictive agreements that impose a cost on society. Enforcement action – necessary to ensure that firms actually take this rule in the book into account when deciding on the nature of the agreements they conclude with other market participants – is also costly to society. The optimal system of enforcement, which corresponds best to the logic of Art 81 EC, minimizes the combined costs of non-compliance and enforcement.[3]

[2] In this and the following chapters the terminology used in Chapter 2 is adopted. There it was explained that not all agreements that restrict competition cause consumer harm. A restrictive agreement therefore constitutes a potential violation of Art 81 EC.

[3] It may be surmised that in a system based on deterrence such as has been instituted by Regulation 1/2003 ([2003] OJ L1/1, see Chapter 2, Section 2.4.1, and Chapter 5, Section 5.3) the costs of non-compliance (which is taken here to include welfare losses due to over-compliance, see Section 3.4.1) are superior to the costs of enforcement by at least an order of magnitude.

In considering the practical implications of this principle it is important to appreciate that enforcement is a process that occurs on two levels.[4] Enforcement action is directed at penalising firms who have signed and implemented harmful agreements (offenders). From society's point of view, however, it is the effect of these actions on the decision making process of firms who may consider signing such agreements (potential offenders) that is of primary importance. As suggested by Becker (1968), given the costs involved, it is preferable to encourage as many potential offenders as possible to comply at the earlier stage, with a minimum of enforcement effort.

Enforcement systems based on deterrence, such as the one currently in place in Europe,[5] are designed to achieve this objective by the following means. Agreements that reduce consumer welfare will generally produce extra profits for firms. The aim is to cancel out this rise in expected profits, by adding to the cost side of the equation. To this end the threat is created that enforcers challenge harmful agreements in proceedings which lead to the imposition of sanctions if an infringement is found. Compliance, and the costs of non-compliance, therefore, depend on potential offenders' expectations as to the likelihood of intervention by enforcers, on their estimation of their own chances as defendants, and on the severity of the sanctions they expect would be imposed.

Notice that if costs and benefits in the form of sanctions and profits were the only determinants of behaviour, enforcement could easily be made to produce optimal results. Sanctions would be set at the highest of levels and imposed on all firms found to conclude restrictive agreements. Consequently, no restrictive agreements would be

[4] This applies to systems based on *ex post* intervention, such as instituted in Europe by Regulation 1/2003 (supra, footnote 3).

[5] The enforcement system that was in place before the entry into force of Regulation 1/2003 (supra, footnote 3), did not primarily depend on selective *ex post* intervention to induce firms to comply with Art 81 EC. Regulation 17/62 ([1962] OJ 13/204) instituted a system of *ex ante* screening. In view of the importance that will be attributed to the design of this enforcement regime in subsequent chapters, it is worth explaining the circumstances under which it made sense to create a system that depended on (costly) interventions in a very large number of cases. This underscores the importance of legal certainty. As is reported in Gerber (1998), at the outset of European competition policy, the Commission faced a difficult situation. The provisions in the Treaty employ broad language that leaves room for interpretation. The Commission and the Court would need powers to assess a large number of cases if they were to be able to exert sufficient influence over the future shape of competition policy to ensure that it would serve the goal of common market integration. In addition, firms could be expected to be hostile to competition policy. In several member states cartelisation had been part of industrial policy before the war. The system therefore also served to ensure a minimum level of compliance. In sum, at the time policymakers estimated that a high level of intervention was necessary to ensure a sufficient case load to speedily develop a body of European antitrust law that would be respected by firms.

concluded, no litigation would result, and enforcement would consume few, if any, resources.

The fact that in reality transgressions do occur and that costs are incurred in dealing with them implies that we must widen the scope of our analysis. It is essential to recognise that potential offenders may not know whether the agreement they intend to sign will infringe the law; whether, if so, it would be challenged; and, finally, exactly what negative consequences would follow. Potential enforcers and defendants, in turn, will be uncertain as to the exact nature of the evidence that their opposing party can produce, and the probable interpretation of facts or the law by the authority or court that reviews their case. These uncertainties have a decisive bearing on the decisions that each of the actors takes and, therefore, on the efficiency of enforcement.[6] For example, the lower potential offenders estimate the probability of being challenged, the more attractive it will be to infringe Art 81 EC.

The legal standard

The legal standard is the test that is applied to see whether an agreement is prohibited under Art 81 EC and it is an integral and crucial part of the enforcement system. It regulates the investigation of restraints in the course of legal proceedings by signalling to parties in litigation what arguments and associated categories of evidence must be presented in order for their claims to succeed, and thus, determines to a considerable degree the amount of enforcement costs that the parties will bear. More importantly, the legal standard serves to inform potential offenders – at an earlier stage – as to whether their intended agreement is of the type that may suffer the consequences of antitrust enforcement.

Note, however, that in the context of effects-based analysis this test should not be thought of as a detailed and precise rule expressed in the Treaty itself. Art 81 EC only describes the most basic features of the investigation to which restraints must be subjected. For the prohibition to apply, an agreement must suppress the process of

[6] It is not suggested that uncertainty is the only factor explaining transgressions from EC competition law. (In this regard, see the discussion below, in Section 3.4.1, where it is explained that firms' incentives to cross the line, to stay in the clear, or to take too much caution, are determined by the interplay between the expected costs and benefits of the different forms of agreement between which they can choose.) The simple point that is made here is that we may expect that no transgressions would occur if enforcement could be structured in such a way as to give firms 100% certainty about (1) the dividing line between permissible and impermissible behaviour, (2) being caught in case of transgression, and (3) being punished in such a way that no net profits can be made.

rivalry between firms and, consequently, do more harm than good to consumers. Clearly, these abstract notions do not provide all firms with sufficient information to determine the legality of their contracts. Such certainty is only provided *ex post*, should the agreement be examined by the Commission or a court. *Ex ante*, firms may obtain additional guidance by looking at the relevant case law of the European Courts, the Commission's decision practice, or guidelines. In this way they can form an image of the likely implications for the agreements they wish to implement. Yet the specific circumstances of prior cases may be different from the situation that other firms face and guidelines may remain too abstract.[7] Inevitably, therefore, they have to make their decisions to invest in distribution networks or in joint production facilities without absolute certainty about whether their agreement will produce the type of effect that will escape the ban of Art 81 EC.

And with a view to our analysis of the calibration of the legal standard in the next section it is important to realise that policymakers face similar difficulties when drawing up antitrust rules. They cannot easily foresee the welfare implications of every possible form of restriction under all possible market conditions. As is evidenced by the broad language of Art 81 EC, they must therefore decide how much to invest in gathering the necessary information to draw up clear and specific rules *ex ante* and how much of the detail should be left over to courts to fill in *ex post*.

Decision theory

These facts suggests that it is important to examine (1) how decision makers – whether they are firms deciding on contracts, parties determining their litigation strategy, authorities and courts trying facts, or policymakers crafting rules – that are faced with imperfect information may determine which decision is optimal and (2) under what circumstances they should make investments to increase the amount of

[7] Moreover, as realists we are forced to admit that the law is not a watertight system. The facts pointed at by older cases and guidelines are not necessarily the only determinants of the outcome of proceedings. Other factors – a differently composed panel of judges or a different economic or political tide – may well play a role. On the other hand, this should not lead us to the conclusion that the legal standard in effects-based analysis is wholly indeterminate. The mode of reasoning employed in decisions and case law suggests that, as a general matter, precedents and (in the case of the Commission) guidelines do limit decision making and it makes sense, therefore, for firms to orientate themselves in the way described above on the legality of their contracts, even if the outcome will not be full proof. In this regard, see Maxeiner (2007) and the discussion on legal certainty below in Section 3.4.

information available.[8] To understand these issues better, consider the position of a firm that wants to invest in its distribution network. Suppose that it faces a choice between two different forms of contract that it may sign with its resellers. The firm has no doubts that the antitrust authorities will not oppose the contract of type A. Type B, on the other hand, imposes considerable restrictions on the commercial freedom of certain market participants. It is expected that this alternative will produce €100 in extra profits. But the firm estimates that there is a probability of 0.5 that the agreement will be caught and terminated, in which event a fine of €90 is imposed and the profits are foregone. If no more information is available, the firm should compare the expected values of these alternatives to determine whether it should rely on contract A or B to structure its relations with resellers. Assuming that our firm is a rational profit maximizing agent,[9] it will prefer B over its neutral alternative A (zero gains and zero losses), since it has a positive expected net benefit of €5 (0.5 x €100 – 0.5 x €90).[10]

Although this decision is perfectly rational, the agreement may subsequently still be caught and terminated. In other words, a rational *ex ante* decision may produce error costs *ex post*. Suppose that the firm can remove all uncertainty, for example, by notifying the agreement to the antitrust authorities as Regulation 17/62 once

[8] These questions are dealt with by the branch of economics that is commonly referred to as decision theory. For a contribution that applies decision theory to decision making in antitrust see Beckner and Salop (1999), who provide extensive references to the literature in general. A third question that will arise – particularly in the context of adjudication – is, if information is to be gathered, exactly which information should be considered and in what order.

[9] That is, we assume that if restricting competition is privately beneficial, the firm will enter into a contract with his rivals. Sanctions are effective in changing behaviour only if they lead to costs that exceed these benefits. One might react to this by saying that surely other factors than financial gain alone can have a bearing on the decision to stay within the bounds of the law. Particularly in fields such as traditional criminal law (i.e. excluding white collar crime) a perceived moral responsibility not to transgress will be of major importance in determining behaviour. This is certainly true. It should be realised, however, that the above discussion can easily be reformulated in terms of utilities (rather than euros). The profit maximization assumption implies that a person will prefer that course of action to which he attributes the highest utility. These preferences are likely to be influenced by the prospect of extra financial profit that the agreement could lead to and by the possible amount of a fine, but they may just as well be influenced by disutilities originating in moral perceptions. The outlook is in principle broader therefore. It should be noted, also, that even if it may be doubted whether individual persons will always act rationally, in antitrust offenders will generally be large corporate entities. Due to the fact that decision making processes in such firms will tend to incorporate shareholder interests, the arguments to expect their behaviour to conform to this assumption are much stronger.

[10] The assumption here – and in the rest of this chapter – is that decision makers are risk neutral. A risk neutral decision maker weighs potential harms equally with potential benefits. In contrast, a risk averse decision maker places more weight on harms. Note, however, that even if a decision maker is risk averse, this does not render our decision-theoretic analysis irrelevant. It will simply mean that the downside potential of the decision will be given additional weight. In this regard, see Beckner and Salop (1999:52).

prescribed.[11] Such an investment in information would eliminate the possible costs of taking an erroneous decision. The firm would either know that alternative B is acceptable and earn €100 or, if it is not, it would implement agreement A. The expected benefit of the decision with the extra information is therefore €50 (0.5 x €100 – 0.5 x €0) whilst the expected benefit without the information is €5 (as calculated above). This means that the net incremental value of the information is €45. If the firm can obtain this information for less than this amount, therefore, it should do so (since the sum of error and investigation costs would remain lower than the total error costs in case no further investigation is engaged in).

Two key insights of the economic approach to decision making are reflected in these examples: (1) where information is limited, decisions should be based on a comparison of the expected value of the alternatives and (2) decision makers should try to minimize the combined costs of error and gathering information.[12] In the following sections we will build upon these insights to examine the decision making processes followed by policymakers and firms.

3.3. Calibration of the legal standard

In this section we adopt a policymaker's perspective and look at the rulemaking process. Our focus will be on the key characteristics of the effects-based standard that distinguish this method for analysing restraints from *per se* rules. In Section 3.3.1, we briefly revisit the reasons for working with a much more broadly pitched investigation and examine some of the implications of working with a standard rather than a rule. In Section 3.3.2, we study the considerations that may lead policymakers to divide the burden of proof between the enforcing party and the defendant.

3.3.1 Rulemaking: accuracy and timing

Components of the rule making calculus

Let us assume for the moment that the effects-based standard of Art 81 EC is composed of a number of rules regarding specific restrictive practices that are specified by policymakers *ex ante*. These rules should inform firms, litigants, and

[11] Supra, footnote 4.
[12] See Ehrlich and Posner (1974).

triers of fact on how to determine whether a restrictive agreement is caught. They must explain – in a greater level of detail than the broad language employed in the provision itself – the build-up and sequence of an acceptable argument that this provision has been infringed and they should designate the types of evidence that can be used to substantiate this argument. In his discussion on rulemaking in US antitrust Page (1989) suggests there are three variables that will determine the composition of these rules. These are: (1) policymakers' priors regarding the frequency with which a certain practice will lead to harm; (2) their estimates of the severity of the harm caused in such circumstances; and (3) their expectations as to the costs of producing the related evidence. Their respective roles can be appreciated by considering the following.

Theory developed in the Industrial Organization branch of economics will have a considerable impact on the formulation of such rules.[13] It provides policymakers with models of reality that show how and under what circumstances certain behaviour will lead to consumer harm. Ideally, such a model will typically point to specific features of reality that allow us to distinguish a practice with restrictive consequences from efficient behaviour. The rules will direct the analysis of a restraint to this type of feature that is compatible with only one explanation. Related empirical studies will inform policymakers about the frequency with which specific practices can be expected to produce harmful and beneficial results.

On occasion, the rules of thumb derived from such empirical work may counsel against the investigation of the type of conclusive evidence advanced by a model. Consider the type of agreements subjected to *per se* rules, such as price fixing and market sharing. These practices are considered to be harmful in the vast majority of cases. Under a *per se* rule, therefore, it is sufficient that the mere existence of an agreement with stipulated features be shown, for the prohibition to apply, even if it is not the agreement itself, but its effect that is the reason for concern. Theorists might be able to show that under very specific circumstances such contracts lead to positive outcomes. But in any case this potential to contribute to consumer welfare will be minute. As a consequence, verification of the existence of these special circumstances would change the outcome of the decision in only a tiny fraction of cases. Treating a certain practice as a *per se* violation implies a policy decision, therefore, holding that

[13] See the discussion on the impact of developments in Industrial Organization on antitrust policy in Chapter 5, Section 5.2.2.

the extra costs of a full inquiry into the effects in each case would be larger than the error costs that would be avoided by so doing.

The reason for subjecting other practices to the effects-based standard is that policy maker's estimates as to their effects are different. In line with modern economic insights, these type of agreements – vertical restraints, for example – are held to have a *non-negligible* potential both to decrease and increase consumer welfare. That is, they are expected by policymakers to produce positive result much more frequently than the type of practice subjected to *per se* rules. This uncertainty makes that requiring only that the existence of such an agreement be shown and then either allowing or prohibiting them, would poses a serious risk of errors. Such erroneous decisions are costly to society, (1) because they prohibit efficient behaviour or sanction harmful conduct and, crucially, (2) because they send out a message to firms in the market to repeat this error. Therefore, effects, or other circumstances than the agreement itself that have the potential to inform about effects, are taken into consideration in the assessment of these restraints.[14]

Differently so than with *per se* rules, however, these additional relevant circumstances are not specified in a great level of detail *ex ante*. For guidance on the application of the effects-based standard firms are very much dependent on case law and decision practice. Such decisions are generally geared towards the specifics of the case at hand and their implications for similar but different future cases will not always be unambiguous. In contrast, notices and guidelines may often be too abstract to resolve all questions that arise in an individual case. Gauging the outcome of

[14] The same type of calculus will be used to determine whether new insights about the harmfulness of restrictive practices generated by Industrial Organization scholars should be incorporated in effects-based analysis. In general, such new insights will offer a different explanation for known behaviour, which can either be positive or restrictive in nature. As we saw, whether it is efficient to incorporate the associated sets of evidence into the legal standard depends, in the first place, on the impact on policymakers' prior conceptions about the frequency with which the effect described in the new model will occur in practice. This can be appreciated as follows. Before the development of new insights, policymakers will estimate that a practice with certain clear outward features will have a good or a bad effect in a proportion of *g* to *b*. A new model will shift this proportion. If the model advances an efficiency-based explanation, *g* will increase at the expense of *b*, and the opposite will happen if a hitherto unknown restrictive effect is shown. If policymakers consider the new model to be very powerful, and think that the explanation it offers will apply to many cases, then one can expect a substantial effect on the legal standard. The ultimate effect, however, is further determined by the two other factors mentioned. These are policy maker's beliefs about the effect on enforcement costs of changing the legal standard to account for the new model, and the error costs (in terms of wrong decisions and distorted incentives) that would be incurred if these changes are not or not fully made. Therefore, if priors change insubstantially, the added costs of gathering and reviewing the type of evidence that fits the model are large, and the harm to consumer welfare if the wrong outcome is reached in these cases is small, no effect on the legal standard may be expected.

effects-based analysis in individual cases will therefore often entail a considerable margin of interpretation and may lead to mistakes. This urges us to look deeper into policymakers' reasons for choosing a standard over a rule.

Timing: rules and standards

Let us start by clarifying the terminology. Rules and standards differ as to the extent to which the law is given content *ex ante* or *ex post* and, thus, as to the clarity of the signal that is sent to potential offenders.[15] A rule will list distortive forms of conduct that firms may not engage in, whereas a standard will only proscribe distortive conduct as such, leaving the determination of which forms of conduct are harmful to adjudication, after the effect has been felt. Effects-based analysis clearly falls in the latter category, as it provides a case-by-case mechanism with which to determine whether agreements restrictive of the competitive process decrease consumer welfare. As argued by Kaplow (2000), the choice to employ a standard, rather than a rule, involves considerations regarding the cost of drafting rules of sufficient precision, the cost of errors due to the under or over-inclusiveness of rules, and the extra costs of legal proceedings due to the use of standards. To understand why effects-based analysis is standard-based,[16] consider the following.

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[15] See Kaplow (1992, and 2000). The desirability of promulgating either rules or standards (the latter are also frequently referred to as principles) are the subject of a long-standing debate in legal theory that includes contributions by Dworkin (1967), Raz (1972), Kennedy (1976), and Alexander and Kress (1997). As is often the case, part of the confusion in this debate relates to differences in the definition of this distinction (in this regard, see Schauer, 1997). Despite the differences, however, most contributors do appear to agree on the more basic elements of this distinction. Generally spoken, they conceive of rules as specific prescriptions, whilst principles are seen as less specific or vaguer prescriptions (see Braithwaite, 2002). Goodin (1982) suggests that one can see this as a continuum. Prescriptions have a core meaning and a penumbra where their meaning is more uncertain. On rule-side of the spectrum the core is relatively large and the penumbra relatively restricted, whilst the opposite is the case on the standard-side of the spectrum. For our purposes, Kaplow's treatise of rules and standards – and his additional emphasis on the moment at which a prescription is best given substance – is particularly important because it adopts the perspective of policymakers. Most other contributions examine rules and standards through the lens of legal certainty. That is, they ask which type of prescription is preferable from a rule of law or moral point of view, focusing on the law's subjects rather than its drafters. In this regard, see the discussion in the text accompanying footnotes 18-20 and in Section 3.4.

[16] It should be pointed out that in comparing EC and US antitrust law in Chapter 4, we will see that in practice effects-based analysis does not rely exclusively on standards. In the analysis of restrictive agreements with the potential to generate efficiencies both systems do rely substantially on standards, but make space for the application of rules where more certainty exists about the effects of a practice. In this regard, see the discussion (in Section 4.3.1.1) on truncated *rule of reason* analysis in US antitrust, the text accompanying footnotes 87-92 (in Section 4.3.1.2 on EC antitrust), and the discussion (in Section 4.4) of the implications of the comparison in terms of legal certainty (following footnote 140).

In traditional criminal law, for example, it will often be relatively easy to verify whether the law has been infringed. In principle, a broken window and a brick on the kitchen floor would suffice, as would a bullet wound on a corpse or an emptied out jewellery store. The difficulty in such cases will rather be to find the culprit. The situation is different in antitrust. Harm to consumers will often be much less evident. As we saw in Chapter 2, it tends to be spread out over numerous unidentified persons, who may be affected differently (some may buy at the higher price, others might spend their money on products that they value less). And to conceptualise harm in antitrust law we must always construe an image of the world without the restraint: how would consumers have fared in the absence of the restriction. In the case of *per se* infringements, this counter-factual will be rather straight forward: if the price fixing cartel had not been implemented prices would be lower, which is a very convincing reason to conclude that consumers would have been better off. When practices assessed under the effects-based standard are concerned, however, the construction of the relevant hypothetical becomes much more difficult to construct. The list of factors that may have to be taken into account is long. One may think of the market position of the parties, their suppliers and customers, about barriers to entry, capacity constraints, and product differentiation. All of these are matters of degree, and between them there may be complex inter-relations. A further complication is the fact that the world absent the restraint will also be the world absent the efficiency made possible by the restraint. In this context, European policymakers obviously estimate that *ex ante* formulation of sufficiently detailed (that is, neither too wide nor to narrow) rules covering all relevant situations is not feasible, or at least, prohibitively costly. These costs are avoided by use of the effects-based standard.

Errors in the application of standards

At the same time, it is important to note that the introduction of a standard implies a trade off between the costs of formulating sufficiently precise rules *ex ante* and the costs of erroneous decisions *ex post*. The uncertainty surrounding a legal standard may lead courts and other decisionmakers, incidentally, to sanction inefficient behaviour (a false positive, also referred to as a Type 1 error) or condemn efficient

behaviour (a false negative, also referred to as a Type 2 error).[17] Apart from leading to an obvious and immediate waste of resources, such decisions may also produce wider adverse effects. This is because they send the wrong signal to other firms, who might copy this behaviour.[18] And, more generally, it can be said that if a norm is given substance after the agreement has produced its effect on the market (*ex post*), firms will be at a relative disadvantage when it comes to assessing the legality of their intended agreement (*ex ante*). Instead of working with a rule that lists prohibited clauses (which are known at the time the agreement is concluded), they must (1) estimate – relying on their experience and knowledge of economics – what effect the agreement is likely to produce on consumers, and (2) assess how this effect would be evaluated in court. The fewer the constraints imposed by law (jurisprudence, secondary legislation, and decision practice) on the method by which proof of a certain claim must be provided, the wider the margin of appreciation that the trier of fact enjoys and the harder it will be for firms to predict the outcome at an early point. Staying in compliance with the law will, therefore, generally be less obvious when a standard is used.[19] Ensuring compliance may also be expected to be more costly.[20] In addition, the broader scope of the *ex post* investigation of effects will come with costly extra investigatory efforts during litigation. We now turn to examine the division of the burden of proof in effects-based analysis, which is an instrument with which investigation and error costs can be minimised.

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[17] Note that in the context of antitrust, the application of the wider effects-based standard to potentially beneficial agreements can be expected to lead to more accurate results than if rules were applied (as was the case with the 'old' generation of block exemption regulations adopted by the Commission; in this regard see Chapter 2, Section 2.3). As argued by Kaplow (2000: 509), however, it is not generally true that standards will lead to more accurate precise results. In certain areas of the law, such as tax law, very detailed rules exist that can be expected to lead to more precise results than if an open-ended standard were used.

[18] Generally, in a system based on deterrence these secondary effects will be of greater concern. This is so since firms are inspired to comply by means of a few interventions, rather than by screening all or the majority of potentially restrictive contracts, as done under the notification regime of Regulation 17/62 (supra, footnote 5). In this regard, see the discussion in Chapter 2, Section 2.3.

[19] See Kaplow (2000: 510). In this regard, two remarks must be made. In the first place, compliance depends on more than the ability to assess the legality of an intended agreement. The expected profits associated with the available alternatives, the probability of being challenged, and the height of the fine that might be imposed will also play a role. A more detailed discussion follows in Section 3.4, and in Chapter 5, Section 5.3. Secondly, it has been suggested (Braithwaite, 2002) that in complex situations subject to continuous change principles may offer more legal certainty than rules. He gives an example of telecommunications regulation. What constitutes a telephone today may be something quite different tomorrow. In such instances a principle will provide more long-term certainty than a detailed rule that would have to be adapted continuously.

[20] Provided, of course, that firms have sufficient *ex ante* incentives to become informed about the law (in this regard, see Kaplow, 2000: 510) and on whether the evidence that will be taken into account *ex post* is of such a nature that it can be anticipated (in this regard, see Kaplow, 1994: 365). As regards the cost of self assessment, see the discussions in Chapter 6, Section 6.2, and Chapter 7, Section 7.2.

3.3.2 Dividing the burden of proof

The division of the burden of proof between the enforcing party and the defendant is an essential aspect of effects-based analysis. We saw that it is one of the main characteristics that distinguish this method of investigating restraints from *per se* (object-based) analysis. To understand its role within the enforcement mechanism, it is important to underline what we are dealing with here.

Like the question regarding the appropriate legal standard,[21] the question of the assignment of the burden of proof relates to evidence. It concerns the question of which party carries the burden to produce evidence in support of his claim concerning the existence of a restriction.[22] This assignment can be made in three ways. The burden can be placed entirely on either one of the parties.[23] Alternatively, the burden to produce the necessary evidence is divided between them. It is easily appreciated that these options are not interchangeable, in terms of their effects on enforcement. Assigning the burden of proof entirely to the Commission will limit its capacity to bring cases. A very low burden, on the other hand, might render its enforcement efforts unfocused. Hay and Spier (1997) offer an analysis of the conditions that determine the optimal assignment of the burden of proof. To do so, they use a model of litigation that is moulded on US civil litigation. As is explained below, antitrust enforcement by the European Commission is considerably different. Nonetheless, their analysis provides a useful starting point for our study of the division of the burden of proof in Art 81 EC proceedings.

Hay and Spier begin by considering the situation where the burden is assigned in its entirety to one party. They assume that only the party that carries the burden will introduce evidence and that he will do so if and only if evidence exists to support his claim.[24] This assumption urges them to consider the probability with which violations

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[21] See Section 3.2. There it was suggested that the legal standard informs firms and litigants about the kind of evidence that can be relied on to show that competition has illegally been restricted.

[22] A third question concerns the standard of proof: what level of conviction must the trier of fact reach to be able to conclude that the evidence produced allows for a finding that a violation has occurred?

[23] In the context of European antitrust, this would mean that the Commission is charged with showing that the net effect of the agreement on consumer welfare is negative or that the defendant is charged with showing that the ultimate effect on consumer welfare is positive.

[24] This assumption follows from their assumption regarding the standard of proof (supra, footnote 22). In their model courts are instructed to find that a violation has occurred if, on the basis of the evidence produced, they consider it more probable that a violation has occurred than not. As a consequence, if evidence exists to support the claim of the party that does not bear the burden, he will choose not to introduce it. This can be appreciated as follows. The party that carries the burden (B) will not make

occur.[25] Suppose that this probability is very small.[26] In that case, a rule that assigns the burden to the plaintiff will result in fewer instances where costs are incurred to produce evidence, than a rule that places the burden on the defendant.[27] They then refine this basic model by considering what happens when, at the start of the proceedings, the court is presented with an initial signal regarding the occurrence of a violation in the case at hand.[28] If this signal provides only a weak indication, the burden is best assigned to the plaintiff.[29] If, on the other hand, the signal is strong, the burden is best placed on the defendant, particularly if he can produce the evidence at lower cost.

At this point, we are also able to see the possibilities offered by dividing the burden between the parties.[30] Assume that (1) the evidence by which it can be shown that a violation has occurred is composed of several elements, (2) that the first of these elements – the initial signal – is not very telling, but that (3) at least two other

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expenses to show the court the available evidence, since it does not support his claim. In that case the standard of proof instructs the court to decide in favour of the other party (N). N does not need to make expenses and show what evidence exists to win the case. It is argued below that this crucial assumption in the model developed by Hay and Spier cannot be transposed to the setting of European antitrust.

[25] For example, the likelihood that a failed surgical operation is the result of negligence on behalf of the surgeon or the probability that inter-firm contracting results in consumer harm.

[26] For the moment, it is assumed that parties incur the same costs in producing the same evidence. The implications of possible differences between the parties in terms of the costs of gathering evidence are discussed below.

[27] The authors use the following expression to illustrate their analysis. The burden should be assigned to the plaintiff if:

$$p(I) \times C_p < p(\neq I) \times C_d$$

where p(I) stands for the probability that an infringement occurred and C_p denotes the plaintiff's costs, whilst p(≠I) stands for the probability that an infringement did not occur and C_d denotes the defendant's costs.

[28] Here, one can think of a clause in an agreement that by its nature limits the commercial freedom of one of its signatories, or of a letter in which the defending manufacturer refuses to supply a distributor. Using Bayes' rule, Hay and Spier express this probability that the law was infringed or was not infringed, given the signal (E), as follows:

$$p(E|I) \times p(I) / p(E) \text{ and } p(E|\neq I) \times p(\neq I) / p(E)$$

where p(E|I) indicates the probability of observing the signal in the event that a violation has occurred, p(I) stands for the probability that an infringement occurred, and p(E) is the probability that we observe the signal, whilst p(E|≠I) indicates the probability of observing the signal in the event that an infringement has not occurred, and p(≠I) denotes the probability that an infringement has not occurred.

[29] By plugging the conditional probabilities given in footnote 27 into the expression of footnote 26 and simplifying, Hay and Spier show that the burden should be assigned to the plaintiff if:

$$p(E|I) \times p(I) \times C_p < p(E|\neq I) \times p(\neq I) \times C_d$$

This expression makes it easy to appreciate that if p(E|I) and p(I) are low and costs not too far apart, the burden is best assigned to the plaintiff.

[30] Hay and Spier (1997) do argue that shifting the burden of proof may be optimal in circumstances where the initial signal provides a high level of certainty that a violation occurred, but they do not provide theoretical support for this argument. What follows in the main text is but a rough description of the conditions under which a division could be beneficial in the context examined by Hay and Spier. Since our focus is on the rather different situation of European antitrust, there is no need here to fully develop this argument.

types of evidence exist that are both substantially more indicative of harm, with (4) type A slightly less indicative and less costly to produce and type B slightly more indicative and more costly to produce, such that (5) evidence of type B will exonerate the defendant in a fraction of cases where exclusive reliance on evidence of type A would lead to a condemnation. In such cases dividing the burden of proof may allow for savings vis-à-vis the situation where the burden is entirely placed on the plaintiff.[31] This is because the defendant can be expected to invest in showing evidence of type B only in the relatively few cases where it will save him. If this fraction of cases is sufficiently small and the costs of showing both types of evidence at the same time not too large in comparison to the error costs that are thus avoided, shifting the burden can consume less resources vis-à-vis the situation where the plaintiff always has to show evidence of type B or where the case is decided on the basis of the plaintiff's showing of evidence of type A (which implies accepting a margin of error).

There are considerable differences between US civil litigation and the administrative law setting of antitrust enforcement by the European Commission. Particularly the vital assumption made by Hay and Spier – that only the party that carries the burden will introduce evidence – does not reflect the realities of European antitrust. When the Commission investigates a case it will make a full assessment that covers all aspects of Art 81 EC, including the existence of efficiencies.[32] Defendants, in turn, will generally also provide arguments and evidence on all accounts.[33]

There are good reasons to assume, however, that the shift of the burden of proof allows the Commission to incur less investigation costs than it would if it were fully responsible for both elements of the analysis (that is, Art 81(1) and (3) EC). The

[31] In the antitrust context A and B must be seen as proxies for consumer harm. A might, for instance, be a showing of market power by means of market shares (where a high level of concentration will lead to a finding of an infringement), whilst B could represent the ultimate effect of the agreement on output (in terms of volume, quality, etc) and prices.

[32] See e.g. Ortiz Blanco (2006: 384).

[33] This state of affairs is clearly reflected in the Commission's infringement decisions. In *Master Card* (decision of 19 December 2007, published on the Commission's website) the defendant presented numerous detailed arguments regarding market definition (which falls under the Commission's burden) that were supported by several expert studies (see e.g. para. 254, 260, 291, and 293); in *Morgan Stanley / Visa* (Commission decision of 3 October 2007, published on the Commission's website) the defendant adduced evidence regarding a drop in merchant service charges to show that the Commission's allegations under Art 81(1) EC did not stand up to scrutiny (see para. 199); the decision in *EATA* ([1999] OJ L193/23) shows that the parties adduced several arguments – supported by evidence – concerning market definition (see e.g. para. 80, 81, 89, and 93); and in the case of *Van den Bergh Foods* ([1998] OJ L246/1).the defendant commissioned several studies relating to the definition of the relevant market (see para. 115).

Commission's Guidelines on the application of Art 81(3) EC indicate that it relies to a considerable extent on arguments and evidence provided by the defendant to complete its initial assessment of the efficiencies generated by an agreement. Explicitly referring to Art 2 of Regulation 1/2003 concerning the division of the burden of proof in Art 81 EC,[34] the guidelines point out that this provision can be invoked as a defence and that in so doing the undertaking concerned must substantiate its claims so that they can be verified and balanced against the negative effects identified in the analysis under Art 81(1) EC.[35] In other words, the Commission does not intend to deepen its initial assessment on this point by gathering detailed evidence should the defendant fail to do so. Recent decision practice reflects this stance. The Commission's analysis under Art 81(3) EC centres on the arguments and evidence presented by the defendant, whilst evidence introduced by the Commission itself generally plays a minor role.[36] Arguably, if the Commission carried the entire burden under Art 81 EC,

[34] Supra, footnote 3. As regards the dividing line between Art 81(1) and (3) EC, see the discussion in Chapter 2, Sections 2.3 and 2.4.3.

[35] [2004] OJ C101/97, at para. 41 ('…the burden of proof under Article 81(3) rests on the undertaking(s) invoking the benefit of the exception rule.'), 55 ('…efficiency claims must be substantiated so that they can be verified.'), 56 ('In the case of claimed cost efficiencies the undertakings invoking the benefit of Article 81(3) must as accurately as reasonably possible calculate or estimate the value of the efficiencies and describe in detail how the amount has been computed. They must also describe the method(s) by which the efficiencies have been or will be achieved. The data submitted must be verifiable so that there can be a sufficient degree of certainty that the efficiencies have materialised or are likely to materialise.'), and 57 ('In the case of claimed efficiencies in the form of new or improved products and other non-cost based efficiencies, the undertakings claiming the benefit of Article 81(3) must describe and explain in detail what is the nature of the efficiencies and how and why they constitute an objective economic benefit.'). These Guidelines were discussed above in Chapter 2, Section 2.4.

[36] The four infringement decisions – where most evidence can be expected to surface – listed in Appendix A are most interesting to look at in this regard. In the case of *Master Card* (supra, footnote 33) the discussion concerning Art 81(3) EC (para. 666-753) fully concentrates on refuting arguments and questioning the evidence presented by the defendant (to the effect that a fixed default fee for inter-bank services served to expand the over all output of its credit card scheme). By comparison, the Commission introduces very little evidence (at para. 696 it discusses evidence that it has presented in the assessment under Art 81(1) EC). The same can be said for the Commission's decision in the case of *Morgan Stanley / Visa* (supra, footnote 33, at para. 311-319 and also at 254-296). In para. 313, the Commission states that 'Visa should identify and determine the specific nature of the efficiencies generated by the Rule as applied to Morgan Stanley (that is to say, it should demonstrate a causal link between the application of the Rule and the efficiencies), and demonstrate how and when each claimed efficiency would have been achieved. In order to establish that the efficiencies generated outweigh their anticompetitive effects, it should establish the likelihood and magnitude of such efficiencies'. Similarly, in the cases of *EATA* (supra, footnote 33, at para. 187-237) and *Van den Bergh Foods* (supra footnote 33, at para. 222-238), the Commission's assessment under Art 81(3) EC consists of a discussion (and refutation) of a whole list of efficiency arguments presented by these defendants, rather than that it discusses the results of its own investigation. The above is not to say that there may not be individual decisions where the Commission makes considerable efforts in the assessment under the third paragraph. The exemption decision in the case of *Bass* ([1999] L186/1), where the Commission set out to quantify efficiencies claimed by the defendant (a detailed discussion of this case follows in Chapter 4, Section 4.3.1), provides an example. Particularly in the current context of ex post enforcement under Regulation 1/2003 (supra, footnote 3), however, these are likely to be exceptions.

an initial assessment that only filters out cases that produce obvious efficiencies would not suffice to discharge its burden under the third paragraph. This would make Art 81(3) loose much of its effectiveness and would turn Art 81 EC as a whole into a rather blunt instrument.

To structure the analysis made in the coming chapters, it is worth examining these implications of dividing the burden of proof in effects-based analysis from a theoretical perspective. For purely descriptive purposes, a number of formulas are introduced.[37] Let us assume that the value of enforcement to society (V) is determined by the amount of harm to consumers that is averted (B) and the legal costs that are incurred in so doing (C):

$$V = B - C \qquad (1)$$

Let us begin by considering the benefits of enforcement.[38] In principle, these benefits depend on the number of cases pursued by the Commission in which it takes a good decision (that is, terminates an agreement that is harmful to consumers). Dividing the burden of proof affects these benefits in two ways. Firstly, by lowering the Commission's per case investigation costs, it increases the total amount of cases that the Commission is able to bring (assuming that it disposes over a fixed budget).[39] Secondly, by allowing the Commission to proceed on the basis of *prima facie* evidence, a risk is introduced that selection errors are made. To appreciate why,

[37] The formulas are introduced so as to facilitate the appreciation of the discussion that follows. We will see that a broad variety of factors weigh in on the costs and benefits of dividing the burden of proof. After discussion of each of these factors, the argument made is summarized in the form of a descriptive formula. By integrating these formulas at the end, the reader is offered a simple and short summary of the entire argument made in this section. Please note that these formulas are not used as the basis of a formal model.

[38] The benefits of enforcement are built up of two components. They include the harm that is avoided (1) by terminating the restrictive agreement in the individual case at issue and (2) because in the future firms in a similar position will abstain from signing an agreement with features singled out in the decision. In this regard, see Section 3.2 above.

[39] It can be assumed that with each additional case that the Commission is able to pursue and in which it takes a good decision, the benefits of enforcement grow in absolute terms. If the Commission sets the right enforcement priorities and deals with the cases that yield most enforcement benefits first, these positive returns on additional enforcement efforts can be expected to decline gradually. The harm that is avoided by terminating an additional restrictive agreement will be smaller than the harm that was prevented in previously challenged cases and the deterrent effect of an additional decision where many exist already will be relatively smaller as well. In the context of European effects-based analysis, where, as we will see in Chapters 4 and 5, decisions are few and there is thus a scarcity of guidance, it seems fair to assume that additional enforcement efforts – provided that they result in insightful decisions – will produce substantial positive returns. This is an argument in favour of dividing the burden of proof, therefore.

consider the situation where upon a showing of a restrictive clause in an agreement, the entire burden of proof under Art 81 EC would shift to the defendant. This would allow the Commission to challenge firms on the basis of a rather superficial investigation of their agreement. Since we know that restrictions are not necessarily harmful, we must expect that such a division would result in relatively unfocused enforcement. Amongst the restrictions selected to be challenged, there will some that produce no harm to consumers.[40] The proportion of cases in which the Commission gets it right – that is, in which it selects a case that is worth pursuing – will depend on the quality of the initial signal. The expected benefits of enforcement can therefore be expressed as follows:

$$B = p(I|E) \times (R/C_C) \times W \qquad (2)$$

(where p(I|E) stands for the probability that the investigation produces the right result (I) when evidence of a certain type (E) is used in the initial assessment under Art 81(1) EC, R stands for the part of the Commission's budget devoted to antitrust enforcement under the effects-based standard of Art 81 EC, C_C denotes the Commission's costs of enforcement per case, and W stands for the welfare increase due to successful enforcement.[41]

Now let us consider the costs of dividing the burden of proof. As suggested, the Commission's per case investigation costs will go down.[42] At the same time, however,

[40] This argument is further developed below. It is worth noting that there is a certain similarity between this argument and the long-standing debate in US antitrust on the appropriateness of the treble damages provision of Clayton Act Section 4 (15 U.S.C.A. §14). The question there is whether multiplying damages by three might give private claimants incentives to file suit in cases with little merits, that is, in cases with a low probability of success. In this regard, see e.g. Landes (1983), Baumol and Ordover (1985), Easterbrook (1985), Cavenagh (1987), and Waller (2003). Here, it is submitted that making it too easy for enforcers to present a *prima facie* case could lead to low returns on enforcement efforts.

[41] In practice, the benefit derived from each case will depend on the seriousness of the infringement and may, thus, vary per case. Here, it is assumed that all cases resulting in the termination of a restriction produce benefits of the same magnitude. More specifically, the term W should be thought of as representing the cumulative benefit derived from all cases challenged – in the situation without a division of the burden of proof, where no selection errors are made – divided by the number of cases that are brought. It is appropriate to do so, since we are studying the division of the burden of proof from the perspective of policymakers. They will not be interested in individual cases, but in enforcement in general and, thus, in average enforcement costs.

[42] We may expect that in the longer run this effect on investigation costs will diminish. This can be explained as follows. Cases assessed under the effects-based standard will generally produce both negative and positive welfare effects. If the Commission sets the right enforcement priorities and deals with the cases that yield most enforcement benefits first, this means that the cases where the difference between these two effect is largest will be prioritized. With each additional case this difference will grow smaller and more detailed and compelling evidence will needed to show that the negative effect

we may expect the defendant's costs to rise by a similar margin. The net cost effect per case will then be neutral, but – given that the Commission is able to challenge more restrictions – total defence costs and, thus, the overall costs of antitrust enforcement will rise. This may be different when the defendants have a cost advantage over the Commission in gathering the evidence concerned, as may be the case with evidence regarding improvements in production or distribution brought about by the agreement (the first condition of Art 81(3) EC).[43]

This, however, is not the whole story regarding the cost effects of dividing the burden of proof. An extra error cost component will have to be taken into account. It was suggested above that some harmless agreements may be subjected to scrutiny and may even be made the object of decisions. This tendency towards Type 2 errors is explained by the structure of the investigation under this provision. Art 81(1) EC essentially functions as a first filter that distinguishes potentially harmful agreements (for example: agreements that restrict the competitive process and enhance market share) from agreements that are clearly not intended to be caught (for instance: a non-compete clause in a partnership or agency agreement). Some of the restraints caught by Art 81(1) EC will only produce harmful effects for consumers. We saw, however, that others will produce opposing effects – certain vertical restraints may, for example, simultaneously increase the price and improve the quality of a product. Such opposing effects are examined under the scope of Art 81(3) EC. This implies that the criterion used in the analysis under the first paragraph (a restriction of the competitive process, possibly combined with an increase in the parties' market share) inevitably catches a larger group of agreements than will ultimately be held to infringe Art 81 EC. Since we are dealing with the introduction of an over-inclusive first test, there can be no risk that dividing the burden of proof will lead to mistaken acquittals (errors of the first type).[44]

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prevails. As a consequence, per case investigation costs will gradually increase. This effect may eventually undo the effect of dividing the burden of proof.

[43] It may also be the case, however, that the Commission has a cost advantage over the defendant as regards certain elements of the latter's burden of proof. As suggested, when it comes to efficiencies it is intuitively appealing to say that the firm that will realise the claimed cost reductions or quality improvements should be better positioned to produce supporting evidence. This is not necessarily the case though when it comes to the other elements of Art 81(3) EC, since they require that the effect of these efficiencies on competition in the market and consumers is shown. Arguably, with its extensive investigative powers, the Commission is better able to obtain data about market-wide effects.

[44] This is not to say that Type 1 errors cannot occur in European antitrust. It is true that under Regulation 1/2003 (supra, footnote 3) the Commission no longer clears agreements (note that commitment decisions constitute implicit prohibitions of the agreement as originally conceived by the

In cases where these Type 2 selection errors are made, the benefits of enforcement do not accrue.[45] In fact, the expenditures made by the Commission and the defence in these cases are resources wasted. If such selection errors are not filtered out during the proceedings and result in an infringement decision or – which is more likely in the context of effects-based analysis under Art 81 EC – in the modification of the original agreement, additional losses will be incurred, since this would mean that an agreement that is harmless to consumers (or even beneficial) and profitable to the firm in question is terminated. These costs will be magnified by the effect on other firms active on the Common Market, who may end up taking unnecessary precautions or signing harmful contracts.[46]

Moreover, we should realise that easing the test that the Commission has to satisfy will affect the benefits of enforcement in yet another way. The fewer efforts we require the Commission to make to ensure that a restriction of the competitive process results in sufficient harm to justify the legal costs needed to bring it to an end, the greater the risk becomes that amongst a pool of harmful agreements to challenge, the Commission will select a number that would not have been given priority if it were held to a more stringent test.[47] Both types of welfare losses – terminating harmless cases and selecting low-value cases – are not reflected in the discount on enforcement benefits discussed above and must therefore be added to the overall costs of dividing the burden of proof:

$$C = (R/C_C) \times [((1-e) \times C_C) + ((1+e) \times C_D) + (p(T|E) \times W)] \qquad (2)$$

where e represents a factor ranging between 1 and 0 by which the Commission's enforcement costs are discounted and by which the defendant's enforcement costs (C_D) are marked up,[48] and p(T|E) denotes the probability that relying on a specific

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defendants), but it remains possible that a good decision is mistakenly annulled in appeal. This, however, would have nothing to do with the division of the burden of proof. What is argued is that shifting the burden of proof will only engender Type 2 errors, for the reasons mentioned above.

[45] This is reflected in expression (2) by multiplying B by p(I|E), which implies that in p(≠I|E) x 100% of the cases enforcement will not produce positive results.

[46] The effects of errors on the behaviour of firms who are in the process of designing and implementing agreements with possible antitrust implications are examined in the following section.

[47] This could be because the proceedings in question produce few benefits in comparison with other restrictions that may be investigated and challenged (with the risk that these benefits are outweighed by the investigation costs).

[48] The implications of possible cost advantages for the defendant are considered below. See the text accompanying footnote 52.

type of evidence in the investigation under Art 81(1) EC will lead to the kind of welfare losses described above.[49]

These considerations may help us decide whether in a given situation dividing the burden of proof may increase the efficiency of enforcement. By inserting (2) and (3) into (1) we obtain the following expression:

$$V = (p(I|E) \text{ x } (R/C_C) \text{ x } W) - (R/C_C) \text{ x } [((1\text{-}e) \text{ x } C_C) + ((1+e) \text{ x } C_D) + (p(T|E) \text{ x } W)] \quad (4)$$

Suppose that policymakers are faced with the choice either to allow the enforcing party to make a *prima facie* case on the basis of evidence of type E_1 or to burden him with the task of coming forward with all the evidence, in which case the type of error costs discussed before will not emerge. Dividing the burden of proof will be beneficial if:

$$(p(I|E_1)/(1 - e_1)xW) - (p(T|E_1)/(1 - e_1)xW) - (((1 + e_1)/(1 - e_1))xC_D) > W - C_D \quad [50] \quad (5)$$

This expression reflects a very basic intuition, notably, that the sum of (1) the benefits of enforcement with a divided burden (which are reflected in the term $p(I|E_1)/(1 - e_1)$ x W), (2) the extra error costs (represented by - $p(T|E_1)/(1 - e_1)$ x W), and (3) the extra defence costs (represented by - $((1 + e_1)/(1 - e_1))$ x C_D) must be larger than when the burden remains undivided.[51] It is easily appreciated, also, that this will sooner be the case if defence costs rise by less than per case enforcement costs decline, that is, if defendants are at an advantage when it comes to providing proof regarding specific aspects of the legal standard.[52] Finally, the same reasoning can be applied to examine whether it is appropriate to alter the Commission's burden of proof in effects-based

[49]The two types of error costs discussed above are lumped together in the term p(T|E) x W. As was done when describing the benefits of enforcement (see footnote 41), the error costs caused by targeting harmless agreements and by bringing low-value cases are assumed to be equal in all cases. This term p(T|E) may thus be thought of as indicating the proportion of cases in which costs of the magnitude of W are incurred (this proportion is obtained by taking all the error costs spread out in smaller and larger amounts over cases involving harmless agreements and cases involving low-value infringements and dividing them by W). This probability will increase as the test to which the enforcer is held becomes less stringent.

[50] This is obtained by (1) equating the situation with a divided burden to the situation where the Commission is responsible for the whole burden and (2) simplifying the result. Note that in the latter situation no division-related error costs are incurred (see footnote 39) and the factor e is set at 0.

[51] Since it is assumed that in either scenario the Commission disposes over the same budget (and depletes it), enforcement costs (C_C) have no influence on the trade off and are left out of this expression.

[52] Since the term $((1 + e_1)/ (1 - e_1))$ will then become smaller.

analysis under Art 81 EC.[53] Whether it would be efficient to shift the burden to the defendant at an earlier or later stage of the investigation depends on whether this would result in a more favourable mix of genuine infringements terminated, defence costs, and error costs.

To deepen our understanding of the effects of errors, the final section of this chapter examines how firms that are in the process of designing and implementing an agreement with possible antitrust implications react to unfocused enforcement, that is, to uncertainty about the precise location of the legal standard.

3.4 Firm behaviour under uncertainty about the legal standard

Before entering into a detailed discussion of firm behaviour under conditions of uncertainty, we do well to briefly consider the role of legal certainty in modern systems of law and, in particular, in European law. The protection of legal certainty is regarded as a crucial requirement for the rule of law.[54] In modern society, the powers of the state to formulate and apply law and legal commands are subjected to clear restrictions.[55] According to legal theory, laws should be validly made and publicly promulgated, of general application, stable, clear in meaning and consistent, and ordinarily prospective. In addition, their application should be impartial, provide parties who are sanctioned an opportunity to be heard, and deliver predictable, consistent decisions in individual cases.[56] The law's subjects, in turn, are expected to behave prudently and to inform themselves about the law and – to a certain extent – the evolving circumstances that determine its interpretation.[57] Together, these prescriptions fulfil a fundamental ordering function. They enable the law's subjects to set out a course of action (and to make the related investments) which they may legitimately expect to remain free of state intervention.

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[53] In this regard, think of a setting as described in the text accompanying footnotes 31 and 14.
[54] For a more extensive discussion of these matters, see Maxeiner (2007).
[55] The rule of law is used here in the narrow – legal – sense of the word. When used in a broader sense this term is often infused with ideals of a liberal and democratic state, such as democracy, constitutionalism, human rights, and a free-market economy. In addition, it may extend over the fairness of the formulation or application of rules. As such, it is a much more contested concept that means different things to different people. In this regard, see e.g. Peerenboom (2004) and Maxeiner (2006).
[56] These requirements can, for example, be found in Fuller (1971), Summers (1999), and Peerenboom (2004).
[57] See Usher (1998: 59) and Popelier (1997: 167) as regards the requirements imposed on those subject to European law.

These concerns are reflected in European law. The protection of legal certainty is recognised as a general principle by both the ECJ and the European Court of Human Rights.[58] In the words of the latter institution, this principle requires that 'all law must be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable under the circumstances, the consequences which a given action may entail.'[59] Yet the principle of legal certainty in European law is not absolute. The ECJ recognises that a certain measure of flexibility is essential if the Community's policy objectives are to be met in situations of complex, changing, or evolving circumstances.[60] In the context of antitrust law, this is, for example, reflected in the *Remia* judgment, where the Court considered that the Commission enjoys a margin of appreciation in the evaluation of complex economic situations.[61] From the point of view of undertakings, the obvious result is reduced determinacy of the law. The present section contributes to our analysis of how well the effects-based standard performs its ordering function by exploring economic insights concerning firm behaviour under conditions of reduced legal certainty.

With uncertainty, potential offenders are unable to determine with precision which commercial practices are likely to violate antitrust laws. This is to say that firms reckon with the chance of being found in violation when considering whether to sign a contract that will not harm consumers. Alternatively, they may take into account the possibility that a pact that does contravene the antitrust laws will be cleared. There are two separate strands of literature that are instructive with respect to how firms may operate under such uncertainty.[62] Calfee and Craswell (1984) and Goetz (1984) reach

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[58] See e.g. Popelier (1997: 162), Usher (1999: 65), Tridimas (2006), and Groussot (2006). It is a fundamental concept of the national legal orders, also. Maxeiner (2007: 549) provides an overview of member state law with references, and detailed information on the importance of the principle of legal certainty in German law. Popelier (1997) discusses both German and Belgian law in addition to European law. In this regard it should be noted that the general principles of EU law, which are prescriptions that are not explicitly expressed in the treaties, are to a considerable extent influenced by concepts developed in the national legal orders. The other source from which general principles are derived are the essential characteristics of the EU's legal order itself. See e.g. Usher (1998) and Tridimas (2006). For ECJ case law on the issue of legal certainty, see e.g. *Duff v. Minister of Agriculture* (Case C-63/93, [1996] ECR I-569) and – in relation to the direct effect of Art 81(1) EC – *Brasserie de Haecht v. Wilkin* (Case 48/72, [1973] ECR 77). As to the case law of the ECHR, see e.g. *Sunday Times v. United Kingdom*, judgment of 26 April 1979, Series A, no. 30, 2 EHRR 245, and, more recently, *Korchuganova v. Russia*, judgment of 8 June 2006 in case 75039/01. The sources cited above provide extensive references to the case law of both Courts.

[59] *Sunday Times v. United Kingdom* (supra, footnote 53, at. para. 49).

[60] See Popelier (1997: 167).

[61] Case 42/84 *Remia et al. v. Commission*, [1987] ECR 2545, at para. 34.

[62] For an overview of this literature see Schwartz (2000). Note that the focus is on the implications of uncertainty for the behaviour of potential offenders, and not so much on the negative effects of a

the conclusion that – depending on the circumstances – operators may respond either by over-complying or violating. Png (1986) and Polinsky and Shavell (1989), by contrast, find that under-deterrence is the only negative effect that can result from uncertainty. Section 3.4.1 discusses how differences in the underlying situations that are modelled lead to these diverging conclusions. Section 3.4.2 examines which of these models can be expected to describe the situation in European antitrust most accurately.

3.4.1 Analysing the effects of uncertainty

Binary settings

Png (1986) and Polinsky and Shavell (1989) analyse situations in which the choice is between engaging in a potentially prohibited practice and desisting from it. It can easily be explained that, in such a setting, uncertainty increases incentives to violate. At the beginning of this chapter we discussed an example of a firm having to choose between a more and a less restrictive form of distribution agreement. The first alternative affords the firm some measure of market power and produces extra profits. But, as a consequence, the firm also estimates that there is a probability that the agreement will be caught and terminated, in which event a fine is imposed and the profits are foregone.[63] To make his choice, we said, the firm will compare B's expected costs and benefits. If the result is positive, it will choose B as it is more profitable than the neutral option A.

Now consider what happens if uncertainty regarding the location of the legal standard is introduced in the form of (1) the possibility that even if B turns out to have negative effects, the court might acquit him, or (2) the (perhaps remote) possibility that even if he chooses A, he might still be found in violation. Both possibilities tend to make option B relatively more attractive. The possibility of false acquittal (a Type 1 error) increases the net expected value of option B, since the probability of the agreement being challenged and terminated becomes smaller. The prospect of false

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mistaken decision *per se*, i.e. the immediate welfare loss of prohibiting a beneficial agreement or sanctioning harmful conduct. We look therefore not at the welfare effects in individual cases, but at the effects of such decisions on all those third parties that base their actions on their best understanding of the relevant case law.

[63] Note that in this example (and differently so than in the example given in Section 3.2) the firm is uncertain about whether the agreement will be discovered by the antitrust authorities or by private enforcers. It entertains no doubt about the illegal nature of the form of agreement it contemplates.

conviction (a Type 2 error) makes choosing A potentially costly, and therefore lowers the net expected value of this option. Under these circumstances, therefore, where firms choose between violating and not violating, uncertainty about the outcome of an investigation by the Commission will always strengthen incentives to break the law. This is the result, also, that is obtained by Schinkel and Tuinstra (2006) in their treatise on the effects of imperfect competition law enforcement on incentives to engage in price fixing behaviour.[64]

Continuous range of options

By contrast, Calfee and Craswell (1984) and Goetz (1984) urge us to consider a situation in which firms have more than two options to choose from. When studying price fixing and *per se* conduct in general, it is natural to present the trade off that firms face as a binary affair. Either they collude or they do not and there is no intermediate form. As is argued in more detail below, in the effects-based field firms may often face a choice between more than two options. This has significant implications for the possible effects on firms' decisions of uncertainty about how the antitrust authority will evaluate these forms of agreement.

Imagine that our firm has a choice between three or more different ways to design his distribution contracts. Rather than supplying all willing resellers in an area, the firm may, for instance, consider whether to work with a number of selected distributors, or he may appoint an exclusive distributor. If he opts for selective distribution, he may be able to choose between various methods for selecting his retailers. In case he decides in favour of exclusivity, he will have a choice whether to

[64] These authors describe a situation with three types of industries (combinations of firms). Two of these industries have the option either to behave competitively or to collude; the third industry always behaves competitively. One of the two industries that may collude can choose between a more and a less collusive alternative, but it is clear that both these options are squarely illegal. On this basis the authors examine how the choice between these alternatives is influenced by imperfect competition law enforcement, that is, by the possibility that assessment errors are made by antitrust authorities. As suggested, they obtain the same general result as Png (1986) and Polinsky and Shavell (1989). In particular, they show that the incidence of anticompetitive behavior may increase in the enforcement error, essentially for two reasons. The first is that the expected sanction for law breaching decreases, due to possibility of firms escaping without a penalty, even when monitored. The second reason is that firms that would otherwise behave perfectly competitive are induced to collude as a precautionary measure when they face the risk of being unjustly sanctioned when obeying the law. This implies that imperfect enforcement may be counter-productive in that it stimulates the very behavior it was designed to prevent. Note that below it is argued that firms' inability to determine with certainty which forms of behaviour that will be assessed under the effects-based standard (as opposed to *per se* analysis) will be held in violation and which forms will be excused, may also produce another perverse effect, which is that firms may end up being unnecessarily cautious in signing agreements and, thus, forego legitimate profits.

allow active and passive sales into this territory by resellers appointed in another area, etc. Some of these alternatives will be legal, others will be caught.

Like in the binary situation, the firm will simply choose that contract to which it assigns the highest net expected benefit (that is, the largest combination of expected profits and fines). Put differently, whether at any starting point the potential offender will find it more profitable to decrease or increase the restrictiveness of his agreement, depends on the pace at which expected profits and sanctions change in moving from the one option to the other. If, at a certain point, the expected sanction costs increase faster, as behaviour becomes more restrictive, than the anticipated profits do, a potential offender will choose the less restrictive course of action.[65]

Legal certainty, in this context, implies that the firm is able to distinguish, without doubts, the forms of the agreement that will be considered illegal and those that are in the clear. Assuming that the expected cost of fines outweighs the benefits of violating, the firm will then choose the most restrictive option that is still legal. Uncertainty, on the other hand, can be thought of as follows. The firm considers that as they become more restrictive, the four options are increasingly likely to be challenged and terminated. But it does not exclude the possibility that if it implements the least restrictive form it will be held in violation, nor does it completely discount the possibility that the most restrictive form will be cleared.[66] It will prove helpful in understanding the arguments that follow, to express this in the form of a graphical image.

[65] See Calfee and Craswell (1984). This means that absolute levels of precaution and liability costs at a certain point are not determinative. Even if in absolute terms expected fines are lower than the costs of precaution at a certain point, the potential offender would still choose to take even more precaution if this would have more effect in terms of minimizing the sum of precaution and liability costs.

[66] Both strands of the literature that are discussed in this section deal with *ex ante* uncertainty on the part of firms in determining how the antitrust authority will assess different forms of conduct that they may engage in. In each context, however, the nature of uncertainty is different. In the type of binary setting such sa described by Schinkel and Tuinstra (2006), the antitrust authority is less well informed about the true nature of firm conduct (in their case, about cost structures) than firms are. *Ex ante*, the question will be whether the authority will take the right decision in case the firm engages in either of the two available options. The situation in the effects-based field, where firms face multiple options, is different. Here, even firms can be expected to dispose of imperfect information, since the welfare effects of these types of agreements are more difficult to assess. *Ex ante*, firms will therefore not be fully certain about the precise impact of their agreement on the market and, crucially, on how this impact will be assessed *ex post* by the antitrust authority.

Figure 3.1

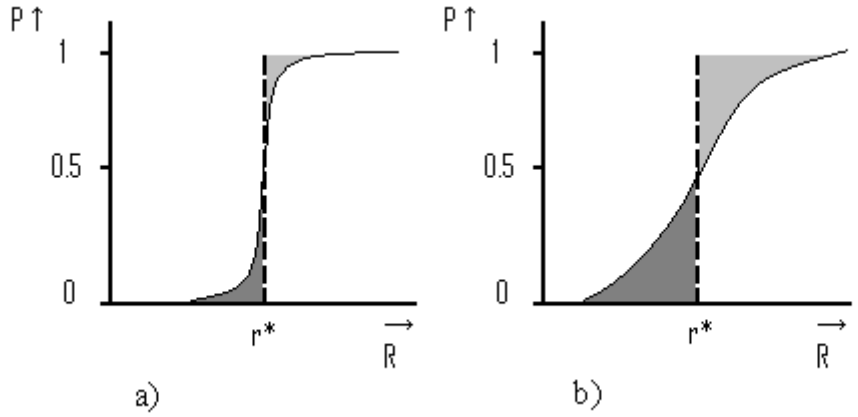


Figure 3.1 displays two possible distributions of probabilities, both of which map the combination of a firm's best guesses of the probability of being found to have violated the law that it associates with each of the possible forms of actions that it can choose from. The horizontal axis measures the firm's options in terms of behaviour. These represent the various forms of agreements that it can conclude. As we move from left to right on this axis, the behaviour becomes more restrictive and, eventually, harmful to consumers. The vertical axis measures the probability of violating the law. Thus, in each of the three graphs the curved line shows the probability violating the law that the potential offender in question associates with each possible form of restriction.

Consider first the vertical dotted line starting at point r* on the horizontal axis. This is the point at which the potential offender estimates that a potential suit challenging his behaviour would be equally likely to go either way. Claims regarding behaviour to the left are more likely to be rejected, and cases involving conduct that are situated to the right are more likely to be granted. This suggests that r* represents the legal standard as perceived by potential offenders. The second feature of the graphs depicted in Figure 3.1 that is of interest here is the way uncertainty is spread around the perceived standard. The spread can be taken as a measure of the uncertainty that potential offenders face. Graphs a) and b) can be used to illustrate this. Potential offenders that work with a distribution such as depicted in graph a) face considerable uncertainty only as they approach the standard quite closely (from both directions). These firms can be said to enjoy a high degree of legal certainty. Potential

offenders that reckon that probabilities are distributed as in graph b) remain uncertain about the appraisal of behaviour that is much less (and much more) restrictive.

Simple numerical examples suffice to show that – in this context – uncertainty may lead to both under-deterrence and over-deterrence. Assume that our firm faces a choice between four different forms of distribution agreement (E, F, G, and H), that these forms are increasingly restrictive of the competitive process, that they present mounting profit opportunities and, thus, increasing sanction costs.[67] Assume, also, that the standard as perceived by the firm corresponds to the actual legal standard as would eventually be applied by the Commission should formal proceedings be initiated,[68] such that the dividing line (r* in graphs a) and b) of Figure 3.1) runs between F (legal) and G (illegal). Now, consider the situations where our firm makes the estimations represented in Tables 3.1 and 3.2 (p represents the probability of being successfully challenged by the Commission; B stands for the profits generated by the agreement; C indicates the fine that will be imposed in case of termination; and EV represents the expected value of each option). Both situations reflect a high degree of legal certainty: options E and F are considered very unlikely to be successfully challenged, whilst the opposite is true for options G and H. Costs and benefits are differently distributed, however. In Table 3.1 expected profits rise faster than the expected sanction and the reverse is true for Table 3.2. In both situations, comparing the net expected benefits will lead the firm to choose the most restrictive legal option F.

Table 3.1

Options	P	B	C	EV
E	0	50	50	50
F	0.05	90	70	82
G	0.95	140	90	<0
H	1	200	110	<0

[67] Fines are calculated on the basis of a proportion of the turnover in the affected market, adjusted for the seriousness of the infringement (see the Commission's guidelines on the method of setting fines pursuant to Article 23(2)(a) of Regulation 1/2003 ([2006] OJ C210/2)). As options become more restrictive (serious) and profitable (higher profits mean a larger turnover) sanction costs should therefore also rise. As is reflected in the tables presented below, however, firms' perceptions of the pace at which sanction costs rise may differ as they depend on (1) how much the extra profits increase overall turnover and (2) the expectations about the Commission's appreciation of the seriousness of the restriction (repeat offenders may, for example, be punished more severely for the same act). In this regard, see also the discussion on fining issues in Chapter 6, Section 6.2.

[68] This means that the negative effects of the restriction start outweighing the benefits exactly at the point where the potential offender considers it most likely that his conduct would be condemned if challenged. This is the case in graphs a) and b) of figure 3.1.

Table 3.2

Options	P	B	C	EV
E	0	100	20	100
F	0.05	120	40	112
G	0.95	140	80	<0
H	1	160	160	<0

It is easily appreciated, by considering Tables 3.3 and 3.4, that when legal certainty deteriorates inefficient results may be obtained. The firm still considers that options E and F are more likely than not to be cleared and that alternatives G and H are more likely to be held in violation. But the differences between the various options in terms of the probability of being successfully challenged by the Commission have grown much smaller. As a consequence, in the situation reflected in Table 3.3, the expected benefits of making the agreement more restrictive increasingly outweigh the expected sanctions, leading the firm to choose the option that poses the greatest threat to consumers (under-deterrence). The opposite result is achieved in the situation captured by Table 3.4. There, it is the rate of change in expected sanctions which outweighs the benefits and induces the firm to opt for a less restrictive alternative than is necessary to avoid consumer harm, which means that it foregoes legitimate private benefits.

Table 3.3

Options	P	B	C	EV
E	0.43	50	50	7
F	0.48	90	70	13.2
G	0.52	140	90	20.4
H	0.57	200	110	23.3

Table 3.4

Options	P	B	C	EV
E	0.43	100	20	48.4
F	0.48	120	40	43.2
G	0.52	140	80	25.6
H	0.57	160	160	<0

More generally, it can be said that it is the spread of a potential offender's probability distribution that determines the seriousness of such inefficiencies, since it influences the pace at which sanction costs are perceived to rise. We can appreciate this by comparing the situations depicted in graphs a) and b) of Figure 3.1. Because in

the latter situation the probability of being found to violate the law starts rising at an earlier point when moving from left to right on the horizontal axis, expected sanction costs initially increase faster than is the case when uncertainty is concentrated in a narrow range. Conversely, in the area immediately surrounding the standard, these costs change at a much slower pace (as in the numerical example). And in the region farther to the right, the effect of uncertainty is to dilute the threat of sanctions. As we said, the ultimate effect on behaviour also depends on the rate of change in foregone profits. Nevertheless, we are able to see that the risk of potential offenders taking too much or too little precaution becomes larger as uncertainty is more spread out.

Since the models developed in the two strands of the literature discussed above point in different directions – Png (1986) and Polinsky and Shavell (1989) find that uncertainty will result in under-deterrence, whilst Calfee and Craswell (1984) and Goetz (1984) find that it may lead to both under-deterrence and over-deterrence – it is important to examine which circumstances prevail in European antitrust. To this end, the next section takes a closer look at circumstances under which firms make decisions that may lead to adverse effects on European consumers.

3.4.2 Contracting in the effects-based field

As we saw, what is crucial here is the number of alternative actions that a firm can take. But note that it is not sufficient that the firm can choose between more than two types of behaviour to determine that the model advanced in Calfee and Craswell (1984) and Goetz (1984) applies. To use an example involving a *per se* violation, cartel members may fix the price of their products at many different levels. But they will surely know that whether they opt for a 5%, a 10% or a 15% mark-up makes no difference whatsoever for the illegality of their conduct. In such cases the real choice is binary – whether to form a price fixing cartel or not – which means that the framework drawn up by Schinkel and Tuinstra (2006), Png (1986) and Polinsky and Shavell (1989) is more suitable. It is only when a firm is able to choose between more than two options that differ in terms of the probability that they will be held illegal that over-deterrence becomes a legitimate concern.

A survey of the Commission's decisions listed in Appendix A suggests that most involve conduct that will have been chosen from a range of options. It was suggested above already that this may be the case when setting up a network. This can be

illustrated by reference to the facts related in the Commission's decision in the case of *Bass*[69](and the nearly identical cases of *Whitbread*,[70] and *Scottish and Newcastle*[71]). UK breweries prevented their tenanting pub-operators from obtaining supplies from competitors, as well as from buying their own brands from wholesalers. The Commission exempted these agreements, but it is clear from reading these decisions that this was only because they applied to a quickly decreasing number of retailers. At the time this form of distribution agreement was implemented – on a much larger scale – antitrust intervention must have been a possibility taken seriously. Lowering the level of restrictiveness by allowing intra-brand competition through the wholesale channel or by allowing tenants to buy from whichever supplier they preferred would each have reduced this probability by a certain margin.

The Commission's more recent commitment decision in the case of *Repsol* points in the same direction.[72] This firm operated a complex system of agreements to regulate the distribution of its fuel products by petrol stations in Spain. Depending on the situation of the individual reseller, these contracts included different stipulations regarding (1) the way the distributor was tied to Repsol (by means of proprietary and or contractual rights), (2) the duration of the distributorship, and (3) the reseller's freedom to determine the prices charged to consumers. The Commission's initial assessment led it to oppose several more restrictive forms of these agreements out of fear that they foreclosed the market. Clearly, raising entry barriers is a gradual affair. As in the case of *Bass*,[73] different variations of the restrictive components in the agreements could have been used to produce results that were either more or less likely to provoke intervention (for example, by allowing more inter-brand competition or by reducing the duration of the agreements).

The exemption decision in *UEFA*[74] (and the very similar commitment decisions in the cases of *Premier League*,[75] and *DFB* [76]) can be used to illustrate that the same may apply to horizontal schemes. UEFA managed a joint sales operation of broadcast rights by football clubs participating in the UEFA Champions League. After

[69] Supra, footnote 36.
[70] [1999] OJ 88/26.
[71] [1999] L186/28.
[72] Decision of 14 April 2006, published on the Commission's website.
[73] Supra, footnote 36.
[74] [2003] OJ L291/25.
[75] Decision of 22 March of 2006, published on the Commission's website.
[76] Decision of 19 January of 2005, published on the Commission's website.

negotiations between the Commission and the organisations involved, the exclusivity claimed by joint venture was trimmed down so as to ensure that individual clubs could market their rights independently in case the joint venture received no reasonable offer. But it is, again, easy to imagine alternative ways to market these rights that – *ex ante* – would have been more or less likely to be held illegal.[77] More generally, the Commission's conditional exemptions and commitment decisions frequently suggest that negotiations with the parties – which are often spread out over different stages of the proceedings – involve bargaining over a range of less restrictive alternatives, rather than two unique possibilities.[78]

Cases that involve strictly exclusionary behaviour, such as *Van den Bergh Foods*[79] and *Morgan Stanley / Visa*,[80] are the best candidates for the binary model, where uncertainty can only lead to under-deterrence.[81] The first case involved Ireland's principal ice cream manufacturer Van den Bergh, which had denied its competitor Mars access to freezer cabinets installed in outlets with limited floor space. The latter case revolved around Visa's refusal to allow Morgan Stanley, a competitor in a different geographical market, to become a member of its credit card network in the UK. At first sight it would appear that both firms had only two options: to accept or to refuse. We must realise, however, that such requests – and the question whether to engage in anticompetitive conduct in general – will seldom present itself without prior notice as these two examples could be taken to suggest. Mostly, the conduct at issue in effects-based analysis will be the result of a sequence of decisions taken over a longer period of time. All examples given above – including the latter two – involve large framework agreements which the firms and organisations in question had put in place to regulate the many different aspects of their complex relations with competitors or retailers.

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[77] A similar argument can be developed for the following horizontal cases included in Appendix A: *P&O / Stena Line* ([1999] OJ L163/61), *TPS* ([1999] OJ L90/6), *P&I Clubs* ([1999] OJ L125/12), *Cegetel* ([1999] OJ L218/14), *EATA* (supra, footnote 33), the exploitative aspects (rebates) of the *Cannes* agreement (decision of 4 October 2006, published on the Commission's website), and *Master Card* (supra, footnote 33).

[78] In this regard the decisions listed in Appendix A where during the proceedings the defendants make amendments to their agreement and the Commission later makes clearance conditional upon further modifications are interesting to look at: *IMA (EPI)* ([1999] OJ L106/14), *GEAE / P&W* ([2000] OJ L58/16), *Reims II* ([1999] OJ L275/17), *BSkyB* ([1999] OJ L312/1], *Visa MIF* ([2002] OJ L318/17), *Lufthansa / SAS / United* ([2002] C264/5), *Reims II Renewal* ([2004] OJ L56/76), *Argev / Ara* ([2002] C250/3), and *Alitalia / Air France* (decision of 7 April 2004, published on the Commission's website).

[79] Supra, footnote 33.

[80] Id.

[81] See the discussion above on the works of Schinkel and Tuinstra (2006), Png (1986) and Polinsky and Shavell (1989).

Now, even if at the final stage the choice is binary, at the moment the agreement is drawn up more options may be available. The case of *Van den Bergh Foods* is a prime example.[82] Van den Bergh provided its network of distributors with free-of-charge freezer cabinets on the condition that they were used to stock the supplier's brand only. Given that most shops selling ice cream had little floor space, in practice almost all vendors had but one cabinet and therefore many of the agreements were in fact exclusive purchasing agreements. At the time these distribution contracts were developed, the company could also have imposed no restriction at all. Alternatively, it could have stipulated a minimum percentage of Van den Bergh ice cream stocked in the cabinet. And at the other end of its range of options, Van den Bergh could have flat-out prohibited selling any other brands in the entire shop.

It is thus of crucial importance that we focus on that stage of the decision making process at which the firm realises that the action it contemplates might fall foul of the antitrust laws. Arguably, in the effects-based field this moment will mostly come early, at the stage where the agreement is given form.[83] Remember that firms whose agreements are subjected to individual scrutiny will often be large undertakings (unable to benefit from a block exemption regulation) or organisations whose market wide coordination is necessary for the existence or proper functioning of the market itself.[84] Such firms and organisations can be expected to be acutely aware of the European antitrust laws and to obtain the necessary advice on the risks they run in implementing these large scale contractual operations. As suggested, at this early stage more than two options will generally be open. Cases such as *Morgan Stanley /*

[82] Id.

[83] Recent US case law offers an interesting example of a case where this point may have come much later: *Pepsi v. Coca Cola* (315 F.3d 101 (2nd Cir. 2002). This case involved the distribution of fountain syrup, which is thickened cola that is mixed with carbonated water at the point of sale. Early on in the 20th century, these two competitors chose for different distribution channels. Pepsi relied on independent bottlers with whom it shared in the ownership of fountain syrup rights by means of licensing agreements. Coca Cola retained its rights and chose to work with exclusive distributors instead. For a variety of reasons, this choice eventually allowed Coca Cola to manage this channel more effectively, resulting in a larger share of this business. Towards the end of the 1990s, Pepsi decided to compete more aggressively in the fountain syrup channel. As a consequence, it shifted its attention away from bottlers towards distributors, many of whom had contracts with Coca Cola. At this point, the exclusivity clauses that had been in Coca Cola's contracts for almost a century suddenly became a serious problem. It should be realised, however, that the circumstances of this case are rather exceptional. Ordinarily, a much shorter time span will be involved and market conditions and antitrust enforcement will therefore not change as much in the period between the implementation of the agreements and the anticompetitive conduct.

[84] Such as *IMA* (supra, footnote 78), *Reims II* (supra, footnote 78), *CEDED* ([2000] OJ L187/47), *Eurovision* ([2000] OJ L151/18, *IFPI Simulcasting* ([2003] OJ L107/58), and *Argev / ARA* ([2002] OJ C250/3).

Visa,[85] where the choice is binary from the start, appear to be exceptional in the effects-based field.[86] This means that we must assume that uncertainty about the effects-standard may result in both under-deterrence and over-compliance.[87]

3.5 Conclusions and implications

It was argued at the beginning of this chapter that a rigorous evaluation of the Commission's effect-based decision practice requires a clear view on the role of the legal standard in the enforcement system as a whole, as well as on the optimal calibration of the legal standard. Such an objective benchmark is absent in earlier assessments of the European *rule of reason*.

We have seen that the legal standard functions at two levels. It regulates the investigation of restraints in the course of legal proceedings by signalling to parties in litigation what arguments and associated categories of evidence must be presented in order for their claims to succeed, and it serves to inform firms as to whether their intended agreement is of the type that may suffer the consequences of antitrust enforcement. The calibration of the legal standard can be said to be optimal if it incorporates policymakers' appraisal of modern economic insights in such a way as to minimise the combination of investigation costs incurred in proceedings and error costs produced by firms deviating from the legal standard. Accordingly, the following chapters will set out to characterise European antitrust in terms of (1) policymakers' priors regarding the frequency with which a certain practice will lead to harm, (2) their expectations as to the costs of producing the related evidence, and (3) their assessment of the consequences of non-compliance.

We have also seen that compliance problems may ensue if the required level of precision in showing harm is low, leaving potential offenders uncertain about the legality of their intended agreements. With uncertainty, firms planning to sign a distribution or joint venture agreement may either take unnecessary precautions, or

[85] Supra, footnote 33.

[86] The behaviour at issue in the case of *ECO System/Peugeot* ([1992] OJ L66/1) might be of a similar nature. Note that this decision is not included in Appendix A because it was adopted well before the reference period.

[87] Note that this conclusion does not call into question the adequacy of the contributions by the authors mentioned in footnote 81 for describing the situation in the *per se* field. Note, also, that the conclusion drawn here corresponds to the approach taken by Cass and Hylton (2001) in their analysis of US antitrust. Without elaborating on their reasons for doing so, they apply a model involving uncertainty that allows for under and over-deterrence, along the lines of Craswell and Calfee (1986).

cross the line instead. This was argued to be different from the situation in the field of *per se* analysis, where firms will typically face a choice (whether to participate in a cartel or not) that does not allow for the third option of taking too much precaution. This, too, is important for the analysis engaged in below, since over-compliance must be addressed by different means than under-deterrence.

CHAPTER 4

Comparing EU and US *Rule of reason* Analysis

4.1 Introduction

The objective of this chapter is to offer a perspective on the level of legal certainty that EU antitrust offers potential offenders after the substantive reforms of the Commission's policy. This is done by contrasting modernised EU antitrust practice with its US counter part. More specifically, we rely on the conceptual model of the legal standard in antitrust enforcement that was developed above to compare the clarity of the signal that each of these systems sends to firms (potential offenders) as to which agreements violate the law. The chapter is organised as follows. Section 4.2 discusses some technical issues relating to the comparisons of the two systems (notably, the methodology employed). Section 4.3 presents the actual comparison and Section 4.4 characterises the results in terms of potential offenders' uncertainty about the precise location of the legal standard.

4.2 A brief note on the comparison

Before starting with the actual comparison, some preliminary remarks are in place, concerning (1) the choice for US antitrust as the system with which to compare European effects-based analysis, (2) the comparative methodology that is relied on, and (3) the focal points chosen for the comparison.

Comparing EU law with US law

The choice to look at US antitrust is given in by very simple reasons. Throughout the history of European antitrust US antitrust law has served as an important point of

reference. In part, this may be explained by the early history of EC antitrust. Recall that although several European nations had an independent tradition of competition law enforcement that pre-dated World War II, the prohibition system introduced by the EC Treaty, especially as regards its substantive aspects, was significantly inspired on the model of US antitrust law.[1] In the period immediately after the entry into force of the Treaty, the law prohibiting restrictive agreements had practically to be constructed from the ground up. At the time, US antitrust offered more than half a century of case law experience. Close economic, cultural and academic ties that exist between Europe and America may also be assumed to have played a part in making US antitrust the natural point of reference for European antitrust lawyers, as well as the fact that there are but few other equally advanced systems of antitrust law in the world. This thesis does not break with this tradition. In fact, an important reason for choosing to make a comparison with US law lies in the fact that the study made in this thesis must be seen as a continuation of the earlier debate regarding the scope for applying a US-style *rule of reason* in the investigation under Art 81(1) EC.[2] Another, equally important, reason is the fact that, because of the close historic link between the two systems, the function of the effects-based standard and the *rule of reason* in their respective jurisdictions is sufficiently similar to allow for a detailed comparison on the basis of the framework developed in Chapter 3.

Comparative methodology

The use of this framework distinguishes the comparison made here from earlier works. Earlier works comparing effects-based analysis and *rule of reason* analysis are generally not explicit about the comparative methodology that is relied on. This tends to somewhat obscure the exact criterion used in finding and evaluating differences between the two systems. Most of these contributions (which include Schechter, 1982; Steindorf, 1984; Schröter, 1988; Caspari, 1988; and Waelbroeck, 1988) compare a combination of statutory language, legislative intent, case law, and doctrinal statements. They tend to focus on the language that is used to give expression to the law, therefore, rather than on the (arguably more important) question of its impact on the behaviour of those that are addressed by it. Moreover, the bulk of this work examines only part of the effects-based standard and the corresponding elements of

[1] In this regard, see Chapter 2, Section 2.2.
[2] See the discussion regarding the European *rule of reason* debate in Chapter 2, Section 2.3.

the *rule of reason*. As was suggested above, the origins of the debate on the *rule of reason* in Europe were closely tied to the Commission's enforcement monopoly under the regime of Regulation 17.[3] These studies examined the scope offered by ECJ precedents for the analysis of efficiency defences in the investigation under Art 81(1) EC, and generally altogether ignore the primary and prior issue in Art 81(1) EC of how a restrictive effect is properly established. Other works, such as Cooper et al. (2005a and 2005b), consider the whole of the analysis (under both limbs of the provision, that is), but focus on a specific type of agreement subjected to effects-based and *rule of reason* analysis, rather than the standard as such.

This work relies on a functionalist approach to compare the effects-based standard under Art 81 EC to the *rule of reason* used in the analysis under Sherman Act §1.[4] The functionalist theory of comparative legal studies instructs us to look beyond differences in language and doctrine, and concentrate on the role that the compared legal instruments fulfil in their respective societies. More specifically, differences and similarities must be established by reference to the effect that these instruments have on the behaviour of those addressed.[5]

Though widely relied upon, the functionalist method of comparative law is itself also subject to debate. The method, as it is frequently applied, is criticised for being impressionistic or unguided in the description of function. Here, it is sought to avoid such impressionism by relying on sound economic insights. The conceptual model developed in Chapter 3 of the function of the legal standard in the antitrust enforcement system provides a rigorous framework for the comparison, which directs the investigation towards those aspects of both system that are determinative of firm behaviour.[6]

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[3] Id.
[4] 15 U.S.C.A. §1.
[5] For an introduction to functionalism and its critique, see Michaels (2007). See also Zweigert and Kötz (1998) and Kraakman et al. (2004).
[6] On comparative law and economics in general, see Faust (2007), Mattei (2000), and De Geest and Van den Bergh (2004). An alternative to the functionalist method relied on here, which deserves to be mentioned, involves the use of quantitative techniques. This approach has recently emerged and has been applied particularly in the field of legal transplants (see e.g. the work of Katharina Pistor) and also plays a significant role in the debate on legal origin (see e.g. Roe, 2006). In the antitrust context such techniques have been used by Bergman et al. (2007) to compare EU and US merger policies. It is submitted, however, that such an approach is not suitable for the issue at hand.
Following Bergman et al., one could compile a dataset of Art 81 EC and Sherman Act §1 cases, identify the relevant economic variables used in their assessment, and determine the extent to which these influence the outcome of a case in either system. This would make it possible to test the hypothesis implicit in most of the existing literature that US antitrust is more permissive, leaving more agreements untouched than in Europe, and holding enforcers to a generally more stringent test than

Materials studied

Typically, and understandably, legal scholars will focus on decisions by the highest courts in the judicial hierarchy. The focus in this chapter is somewhat different. Next to leading cases by the European courts and the US Supreme and Circuit Courts, we also take a broad array of the Commission's decisions and of District Court case law into consideration (see Appendixes A and B for lists of EU and US cases relied on, and the criteria used to select them). The primary reason, at least as regards the selection of European cases, is that we want to create a perspective that allows us to evaluate how the Commission's modernised framework of competition analysis has been applied in practice. There are two more general reasons, also, which relate to our focus on the determinants of firm behaviour.

First, as we will see below, the principles of assessment set out in higher court decisions often share important characteristics with legal standards. Their application to individual cases by the Commission leaves considerable room for appreciation. This means that in a firm's assessment of the legality of an intended agreement lower ranking decisions applying these principles will be of considerable importance.[7] A

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their EU counterparts. Apart from obvious but possibly surmountable problems with accessing the necessary data, a number of other serious difficulties arise, however, in the practical application of such an approach.

In the first place, though Art 81 EC decisions applying effects-based analysis are many, few of these can be used for the purposes of comparison. The bulk of the decisions are exemptions, for which no parallel exists in the US system. Exemptions – like commitment decisions (art 9 of Regulation 1/2003, [2003] OJ L1/1) under the new enforcement regime – are decisions of a positive nature, stating that an agreement is in the clear. In terms of the incentive structures that drives the starting of such proceedings and the adoption of such decisions, this is not comparable to the situation in which a US court rejects a plaintiff's claim and finds for the defendant (a negative decision). It should be remembered also, that, on the European side, the 'failing enforcer' in such no-fault decisions, would be the Commission itself.

The number of remaining infringement decisions is small. The fact that the Commission seldom makes an unequivocal choice to apply only the effects-based standard to an agreement, but instead tends to also formulate an object-based argument, complicates the count. Nonetheless, the number of decisions which predominantly rely on effects-analysis stands at around 20 since 1990. This makes for a poor dataset.

Moreover, this group is heterogeneous. The assessment of vertical restraints and joint-ventures is different to such an extent that they would have to be analysed as separate categories, which would effectively reduce the size of the sample even further. Secondly, efficiency defences play an important role in effects-based and *rule of reason* cases. Such defences are difficult to quantify, however, and are therefore not readily modelled. Lastly, given that in such an approach both the independent and the dependent variable in the model are based on the same Commission or court decisions, endogeneity – which, in essence, is not so different from impressionism – may be a justified concern.

[7] See e.g. Holley (1993: 702) who states that 'formal Commission decisions are the most obvious candidates for precedents' in EC competition law. He adds (at p. 703) that 'formal Commission decisions have been of immense interest to counsel in developing a feeling as to the way future situations will be handled by the Commission – and that, after all, is the basis of counselling in EEC competition law'. As regards case law, het states (at p. 705) that 'the Court's judgments have served a different role and are used in a different way. […] In terms of volume the Court has been producing

second reason is provided by the Commission's historical tendency to adopt a somewhat different test in the analysis under Art 81(1) EC than prescribed by the European Courts. We saw that, particularly in the early days of European antitrust policy, the Commission's approach was less permissive than could be expected by looking at case law alone.[8] In as much as this practice persists today, and we will see that in some measure it does, it is to be expected that the Commission's stance will have a significant effect on the behaviour of potential offenders.[9]

Structure of the comparison

Finally, a comment about the way in which we will proceed with the comparison is in place. As said, we will compare the case law and the decision practice of these two systems in order to evaluate the clarity with which they signal to firms which types of behaviour are impermissible. This analysis is made in two steps. Section 4.3 looks at the evidentiary requirements for showing antitrust harm (that is, on the types of evidence relied on in the assessment of potentially restrictive agreements).[10] We saw that an agreement will be harmful to consumers if it reduces competitive pressures to such an extent that it enhances the firms' ability to increase their profits whilst lowering the volume or quality of their output. Based on what was said in Chapter 2 on this issue of market power,[11] we distinguish evidentiary requirements imposed by the two legal standards according to whether they constitute a more or less direct

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about as many competition law judgments each year as the Commission produces decisions on the substance of Articles [81 and 82 EC]. Counsel have not always found the Court's judgments easy to interpret. The difficulty of producing a wholly coherent judgment when the Court acts per curiam is obvious. On the other hand, no one can contest the authority of the Court's judgments […].'

[8] See the discussion in Chapter 2, Section 2.3. The discrepancy between the two approaches, and the extent to which it persists today, is discussed below in Section 4.3.1.2.

[9] In addition to case law and decision practice, guidelines issued by enforcement agencies to explain how they intend to apply Art 81(1) EC in general and to specific types of agreements will also be of relevance to firms in assessing the legality of their agreement. We have seen that, in Europe, a new generation of such guidelines has been introduced over the course of the past decade. These are not discussed in the present chapter. Their effect on legal certainty is dealt with separately in Chapter 5. In that context it will be argued that guidelines are of limited use to firms. Essentially, they describe the framework of the investigation that will be made, and provide a list of the arguments that could be important. What is crucial from the point of view of potential offenders, however, is to know what value will be attached to such arguments in the circumstances that they face. This information can only be gleaned from case law and decision practice.

[10] This means that the scope of the exercise is limited to making a comparison of direct enforcement criteria and intermediate policy objectives (see Chapter 2, Section 2.3.3). No statements will be made as to possible differences between the ultimate objectives of EC and US antitrust, as these are not as immediately relevant to firms in assessing the legality of agreements they intend to conclude. As to differences in the objectives of the two systems, see e.g. Fox (2001), Van den Bergh and Camesasca (2001), and Hildebrand (2002).

[11] See the discussion in Chapter 2, Section 2.4.

means of showing such antitrust harm. The indirect method concentrates on evidence regarding the competitive structure of the market (firm size, the position of competitors, and barriers to entry) to assess a firm's capacity to adversely affect consumers by means of an agreement. The alternative method is to focus directly on effects: is there evidence of a reduction of output in combination with higher prices? Next, in Section 4.4, we take a more abstract perspective and examine how the use of these direct and indirect forms of evidence influences potential offenders' uncertainty about the precise location of the legal standard.

4.3 EU and US law on restrictive agreements compared

This Section compares European antitrust policy with the way restrictive agreements are regulated in US antitrust. The main counterpart of Art 81 EC in US law is to be found in §1 of the Sherman Act of 1890.[12] We saw earlier that although the language of this provision suggests otherwise by prohibiting 'every' contract, combination, or conspiracy in restraint of trade, numerous categories of restrictive agreements are in fact subjected to a *rule of reason* that, in terms of its main characteristics, is identical to European effects-based analysis.[13] In both systems *rule of reason* analysis

[12] Supra, footnote 6. A number of later antitrust acts contain rules that apply to specific restrictive agreements. The Clayton Act of 1914 (15 U.S.C.A. §14), for instance, applies to certain forms of exclusive dealing and tying arrangements, and the Robinson Patman Act of 1936 (15 U.S.C.A. §14) deals with price discrimination. The case law relating to these acts is not discussed separately. The nature of the *rule of reason* analysis conducted in such cases is generally not different, and, more importantly, the bulk of the cases on restraints of trade is settled under the Sherman Act, providing sufficient material for our comparison. It is useful, also, to discuss some procedural aspects of US antitrust here. As is the case with Art 81 EC, Sherman Act §1 is enforced by a range of different actors. At the federal level there are the antitrust division of the Department of Justice and the Federal Trade Commission (FTC), there are the attorneys general active at the level of the states and, finally, there are private enforcers. Formally, it is only the first and the last of these that are charged with the enforcement of the Sherman Act. However, §5 of the FTC Act, which prohibits unfair methods of competition, has been interpreted to include any practice that would violate the Sherman Act; see Schwartz et al. (1993: 20). In addition, many states have 'baby FTC Acts', which mirror §5 of the FTC Act. Most states also have antitrust statutes that contain a close analogue to §1 of the Sherman Act and courts of many states rely on federal antitrust jurisprudence to construe these provisions; see Gavil et al. (2002: 973). There are two notable differences with the European set up. First-line decisions are adopted by courts in the US (in FTC procedures the decision is taken by an administrative law judge) and not by administrative agencies. Arguably, the Commission's unique decision making powers (see Ehlermann, 1998: xi) give it relatively more influence on policymaking than its US federal counterparts enjoy. A second difference relates to the role of private enforcers in the US system. Due to the treble damages provision in the Clayton Act (and other aspects of US law that facilitate private action, such as contingency fees and class actions) private enforcement plays a relatively more pronounced role in the US. On private enforcement in Europe, see Chapter 7, Section 7.3.2. On the effect of the treble damage provision on the calibration of the *rule of reason* standard, see Chapter 7, footnote 54.

[13] See the discussion on early US antitrust case law in Chapter 2, Section 2.3.2.

distinguishes itself from *per se* analysis on two essential points.[14] In the first place, this method of analysis directs the investigation to the effects of an agreement, rather than its legal form. Secondly, once the enforcing party has discharged his burden of showing a restrictive effect, the *rule of reason* and the effects-based standard allow the burden to shift to the defendant so that he may proffer evidence of the efficiencies produced by the agreement.[15] In a final stage, these effects are weighed against each other. The comparison made below follows these phases in *rule of reason* and effects-based analysis. In Section 4.3.1 we consider the enforcing party's burden of proof, and in Section 4.3.2 the affirmative defence and balancing are looked at. The focus in both sections is on the precise requirements for showing the effects of restrictive agreements.

4.3.1 The enforcing party's burden of proof

4.3.1.1 US antitrust

In the US, the enforcing party has to present what is often referred to as a *prima facie* case that an adverse effect has occurred, in order to shift the burden of production to the defendant. Proving a restrictive effect has traditionally been associated with evidence regarding market structure. Presentation of this kind of evidence follows a

[14] See also the discussion in Chapter 3, Section 3.3.

[15] As regards the scope for presenting an affirmative defense, some see systemic differences between EU and US law (e.g. Whish, 2003: 112). In the case of *Matra Hachette v. Commission*, case T-17/93, [1994] ECR II-595, at para 85, the CFI stated that there are no infringements that are inherently capable of qualifying for the application of Art 81(3) EC. On its face, this would indeed seem to indicate that whatever the method of analysis employed in the investigation under Art 81(1) EC, and no matter how grave the infringement thus found, an efficiency claim can always be made. In practice, however, the differences are hard to see. There appear to be two reasons. Before discussing these, however, it should be pointed out that even if this difference do exists, this does not undermine the characterisation of the *rule of reason* and effects-based analysis as being focused on effects and allowing for efficiency defenses. The difference would centre on the treatment of *per se* violations. In the first place, there is no evidence of serious *per se* infringements being exonerated. If, for example, we look at the 21 decisions taken between 1990 and 1999 that are listed in Jones and Van der Woude (2003: 179) as horizontal cartel cases, we see that in nine of these, some analysis under Art 81(3) EC was engaged in. Generally, however, the discussion is not very fact-specific. And, more importantly, in each of these nine cases, the agreement had either been notified, or fell under the scope of a block-exemption regulation. Few of these cases give the impression that, absent a notification or a claim that a block-exemption regulation applied, the Commission would have engaged in more than a perfunctory investigation under Art 81(3) EC. Secondly, as we will see in Section 4.3.1, a measure of flexibility is adopted in both systems if an agreement nominally falls in a *per se* category, but is clearly beneficial in its effect.

well established pattern pioneered in the field of merger law,[16] which starts with definition of the relevant product and geographical markets, and is followed by identification of the market shares held by the defendants, consideration of indicators for market concentration, and an assessment of the threat of entry. Where vertical restraints are concerned, the investigation centres on the extent to which the market as a whole is covered by such arrangement, and the contribution made by the defendant's agreements.[17] The image of the competitive environment of the defendants that is thus drawn-up makes it possible to assess the threat that the agreement they have concluded poses for consumers. As was suggested, however, this is not the only method by which the adverse effects of a restrictive agreement can be shown in US antitrust. There is an important line of Supreme Court cases that indicate that such an effect can also be shown by means of direct, as opposed to circumstantial, evidence of harm to consumers.

The use of direct evidence

National Collegiate Athletic Association[18] (NCAA) was the first case in which the Supreme Court signalled the existence of this alternative method of showing adverse effects. For a good understanding of the importance attached to direct evidence in US antitrust, it is useful to spell out some of the details of this case. The NCAA plays an important role in the regulation of US amateur collegiate sports, *inter alia* by promulgating playing rules and standards for amateur sports. This case involved a rule restricting the number of collegiate American football matches that could be broadcast on television, which was adopted with the aim of securing sufficient attendance at the games themselves. This was interpreted by the Court as an evident restriction of output, with a significant potential for anti-competitive effects. Faced with a plea by the NCAA that the rule could not have such an effect, because it did not possess

[16] See *Brown Shoe Co. v. US* (370 U.S. 294 (1962)), *US v. Philadelphia National Bank* (374 U.S. 321 (1963)), and *US. v. General Dynamics Corp.* (415 U.S. 486 (1974)). Note that market power as evidenced by the process of market definition is not treated the same in investigations under § 1 Sherman Act, as is under other provisions of the antitrust laws. To infer monopoly power, for example, larger market shares are required. See Gavil (2000), who also discusses the relation with direct evidence.

[17] See *Standard Oil Co. v. US* (337 U.S. 293 (1949)) and *Tampa Electric Co. v. Nashville Coal Co*. (365 U.S. 320 (1961)). For recent applications in lower court case law see e.g. *Omega Environmental, Inc. v. Gilbarco, Inc.* (127 F.3d 1157 (9th Cir., 1997)); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.* (953 F.Supp. 617 (1997)); and *Servicetrends, Inc. v. Siemens Medical Systems, Inc.* (870 F.Supp. 1042 (1994)).

[18] *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 486 U.S. 85 (1984).

market power as evidenced by market shares, the Court responded that, as a matter of law, the absence of this kind of proof could not justify this kind of a naked restriction. NCAA is an important precedent for a second reason, also. This was one of the first in a line of cases where the Supreme Court abandoned the traditional pattern of chosing to apply either a *per se* rule or the *rule of reason*. After taking a *per se* approach to the investigation of adverse effects, which as we saw was focused on the implications of the form of the agreement, the Court nonetheless examined the beneficial effects advanced by the NCAA in quite some detail. This hybrid method of analysis of restraints is often referred to with the terms 'truncated *rule of reason* analysis' and 'quick look analysis'.[19]

In the subsequent case of *Indiana Federation of Dentists*,[20] the Supreme Court was even more explicit on this point. This case involved a purposely created federation of dentists that enjoined its members from submitting their patient's x-rays to health insurers. This was a reaction to a policy by insurers to limit the payment of benefits to the cost of the least expensive treatment suitable to the needs of the patient, in an attempt to contain the cost of premiums. In order to carry out the necessary evaluation, insurers frequently requested dentists to provide any x-ray material used in examining the patient. After summarily dismissing the justification offered for the boycott, the Court considered the federation's argument that this collective refusal could not be deemed an unreasonable restraint of trade, in the absence of findings regarding the relevant market showing that the federation held market power. Acknowledging that the restriction in this case might not have been as 'naked' as in *NCAA*, the Court nonetheless stated that:

> [s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output" can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."[21]

[19] See e.g. Calkins (2000) and Muris (2000).
[20] *FTC v. Indiana Federation of Dentists*, 476 US 447 (1986).
[21] Id. at 460.

These precedents have had a noticeable impact on US antitrust practice. Direct evidence is successfully relied on in a number of lower court cases to demonstrate restrictive effects of an agreement, either alone or in conjunction with indirect evidence.[22] Review of lower court practice confirms, also, what *Indiana Federation of Dentists* already suggested, namely that the category of evidence from which an adverse effect can be inferred consists of more than naked restrictions of output in terms of units alone. What the dentists in this case withheld, essentially, was information.[23] Numerous circuit and district court decisions offer examples of other types of effect that have been accepted as evidence of a restraint, including reduced consumer choice,[24] a lower level of quality or service,[25] and diminished innovation.[26]

The need to verify actual harm to consumers that is visible in this line of cases has also found expression in the way indirect evidence is evaluated by US courts. The enforcing party that presents evidence of a concentrated market has to explicitly address the likely effect of the agreement on consumers. In the words of the 11th Circuit:

> "[…] GDP [the plaintiff], after crossing the threshold of showing Itek's market power, was required to establish that the interbrand market structure was such that intrabrand competition was a critical source of competitive pressure on price, and hence of consumer welfare. GDP was also required to show that the nature and effects of the restraint were such as to be "substantially adverse" to market competition."[27]

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[22] Examples of cases in which direct evidence is successfully relied on are *US v. Visa* (163 F.Supp.2d 322 (2001)); *Continental Airlines v. United Airlines* (126 F.Supp.2d 962 (2001)); *Yeager's Fuel* (supra, footnote 17); *Southtrust v. Plus System* (913 F.Supp. 1517 (1995)); *Sears v. Visa* (819 F.Supp. 956 (1993)); *US v. Brown University* (805 F.Supp. 288 (1992)); and *Breaux Bros v. Teche* (792 F.Supp. 1436 (1992)).

[23] The case of *California Dental Association v. FTC* (526 U.S. 765 (1999)), which is discussed below, also involved restrictions on the information to be supplied to (prospective) customers.

[24] See e.g. *Toys-R-Us, Inc. v. F.T.C.* (221 F.3d 928 (7th Cir., 2000)), and *US v. Visa USA* (344 F.3d 229 (2nd Cir., 2003)).

[25] See e.g. *National Marconi Manufacturors Ass'n v. FTC* (345 F.2d 421 (7th Cir. 1965)), and, more recently, *Continental Airlines, Inc. v. United Airlines, Inc.* (supra, footnote 22).

[26] See e.g. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.* (456 U.S. 556 (1982)), and *United States v. Microsoft, Corp.* (253 F.3d 34, 59 (D.C. Cir., 2001) (§ 2 case)).

[27] *Graphic Products Distributors v. Itek Corp.* (717 F.2d 1560 (1983), at 1573, quoting *US v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), at 375). Similar statements can be found in the case law of other circuits, e.g. *Tops Markets, Inc. v. Quality Markets, Inc.* (142 F.3d 90 (2nd Cir., 1998)).

The Supreme Court's subsequent ruling in *Eastman Kodak*[28] and *California Dental Association*[29] underscore the need to make consumer harm plausible, regardless of the way the plaintiff construes his claim, and inform us about the circumstances in which direct evidence can be used, or market structure has to be analysed instead.

Eastman Kodak and California Dental Association

The *Kodak* case involved the market for servicing photocopying machines produced by this manufacturer.[30] Kodak, the sole supplier of parts for its equipment, competed on this market with independent service providers (ISOs). In 1985 Kodak changed its policy and refused to supply parts to ISOs, forcing many out of business, and forcing users of Kodak equipment to turn to Kodak itself, for servicing. Kodak argued that economic analysis demonstrated that antitrust harm could not follow in the after-market. If it would overcharge its locked-in customers, this would inevitably hurt its sales in the original equipment (OE) market, where it did not possess market power. The Supreme Court decided, however, that the plaintiffs were entitled to go to trial on the basis of their argument that significant information and switching costs prevented OE buyers from making informed decisions.

The same preference for facts over theory is revealed in the case of *California Dental Association*, which dealt with restrictions on certain forms of advertising by members of an association of dentists.[31] The Association argued that these restrictions were justified, and benefited consumers, because they aimed to ensure the accuracy of the information contained in advertising in a market characterised by large disparities between the information available to the professional and the patient. Leaving open the 'economic' question of whether indeed consumers would benefit more from having accurate information, than from the type of advertising that would ensue if the restrictions were removed, the Supreme Court decided that the Court of Appeals had mistakenly required the Association to substantiate its position. Given that restricting advertising has the potential to reduce demand for dental services, it was not entirely obvious that it would also result in a restriction of output. Confronted with two equally plausible, but competing theories, the Ninth Circuit should have required the FTC to proffer evidence of a restrictive effect first.

[28] *Image Technical Services, Inc. v. Eastman Kodak Co.* (504 U.S. 451 (1992)).
[29] Supra, footnote 23.
[30] Supra, footnote 28.
[31] Supra, footnote 23.

This opinion provides an insight, also, into the method to be used in producing evidence of consumer harm. Noting, as it did in the case of *Indiana Federation of Dentists*,[32] that the restriction in the case at hand was not as 'naked' as the one in *NCAA*,[33] the Court suggested its insistence on a more elaborate showing of harm before shifting the burden to the defendant should not be equated to a call for the FTC to engage in the fullest of market analysis. In Chapter 3 (Section 3.3) it was suggested that the level of *ex ante* certainty about the harmfulness of a restraint determines whether it is subjected to either *per se* or *rule of reason* analysis. In *California Dental Association* the Court replaced this traditional dichotomy. Truncated *rule of reason* cases such as *NCAA* already indicated that *per se* analysis of adverse effects does not preclude the hearing of exculpation, which effectively introduced a third and hybrid form of analysis. In *California Dental Association* the Court went further and described a method of analysis that gradually intensifies the required level of scrutiny as uncertainty increases.[34]

The required level of substantiation: A sliding scale

The harmfulness of clear-cut horizontal price fixing and market sharing is obvious enough to subject them to traditional *per se* analysis. Circumstances may arise, however, where seemingly obvious restrictions require further scrutiny. In the first place, there are cases in which an agreement on prices or on output is necessary for the proper functioning, or even the existence of the market at issue. *Broadcast Music Industry* provides a good example.[35] This case involved the licensing of the right to broadcast musical compositions to radio and television networks. Imagine that copyright holders would individually have to negotiate an agreement with every broadcasting station, and monitor that the agreed upon amount of performances was not exceeded. Associations of copy right holders reduce the prohibitive costs thereof by issuing so-called blanket licenses. These are bundles of copyrights that allow the licensee to use any music in the repertory, as often as desired, for a single license fee. Clearly, this involves the fixing of prices by competitors. It should be equally clear however that this restriction is indispensable for the existence of the market itself. In

[32] Supra, footnote 20.
[33] Supra, footnote 18.
[34] Supra, footnote 23. See e.g. Calkins (2000), Muris (2000).
[35] *Broadcast Music Inc v. CBS Inc* (441 US 1 (1979)).

such cases, which include *NCAA*, exculpation may be heard, despite the *per se* characteristics of the conduct at issue.[36]

Where the effects of the restraint are less obvious, more proof of harm is required before the burden is allowed to shift. The cases of *Indiana Federation of Dentists*[37] and *California Dental Association*[38] suggest that markets involving professional service providers (particularly in the area of healthcare) are candidates for this type of treatment.[39] Both decisions indicate that even though harm may not be directly visible in such cases, other roads are open to enforcers than full scale market analysis. That the Indiana Federation of Dentists' policy suppressed competition among dentists with respect to co-operation with the requests by insurance companies, was easily answered in the affirmative by the Supreme Court. There was evidence in the record both of Indiana dentists' perceptions that unrestrained competition tended to lead their colleagues to comply with insurers' requests, and of the fact that outside of Indiana, where no ban existed, insurers generally found little difficulty in obtaining compliance by dentists.[40] A similar exercise in comparative statics might have been sufficient to fulfil the FTC's burden in its case against the California Dental Association.[41]

In other cases, particularly where exclusionary practices are at issue, the situation absent the restraint may be much more difficult to show by means of direct evidence, making analysis of market power unavoidable. This can be illustrated by reference to the facts in the case of *Visa and MasterCard*.[42] Both Visa and MasterCard are joint-ventures of banks. Under the challenged rules, banks were able to issue credit cards on both networks, but faced expulsion upon issuing of cards on the competing American Express or Discover networks. The latter two are vertically integrated systems, which at that time operated independently from banks. The Department of Justice challenged the rules arguing that they unreasonably restrained trade in the markets for issuing cards and providing card services, because they excluded

[36] Supra, footnote 18.
[37] Supra, footnote 20.
[38] Supra, footnote 23.
[39] The case of *National Society of Professional Engineers v. US* (435 US 679) points in the same direction.
[40] Supra, footnote 20, at 456.
[41] Supra, footnote 23. For example by comparing prices in California with otherwise similar markets for dental services in which such a rule did not apply, or comparing fees in counties with more than average association members, to those with a less than average number of members.
[42] Supra, footnote 22.

American Express and Discover from access to banks. The implied counter-factual is that if such access was secured, more cards would be issued, and prices for cardholders would go down. This depends on whether the exclusion has effectively raised American Express' and Discover's costs of issuing cards and servicing payments in such a way that has forced them to reduce their output, and led to a higher level of prices in the market. Discovering information about prices and costs, and comparing them across these very different organisations will in all probability not yield a picture that is as self-evident as in the cases discussed above. Particularly because the possibilities for useful comparison with control groups as in *Indiana Federation of Dentists*[43] appear quite dim. Absent a good natural experiment, an assessment of Visa and MasterCard's potential to achieve those results was indispensable in supporting such a claim.

An investigation of market power need not follow the traditional pattern described above, however. This can be illustrated by considering the FTC's case against Toys "R" Us, a large retailer selling toys.[44] Toys "R" US obtained a commitment from supplying manufacturers, not to sell certain articles to competing warehouse clubs. Proving harm in such a case requires one to examine the proportion of sales made by manufacturers through this retailer, and whether consumers would go elsewhere if the product is unavailable at the retailer in question. Neither question can be usefully answered by concentrating on traditional market share analysis.[45]

4.3.1.2 EC antitrust

If we now turn to look at the situation in Europe, we see two main differences. The first is that there is no comparable insistence on directly relating harm to consumers and no comparable tradition of emphasising the use of direct evidence to demonstrate such harm.[46] In the analysis under Art 81(1) EC, the emphasis is on structural

[43] Supra, footnote 20.
[44] Supra, footnote 24.
[45] See in this sense Patterson (2000).
[46] In *per se* analysis (in European terminology: in the investigation of agreements that have the object to restrict competition), on the other hand, direct evidence is examined with some frequency. This is done for different purposes than to establish a restrictive effect, however. In the context of *per se* analysis the aim will be to establish the existence of the agreement itself. In cases of tacit collusion, for instance, pricing data will generally be crucial to establish concerted action. See Commission's decision in *Woodpulp* (OJ [1984] L85/1) and the review thereof by the ECJ (*Woodpulp II*, [1993] ECR I-1307). And similarly, price differentials between separated markets are frequently relied on, in conjunction with other evidence, to establish the existence of bans on parallel imports. See e.g. *Glaxo Wellcome* ([2001] OJ L302/1), *JCB* ([2002] OJ L69/1), and *SEP – Peugeot* (Commission decision of 5

analysis, although the exact picture is complicated by a divergence between the approaches of the European Courts and the Commission. In addition, it has to be concluded that the European Courts do not offer much concrete guidance as to the procedure to be followed in assessing the negative effects produced by an agreement. We will first consider the *de minimis* doctrine and go on to examine the case law and decision practice.

De minimis doctrine

An important aspect of the analysis of anti-competitive effects under Art 81(1) EC is the question of the appreciability of the restriction. In a decision taken in 1969, the Commission indicated that it would consider an agreement to fall outside the scope of Art 81(1) EC if the parties have only a negligible position on the relevant market.[47] Several months later the ECJ endorsed this approach in its ruling in *Völk v.*

October 2005, published on the Commission's website) In other cases, however, such evidence does not have to be shown to establish the existence of an agreement which is restrictive by object; see e.g. *Commission v. Anic Partecipazioni* ([1999] ECR I-4125, para. 99). In addition, in horizontal cartel cases pricing and output-volume data may be looked at to assess the gravity of the infringement, when determining the level of the fine to be imposed. See e.g. Commission decision in *Amino Acids* (OJ [2001] L152/24) and the CFI's judgment in appeal (*Archer Daniels Midland*, [2003] ECR II-2733).
It is appropriate to emphasise, also, that the reluctance to include direct evidence of harm in effects-based analysis under 81(1) EC is not related to the fact that under the notification regime, the screening of agreements occurred *ex ante*, when such evidence can be expected to have been absent. In practice, much time would normally pass between notification and the adoption of a formal decision (see e.g. Wils (2002: 85) who mentions the extreme example of a case where this period spanned 46 months), enough for effects to materialise. And it is possible to identify a group of cases in which we can be even more certain that availability was not a constraint. There is a small number of cases regarding non-notified (but implemented) agreements initiated by the Commission itself, in which the effects-based standard was applied. A survey resulted in a total of six of such cases for the period between 1990 and 2003, at the end of which the notification system was replaced. Apart from the cases that are about to be discussed the group of six includes: *UK Tractors* ([1992] OJ L68/19), *Screensport EBU* ([1991] OJ L63/32), and *Langnese Schöller* ([1993] OJ L183/19). As was suggested, in none of these decisions is direct evidence of consumer harm relied on to establish a violation of Art 81(1) EC. This statement requires some explanation when it comes to the cases of *EcoSystem – Peugeot* ([1992] OJ L66/1), and *Van den Bergh Foods* ([1998] L246/1).
EcoSystem involved a car dealer specialised in exploiting price differentials between France and Belgium. The Commission showed, by pointing at sales volumes, that the company was able to rapidly expand its operations in the first years. Later, as manufacturer Peugeot created obstacles to EcoSystem's trade by requesting other dealers not to supply it, the numbers decreased drastically. This is not, however, direct evidence of consumer harm. The Commission showed that Peugeot's instructions to its dealers had the actual effect of excluding EcoSystem. It did not present evidence to the effect that this reduction of EcoSystem's output would negatively influence consumers.
The second case, *Van den Bergh Foods*, is discussed in detail below. Here, the Commission's evidence regarding switching costs is relevant. To support the assertion that Van den Bergh's exclusive supply agreements foreclosed the larger part of the market, the Commission presented evidence obtained by means of surveys that showed that the vast majority of distributors considered the costs of switching supplier to be prohibitive. Again, this is not direct evidence. Foreclosure is the typical structural argument establishing the potential of harm to consumers.
[47] See the Commission decision in the case of *Limeburners*, [1969] OJ L122/8.

Vervaecke.[48] In its first *de minimis* notice, published in 1970, the Commission provided quantitative guidelines to determine appreciability.[49] According to this document an agreement would escape the prohibition of Art 81(1) EC if the products concerned did not amount to more than 5 percent of the total turnover in the relevant market. The Commission's most recent notice of agreements of minor importance, dating from 2001, excuses horizontal agreements concluded by firms with less than 10% market share and vertical agreements concluded by firms with less than 15% market share.[50] To be sure, this doctrine provides a welcome safe haven for a potentially very large amount of commercial agreements concluded by smaller firms.[51] Yet it does not provide much insight as to how larger firms must assess whether their agreement comes within the ambit of Art 81 EC. Both the case law and the notice indicate that agreements concluded by larger firms are not to be considered caught by Art 81(1) EC for the simple reason that they cannot be qualified as *de minimis*.[52] Since appreciability is defined in negative terms only (that is, it is indicated which agreements are certainly not caught), we must look elsewhere to learn what may be inferred from larger market shares and whether and how other factors may weigh in on the analysis.

The case law

Several judgments by the ECJ and the CFI contain important statements on the required mode of investigation. Generally, however, the language used is very broad and unspecific. As we saw in Chapter 2, in order to establish, in individual cases falling under the effects-based regime, whether the prohibition applies or not, actual consequences of the agreement for competition must be examined.[53] The aim of the

[48] Case 5/69, [1969] ECR 295. Note that this case involved the type of exclusive dealing agreement with territorial protection that it had earlier considered *per se* illegal in *Consten and Grundig v. Commission* ([1966] ECR 29).
[49] [1970] OJ C64/1.
[50] [2001] OJ C368/13.
[51] In this sense see e.g. Whish (2003: 132) and Schröter (1987: 676).
[52] Supra, footnote 50, at para. 2. As regards the case law, see e.g. *European Night Services*, Case T-374/94 etc., [1998] ECR II-3141, and *Langnese-Iglo*, Case T-7/93, [1995] ECR II-1533.
[53] See the ruling in in *Société Technique Minière v. Maschinenbau Ulm*, Case 56/65, [1966] ECR 235, at p. 249, where the Court stated that where an analysis of the clauses of the agreement 'does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is […] necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent.' On the next page it added the following: 'The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute.' See also the ruling in *Brasserie de Haecht v. Wilkin*, [1967] ECR 407, in which the ECJ stated

exercise is to form an image of the way competition would have evolved in the absence of the disputed agreement.[54] Recent rulings by the CFI tend to add that, in particular, account should be taken of the economic context in which the firms operate, the products or services covered by the agreement and the actual structure of the market concerned.[55]

More specific guidance was provided in the case of *Société Technique Minière*, which presented a list of factors that may be of relevance in the evaluation of exclusive dealing arrangements,[56] and particularly in the ECJ's elaborate ruling on exclusive purchasing arrangements in the case of *Delimitis*.[57] The investigation that is described consists of several layers and is sometimes referred to as the cumulative

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that: "[…] in order to examine whether it is caught by Article [81(1) EC] an agreement cannot be examined in isolation from the […] factual or legal circumstances causing it to prevent, restrict or distort competition.' (These cases were discussed in Chapter 2, Sections 2.2 and 2.3.) These statements are very similar in spirit to the famous description of the *rule of reason* by Justice Brandeis in *Board of Trade of the City of Chicago v. US* (246 U.S. 231 (1918)): "[…] the courts must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." See also *National Society of Professional Engineers* (supra, footnote 39).

[54] In this regard, the CFI's recent judgment in the case of *O2 (Germany) v. Commission* (judgment of 2 May 2006 in Case T-328/03) should be mentioned. O2 and T-Mobile are two mobile telephony operators. In 2002, they entered into and notified to the Commission a network sharing agreement in Germany to cooperate in creating a third generation network in Germany. The Commission, in its decision (OJ [2004] L75/32), determined that the provisions in the agreement whereby they would give each other access to their network (roaming agreements) restricted competition in the sense of Art 81(1) EC and granted a provisional exemption (the duration varied for different areas in the country). O2 challenged the Commission's decision before the CFI arguing that the Commission had not analysed the agreement's actual adverse effect on competition. More specifically, O2 claimed that the Commission examined the relevant *counterfactual*: what would the market have looked like in the absence of the restraint. In its evaluation of this claim, the CFI started (paras. 66 and 67) by repeating the general formulas known from cases like *Société Technique Minière* (supra, footnote 53) and *Oude Luttikhuis* (Case C-399/93, [1995] ECR I-4515, paragraph 10) and emphasising that 'the competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute'. It continued to observe (para. 71) that 'the examination required in the light of Art 81(1) EC consists essentially in taking account of the impact of the agreement on existing and potential competition and the competition situation in the absence of the agreement. Reviewing the Commission's decision in this light the Court concluded that it suffered from 'insufficient analysis' as it contained no discussion of the market situation in the absence of the agreement (at para. 116).

[55] See e.g. *European Night Services* (supra footnote 52), at para. 136, and *Métropole v. Commission*, [2001] ECR-2559, at para. 77.

[56] Supra, footnote 53, at p. 250, where the ECJ indicated that 'in order to decide whether an agreement granting an exclusive right of sale is to be considered prohibited […] it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionnaire on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation.'

[57] *Stergios Delimitis v. Henninger Bräu*, [1991] ECR I-935.

effects doctrine.[58] First the relevant market should be defined, both in its product and geographical dimension. Next, to evaluate the impact of the agreement on the market, its structure and the conditions for access must be examined. This investigation consists of two further layers. First the market as a whole is looked at, to see whether foreclosure concerns are justified. In this regard, the cumulative use in the market of the type of agreement at issue must be examined in terms of the number of outlets concerned, the duration of the contracts, and the quantities of goods sold through this channel. In light of this, the scope for entry by new competitors has to be considered, and in addition, factors such as the number and size of producers, and the degree of product differentiation have to be taken into account. Then, if this market-wide investigation points to a substantial threat of foreclosure, the analysis zooms in on the agreement of the defendants, to assess the extent to which they contribute to the overall effect, by reference to their share of the whole market and their duration. If this contribution is substantial, then the agreement must be held to violate Art 81(1) EC.

There are no rulings that spell out in similar detail the investigation that is called for in case of horizontal co-operation. Still, the framework of analysis that is implicit in the CFI's assessment of certain Commission decisions involving joint venture, such as in the cases of *European Night Services*[59] and *M6*,[60] is comparable to the approach set out in *Delimitis*.[61] In both situations it is essentially examined how large a share of the market is closed off from competition by means of the agreement. The first step in making this assessment involves defining the relevant market. The structure of the relevant market is then examined to determine how large the defendants are individually and to what extent the agreement allows them to combine their behaviour and, thus, increase their strength. At the same time, market structure provides the backdrop against which it must be examined how competition would have evolved in the absence of the restraint.[62]

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[58] The origin of this doctrine can be traced back to *Brasserie de Haecht* (supra, footnote 53). Immediately after the statement reported there, the ECJ held that: "The existence of similar contracts may be taken into consideration for this objective to the extent to which the general body of contracts of this type is capable of restricting the freedom of trade."
[59] Supra, footnote 52.
[60] *M6 v. Commission*, [2002] ECR II-3805.
[61] Supra, footnote 57.
[62] In this regard, see also the case of *O2 (Germany) v. Commission* (supra, footnote 54).

The case of *European Night Services* indicates that in making this assessment, the Commission cannot rely on theory alone.[63] Citing *Delimitis*[64] the CFI emphasised that in assessing an agreement under Art 81(1) account should be taken of the actual conditions in which it functions. It found that the Commission had failed to do so in a number of respects. The Commission had argued that by entrusting rail services to their joint venture the parent undertakings had appreciably restricted potential competition, because it prevented each parent from setting up subsidiaries in the Member States of the other parents and so offer these services themselves and in competition with each other. The CFI considered this to be:

> […] a hypothesis unsupported by any evidence or analysis of the structures of the relevant market, from which it might be concluded that it represented a real, concrete possibility.[65]

As is the case in US antitrust, therefore, the purpose of examining evidence regarding the structure of the market will be to assess whether the defendants can be expected to cause harm. However, the two systems use different reference points in making this assessment. Where US courts require plaintiffs to explicitly address the likely effects on consumers,[66] the European Courts appear to be primarily concerned with the effects of market power on the competitive structure of the market. The same can, by way of parallel, be said for the law on Art 82 EC (on abuse of a dominant position). In this regard, the recent judgments in the cases of *British Airways*[67] and *Microsoft*[68] are worth mentioning.[69]

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[63] Supra, footnote 52.
[64] Supra, footnote 57.
[65] Supra, footnote 52, at para. 142. See also the discussion of the case of *O2 (Germany) v. Commission* (supra, footnote 54).
[66] As can be expected, there is considerable debate amongst US antitrust scholars about the precise requirements for showing consumer injury. This debate centres on the extent to which evidence regarding market structure can be relied on in the type of cases discussed above in the text accompanying footnotes 43 and 44, where compelling direct evidence is absent. In this regard, see Schulman (2005), Arquit (2004), Doyle (2004), Jacobson (2002), Evans (2001), Joffe (2001), and Rooney (2001). Generally, however, these authors entertain no doubt that the Supreme Court case law requires the question of consumer injury to be expressly addressed (in some way or other). This already constitutes a major difference with the situation observed in EU law, where the focus is on competition (either seen as a process or in structural terms) and not directly on consumers.
[67] Judgment of the ECJ in Case C-95/04 P of 15 March 2007.
[68] Judgment of the CFI in Case T-201/04 of 17 September 2006.
[69] The case of *Michelin (II) v. Commission*, Case T-203/01, [2003] ECR II-4071, may also be mentioned here. Much like in the cases that are about to be discussed, the applicant, Michelin, argued that the alleged abuse could not have had a negative impact on competition or have strengthened its

The former case involved an incentive scheme for travel agents set up by British Aiways (BA). The Commission reasoned that this scheme was designed in such a way as to inspire loyalty and that it could not be seen as an instrument with which BA could reward more efficient agents, since even inefficiently operating resellers could expect to increase their dues as long as they stayed loyal. Referring to existing ECJ case law, the Commission determined that this constituted an abuse of BA's dominant position on the UK market. BA had argued that the Commission's theory about the harmful effects of the scheme on the market were inconsistent with evidence of BA's principle competitors gaining market share since its introduction. The Commission, however, indicated that these increases should be seen as the result of the liberalisation of the market in question. Without the restraint, it concluded, competitors would have been able to make even larger inroads on BA's market position. On appeal, BA argued that these findings as to the effect of the scheme were not supported by the evidence and, in particular, that the Commission should have examined whether the rebate scheme caused actual prejudice to consumers. In this regard, the ECJ stated that:

> 'Article 82 EC is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3(1)(g) EC.'[70]

The CFI's review of the Commission's decision in the *Microsoft* case provides equally good indications that the focus, at least in the investigation under Art 82 EC, is primarily on the implications for the structure of competition.[71] This case centered, amongst others, on operating software for server computers, which are used to manage local networks of client PCs (for example in companies). Developers of operating software for server computers need to be able to make their software

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dominant position, since its market share had declined and price levels had fallen in the period that it had engaged in this behaviour. There is a difference, however, in that Michelin's conduct was such as to reveal that it had the *object* to restrict competition. In parallel with the law on Art 81 EC, the CFI determined that once it is established that a dominant undertaking has the *object* to restrict competition, there is no need to show that its conduct produced actual adverse *effects*. The cases of *British Airways/Virgin* (supra, footnote 67) and *Microsoft* (supra, footnote 68) were argued under the effects-standard and therefore more closely related to the topic of our interest.

[70] Supra, footnote 66, at para. 106.

[71] Supra, footnote 67.

communicate with client PCs working on Windows. Microsoft, which produces both types of software and, as is well known, enjoys a near monopoly on the market for PC operating systems, refused to provide a competitor on the server market certain information it had requested to enable its software to interoperate with Windows. In assessing Microsoft's assertion that the Commission had not demonstrated that its refusal caused prejudice to consumers, the CFI stated that:

> 'it must be borne in mind that it is settled case-law that Article 82 EC covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure […] In this case, Microsoft impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market.'[72]

It is true that the arguments to rely substantially on evidence regarding the competitive structure of markets are stronger in cases involving dominant undertakings. In Art 81 EC cases, where the combined size of the defendants is generally much smaller, arguments and evidence concerning the existence or absence of consumer harm can, in principle, be expected to be attributed more weight. The ruling in the case of *European Night Services* appears to contradict this assumption.[73] The CFI insisted that the Commission should have examined the effects of the agreement on the *competitive structure* of the market even though the defendant's share of that market barely surpassed the *de minimis* threshold (5%). Arguably, in such circumstances, a US court would require very substantial indications of *consumer harm* before shifting the burden to the defendants. The case of *European Night Services* is also interesting from another point of view; notably, because it provides an extreme example of the broad interpretation that the Commission has generally given to its powers to intervene in business behaviour.[74] Despite the fact that the defendants were small players on the relevant market, the Commission had demanded considerable amendments to the joint venture agreement they had concluded. The following review of recent decision practice shows that, even today,

[72] Id., at para. 664.
[73] Supra, footnote 52.
[74] Id. See also the discussion in Chapter 2, Section 2.3.

in cases where an appeal is not very likely to be filed the type of evidence required by the Court is frequently not discussed.

The Commission

The Commission's post reform decision practice presents a mixed image. In recent cases involving vertical restraints, such as the prohibition of a network of exclusive purchasing agreements in *Van den Bergh Foods*,[75] the Commission carefully applies the investigation format set out in *Delimitis*.[76] Yet, even at present, there are differences with the approach reflected in case law. On the one hand, in its *Master Card* decision the Commission appears to go well beyond what is required by the Courts, relying extensively on direct evidence to show the restrictive effects of co-operation between banks.[77] On the other hand, many of the Commission's exemption and commitment decisions still rely on legalistic arguments.

Master Card is a credit card system jointly operated by banks. In such a system credit card payments involve two banks, that of the merchant accepting the payment, and the bank that issued the customer's card. The Master Card system provided for a default fee charged by the issuing bank to the merchant's bank. This fee was charged in the absence of specific bilateral agreements between such banks on transaction fees. Relying on several forms of direct evidence (two quantitative studies price effect produced by the default fee and a survey of merchants) the Commission showed that Master Card's arrangement had the actual effect of inflating the charges set to merchants. By pointing to the existence of comparable payment card schemes that operate without a default fee, it was shown that the arrangement was not essential for the viability of the system.

Still, the approach adopted by the Commission in this case is not fully comparable with the way that the investigation of direct evidence is organised in US *rule of reason* analysis. As will be explained in the next section, the Commission considered

[75] Supra, footnote 46. This decision is important, as it constitutes the only finding of an infringement based on analysis of effects that has been taken in the field of vertical restraints since the modernization of the Commission's approach. Examples of clearance decisions are *P&I Clubs* ([1999] OJ L125/12); *Bass* ([1999] L186/1); *GEAE/P&W* ([2000] OJ L58/16); *Revised TACA* (decision of 14 November 2002, published on the Commission's website); *O2 UK/T-Mobile UK* ([2003] OJ L200/59); and *Telenor/Canal+* (decision of 29 December 2003, published on the Commission's website).

[76] Supra, footnote 57.

[77] Decision of 19 December 2007, published on the Commission's website. In this regard, see also the brief reference that the Commission makes to the possibility of relying on direct evidence to show a restriction in its 2004 Notice containing Guidelines on the application of Art 81(3) EC, [2004] OJ C101/97, at para. 27

the defendant's argument that the default fee increased output to come under the scope of Art 81(3) EC. In US law it would be upon the plaintiff to address this argument, before the burden of proof could shift to his opponent.[78]

As suggested, in a considerable number of exemption and commitment decisions, legalistic arguments continue to play a part.[79] The Commission's decision in *UEFA* provides a prime example.[80] This case involved the joint selling of broadcast rights by football clubs participating in the UEFA Champions League. After carefully defining the relevant market (acquisition of TV broadcasting rights to football), the structure of this market and the impact of the agreement thereon are hardly considered. All that the Commission notes, in the context of examining the appreciability of the effect on competition (*de minimis* test), is that UEFA matches make up 20% of the money paid

[78] Evidence of a rise in prices within the Master Card system is not sufficient proof of consumer harm. It should further be shown or made plausible that this price rise was accompanied by a restriction of Master Card's and market wide output.

[79] Before looking at such cases from closer range it is useful to recall why such clearance decisions may be relevant to look at. In principle, decisions finding an infringement will be of much more use to firms in determining the legality of the agreement they intend to sign, for the simple reason that they tend to be more rigorously motivated. This is understandable, as the chances that the case will be appealed are much smaller. The effect can be illustrated by comparing the length of the commitment and infringement decisions adopted by the Commission over the past years. The number of pages of commitment decisions is given without counting the description of the commitments proposed by the parties. The following commitment decisions were looked at: *Bundes Liga* (decision of 19 January 2005, published on the Commission's website), *PremierLeague* (decision of 22 March 2006, published on the Commission's website), *Repsol* (Commission decision of 12 April 2006, published on the Commission's website), and *Cannes* (decision of 4 October 2006, published on the Commission's website). Without considering the description of the commitments offered by the parties, on average these decisions count 13 pages. The decision finding an infringement in the case of in *Van den Bergh Foods* (supra, footnote 46) covers 57 pages and *Master Card* decision (supra, footnote 77) counts no fewer than 241 pages. Infringement decisions applying *per se* analysis are also much longer. The decision in *RawTobacco* (Commission decision of 20 October 2005, published on the Commission's website), *SEP/Peugeot* (footnote 45), and *Bayer* (Commission decision of 21 December 2005, published on the Commission's website) each contain close to 100 pages.
In practice, however, clearance decisions will be of considerable importance for two reasons. Firstly, only four infringement decisions based on pure analysis of effects have been adopted since the Commission modernised its approach, whilst over the same period of time near to 30 exemption and commitment decisions have been adopted (see Appendix A for the list of effects-based decisions and the criteria looked at in selecting them). These four infringement decisions are *Van den Bergh Foods* (supra, footnote 46), *EATA* ([1999] OJ 193/23), *Morgan Stanley / Visa* (decision of 3 October 2007, published on the Commission's website), and *Master Card* (supra, footnote 77). In part, this scarcity of infringement decisions can be explained by the fact that under the notification regime of Regulation 17/62 infringement decisions were frequently motivated on the basis of object-analysis, even if agreements with the potential to produce efficiencies were at issue. Such agreements would either not have been notified, or have been implemented differently than described in the notification.
Secondly, it should be well understood that commitment decisions and exemptions with conditions are implicit prohibitions. Such decisions are preceded by negotiations between the Commission and the defendants, which result in amendments to the original agreement that the Commission objects to. This implies that these interventions by the Commission do change the market behaviour of the defendants. For both reasons it can be expected that the approach reflected in clearance decisions will be of interest to potential offenders.

[80] [2003] OJ L291/25.

for broadcasting rights in the market. In the legal assessment that follows, the clause prohibiting individual marketing of broadcasting rights by clubs that is the focus of the Commission's attention is not discussed in light of these structural conditions, that is to say, it is not explained why UEFA's market position gives cause for concern about its joint selling arrangement, as, arguably, the Courts require it to do.[81]

The case of *TPS*, involving a joint venture on the provision of pay-television in France, provides another example in point.[82] This market was, at the time, heavily dominated by one player, Canal+, with over 4 million customers. There were two much smaller competitors in the market, including the joint venture, which had some 400.000 customers. In the Commission's legal assessment – which contained a specific section devoted to the application of Article 81(1) EC to the contractual clauses – it found a provision in the agreement granting the joint venture the right of first refusal to programmes in the portfolios of its parents to be restrictive, without discussing market structure.[83]

The outcome of a comparison of a clause-driven approach with US antitrust is quite clear. Although superficially similar to the approach taken in *NCAA*[84] and *Indiana Federation of Dentists*,[85] underneath there are significant differences. Take for instance the finding in *TPS* regarding the right of first refusal. The Commission found that this limited the supply of special interest programming to the market.[86] Absent a discussion of the supply of such programming through other sources (i.e. by competitors), this does not amount to an 'obvious' market-wide restriction of output,

[81] Note that the argument that is made is not that the decision reached by the Commission is wrong. Rather, it is that the reasoning followed to reach this outcome is not fully consistent with the spirit of the relevant case law. It is worth mentioning, also, that the Commission's approach is continued under the enforcement regime of Regulation 1/2003 (supra, footnote 6). The commitment decisions in the cases of *DFB* (supra, footnote 79) and *Premier League* (id.) apply reasoning that, although much more compact, can be likened to the decision taken in *UEFA* (supra, footnote 80).
[82] [1999] OJ L90/6.
[83] This decision was appealed before the CFI (*Métropole v. Commission*, supra, footnote 55). The CFI's findings, however, do not touch on this matter of the right of first refusal. The applicants made no plea arguing that given their position as a new entrant on the market, this restriction of freedom would be insufficient to adversely effect competition. Another example of a case in which the clause driven approach remains visible is *Cégétel*, ([1999] OJ L218/14), where the Commission stumbles over a clause in the agreement making the joint venture the sole distributor in France of a foreign parent's concert services business. The case of *P&O/Stena Line* ([1999] OJ L163/61) is also worth mentioning in this regard. The case involved a joint venture on ferry services across the English Channel. Engaging in an extensive investigation of the relevant market and its structure, the Commission found no restrictions at all. Given however that there were indications that the market circumstances might change in the future, it did not clear the agreement, but gave an exemption for a period of three years.
[84] Supra, footnote 18.
[85] Supra, footnote 20.
[86] Supra, footnote 82.

that would be sufficient to shift the burden of production to the defendant, under US law. The case of *P&O / Stena Line* provides a possibly even more telling example of the differences in the approach of the two systems.[87] Even though it found that the joint venture "would be unlikely to be able to raise prices without losing their competitors" it considered that its 30% market share was sufficient to find a restriction in the sense of Art 81(1) EC.

Distinguishable from the decisions where the effect of clauses on the freedom of trade is looked at, are cases such as *Visa International – MIF*[88] and *IFPI Simulcasting,*[89] where a plainly restrictive agreement that would ordinarily be subjected to object-based analysis is looked at from a broad perspective and shown to be necessary for the proper functioning of the market in question, which is comparable to the approach in *Broadcast Music Industry*.[90] In addition, decisions in the line of the ECJ's ruling in *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*,[91] such as *Belgian Architects*,[92] show that a similar approach may be adopted with respect to regulations by associations of professional service providers as is done in US case law.[93]

4.3.2 The affirmative defence and the weighing of effects on competition

The basic framework of *rule of reason* and effects-based analysis is identical. Once the enforcing party has presented sufficient evidence to show that the agreement has restrictive effects, both systems shift the burden of production so that the defendant may substantiate claims that the contract produces beneficial effects. In a final stage these arguments are weighed against each other. Despite the similarities, however,

[87] Supra, footnote 83.
[88] OJ [2002] L318/17.
[89] OJ [2003] L107/58.
[90] Supra, footnote 35.
[91] [2002] ECR I-1577.
[92] Decision of 24 June 2004, published on the Commission's website.
[93] See the text accompanying footnotes 26-30. The approach adopted by the CFI in its recent ruling in the case of *Glaxo Wellcome* ([2006] OJ C294/39) must be distinguished. As we have seen, this case involved an agreement that on its face appeared to hinder parallel imports. Despite the fact that such an agreement would ordinarily be examined under the object standard, the Court decided that a more broadly construed investigation was called for. In particular, it required that already in the investigation under Art 81(1) EC the actual effect of the agreement on consumers be taken into account. The reason the court adopted this stance is that it was not obvious in the context of the heavily regulated Spanish market for medicine, that this agreement would have the effect that could normally be presumed (at para. 134).

several crucial differences exist. Before discussing these, we take a closer look at the basic framework.

Basic framework

Art 81(3) EC explicitly provides for an affirmative defence, and describes it in some measure of detail. In the US the exception to the basic provision of §1 of the Sherman Act is the product of judge-made law.[94] For practical reasons, the structure of the European provision is taken as the guideline for the following comparison.

The exception to the prohibition of Art 81(1) EC depends on four conditions being met. The first two of these are positively stated. To apply, a restrictive agreement must (1) produce efficiencies that (2) accrue to consumers. The other conditions are stated negatively: (3) the restriction found in the analysis under Art 81(1) EC should be indispensable to achieve the efficiencies that the defendant relies on to justify his agreement, and (4), in addition, the agreement must not afford the parties the possibility of substantially eliminating competition. It is settled case law that all of these conditions have to be met in order for the exception to apply.[95] The negatively stated conditions are screens that serve to filter out cases in which the costly exercise of identifying and weighing efficiencies can be avoided. If a less restrictive alternative exists to achieve the claimed efficiency, or if the agreement affords the parties the possibility of substantially eliminating competition, then the defendant's arguments cannot succeed, and only the enforcing party's evidence of a restriction stands. Even if they are not codified as in Europe, the same screens are applied by US courts, with some frequency.[96]

The first of the positively stated conditions concerns the types of benefit that are accepted. In this regard the provision employs broad language, referring to improvements in production or distribution, and promotion of technological progress. There has been considerable debate in the past about the scope of this first

[94] See the discussion in Chapter 2, Section 2.3.
[95] See e.g. *Métropole* (supra, footnote 55 at para. 86).
[96] Regarding indispensability, see e.g. *Ntl. Cable Television Association, Inc. v. Broadcast Music, Inc.* (772 F.Supp. 614 (1991)), and *Floors-N-More, Inc. v. Ianuzzi et al.* (142 F.Supp.2d 496 (2001), at 501, referring in this regard to *Capital Imaging Associates , P.C. v. Mohawk Valley Medical Associates, Inc.* (996 F.2d 537, 543 (2nd Cir., 1993)); as well as to *Clorox, Co. v. Sterling Winthrop, Inc.* (117 F.3d 50, 56 (2nd Cir., 1997))). Regarding the elimination of competition, see e.g. *Yeager's Fuel* (supra, footnote 17, at 659, referring in this regard to *American Motor Inns, Inc. v. Holiday Inns, Inc.* (521 F.2d 1230, 1247 (3rd Cir., 1975))).

requirement.[97] Essentially, the question was whether the efficiencies defendants claim should relate strictly to generic antitrust goals, or whether they could be based also on other goals of the European Communities such as safeguarding employment and the environment (Art 2 EC). The Commission and the Courts have accepted justification based on these wider goals on several occasions.[98] But as we have seen, since the end of the 1990s the Commission has rather consistently signalled that it favours a narrow interpretation of Art 81(3) EC, based on economic efficiency.[99] This is most poignantly expressed in the Commission's 2004 Guidelines on the application of this provision.[100] The efficiencies that are discussed there basically fall into three groups: (1) measures that allow for cost reductions, (2) agreements that enable firms to offer new products (and thus increase choice), and (3) arrangements that make it possible to improve the quality of products or services (including by means of distribution).[101] These are the same dimensions of output that are considered relevant in US antitrust.[102]

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[97] See Whish (2003: 152-156) for an overview with references. The following discussion is based on this overview.

[98] See e.g. the Commission's decision in *Saba* ([1976] OJ L28/19), and the subsequent ECJ judgment in the same case following an application for annulment of the exemption decision by a third party: *Metro v. Commission* ([1977] ECR 1875). See also *Eni/Montedison* ([1987] OJ L5/13), and the more recent *Ford/VW* ([1993] OJ L20/14), which led to the CFI's ruling in *Matra Hachette* (supra, footnote 15). Lastly, *M6 v. Commission* (supra, footnote 60) can be pointed at here, where the CFI indicated that 'in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article [81(3)]'.

[99] See the discussion of these matters in Chapter 2, Sections 2.2.3 and 2.4. For examples of decisions applying this approach see *Van den Bergh Foods* (supra, footnote 46; where a refusal to grant an exemption is motivated by pointing out *inter alia* that the agreement reduces the choice available to consumers, and lessens price competition so that economies of scale cannot be expected to benefit consumers); *Eurovision* ([2000] OJ L151/18; which discusses a reduction of transaction costs, and expansion of output); *JCB* (supra, footnote 46; which involves more efficient after-sales services, and improvements in planning of production and supply, which arguably reduces costs); and *Austrian Airlines / Lufthansa* ([2002] OJ L242/25; which discusses wider choice and improved quality of services). The case of *CEDED* ([2000] OJ L187/47), where environmental benefits were taken into account, provides a good example for the thesis developed by Monti (2002) that was discussed in Chapter 2, Section 2.2.3. Prior to discussing the benefits of the agreement in environmental terms, the Commission devotes considerable energy to analysing the cost reduction that it makes possible, and it is only this cost reduction that it refers to in its conclusion on the first two conditions of Art 81(3) EC in p. 57 of the decision.

[100] Supra footnote 69. These guidelines elaborate on the framework of analysis developed in the earlier Guidelines on vertical restraints ([2000] OJ C291/1) and the Guidelines on horizontal co-operation ([2001] OJ C3/2).

[101] In these guidelines the Commission – after noting that it is not appropriate to draw clear and firm distinctions between the broad and overlapping categories of efficiencies listed in that provision – proceeds to make a distinction between cost efficiencies, and qualitative efficiencies. The groups outlined above are based on the examples it gives of such efficiencies. What is more important is that the Commission does not discuss any of the broader policy concerns at any point in the Guidelines.

[102] See e.g. *New York v. Anheuser-Busch, Inc.* (811 F.Supp. 848 (1993)); in which the benefits of agreements between a brewery and wholesalers in terms of increased quality of the product and its distribution are discussed in light of its negative effects on inter-brand competition); *Servicetrends, Inc.*

The requirement in Art 81(3) EC that a fair share of the benefits should accrue to consumers gives expression to the ultimate benchmark applied in *rule of reason* analysis in both systems. Agreements that restrict the competitive process are permissible only if they increase consumer welfare. The case law of neither jurisdiction circumscribes the method that is to be used in weighing these effects in much detail. Nonetheless, subtle but important differences in approach can be identified.

Crucial differences

When the process of identification and weighing of beneficial effects of agreements is examined in more detail, three crucial differences between the European and US legal standards emerge. These relate to (1) the types of argument that are classified as affirmative defences, (2) the assignment of the burden of production as to the outcome of the balance, and (3) the scope of the indispensability requirement.

The most eye-catching difference is that the two systems distribute the burden of balancing effects differently. Where in Europe, as the language of Art 81(3) EC suggests already, it is upon the defendant to establish that the efficiency he claims outweighs the negative effect of the restriction, the opposite is true in the US. There, once the defendant's claim is not, or insufficiently rebutted, the burden shifts back to the plaintiff, to show that the net effect is detrimental to consumers.[103] This has important implications. In the US, if the outcome of the balance is not obvious, the defendant will carry the day. In Europe, the opposite mechanism is in place. The

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v. Siemens Medical Systems, Inc. (supra, footnote 17; in which the court accepts the defendant's argument that the agreement produces substantial beneficial effects by offering a much higher level of after-sales services); *Picker Int., Inc. v. Leavitt* (865 F.Supp. 951 (1994); where an exclusivity clause is sanctioned because it protects investments in research and development); and *Southtrust Corp. v. Plus System*, Inc. (supra, footnote 22; which discusses the benefits of a clause in a joint venture agreement in terms of lowering prices).

[103] See e.g. *United States v. Microsoft, Corp.* (supra, footnote 26, at 59). This case involved a claim based on § 2 of the Sherman Act (supra, footnote 4), but, as Gavil et al. (2002: 908) point out, the framework that is laid down there applies equally to § 1 cases. Interestingly, the US approach is very similar to the assignment of the burden in Art 82 EC cases (abuse of dominance) as described by the CFI in the European counterpart to this case, *Microsoft v. Commission* (supra, footnote 68). There, at para. 688, the Court stated that 'although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.' For further discussion of this case, see Chapter 7, Section 7.4.

Commission will prevail unless the efficiencies clearly outweigh the restriction. In this regard, two further remarks have to be made.

Firstly, where US courts could be argued to show a certain leniency in their evaluation of efficiencies,[104] this is not the case for the Commission. The Guidelines on the application of Art 81(3) EC make acceptance of efficiency claims dependent on a high degree of empirical substantiation by the defendant, which allows them to be measured and properly balanced against the restriction found in the analysis under Art 81(1) EC.[105] The same standard is applied in the *Master Card* decision.[106] It is true that the Commission's guidelines do not necessarily reflect the position of the Courts. Given, however, that review of the Commission's assessment of complex economic questions is limited to verifying whether no manifest errors have been made, it is not likely that that the courts would feel compelled to reproach the Commission for adopting too stringent a test.[107]

Arguably, also, the Commission's margin of discretion in evaluating the outcome of the balance is wider than that enjoyed by US fact finders, because the effects that are weighed are conceptually distinct. In practice, as we saw, the negative effects of an agreement will be expressed in terms of the impact on market structure or the process of competition. Weighing these against benefits stated in terms of consumer welfare requires more appreciation than the already complex task of comparing different effects on market output. In any event, apart from the decision in *Bass* that is about to be discussed,[108] very little useful decision practice exists to guide firms on this part of the analysis. The bulk of the decisions in which balancing is engaged result in clearance. Understandably, many of these are motivated with less care than infringement decisions. In fact, in quite a number of cases that result in a finding that Art 81(3) EC applies, balancing isn't really engaged in at all. In such cases, once the Commission finds plausible efficiencies, it concludes that the second condition of the

[104] See e.g. the cases discussed in footnote 101.
[105] Supra, footnote 77.
[106] Supra, footnote 77, at para. 694 a.f.
[107] Regarding the test applied in review, see *Remia et al. v. Commission*, Case 42/84, [1987] ECR 2545 at para. 34: "Although as a general rule the court undertakes a comprehensive review of the question whether or not the condition for the application of Article 85(1) are met, it is clear that in determining the permissible duration of a non-competition clause incorporated in an agreement for the transfer of an undertaking the Commission has to appraise complex economic matters. The court must therefore limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the Decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers."
[108] Supra, footnote 67. The decision in the cases of *Whitbread* ([1999] OJ 88/26) and *Newcastle* ([1999] L186/28) are identical to this decision, and will not be discussed separately.

third paragraph is met, without drawing the results of the investigation under Art 81(1) EC into the analysis.[109] This is not surprising, however, given that in the majority of the Commission's decisions the findings made in the analysis under Art 81(3) EC are in fact such as to show that the restrictions found in the investigation under Art 81(1) EC pose no meaningful threat to consumers. This can be illustrated by considering the Commission's decisions in the cases of *Bass*,[110] *Van den Bergh Foods*,[111] and *Master Card*.[112]

Bass

The case of *Bass* involved the use of a so-called 'tied-house' construction in the distribution of beer in public houses.[113] A large proportion of the pubs in the market were owned by Bass or its competitors, and either run by them, or leased to a tenant under an exclusive purchasing and non-competition obligation. These obligations prevented the tied-houses from obtaining supplies from competing brewers, as well as from buying Bass products from wholesalers. The Commission's analysis under Art 81(1) EC closely followed the framework laid down in *Delimitis*.[114] It found that this type of agreement was widely used by brewers, and that Bass' agreements significantly contributed to the foreclosure effect on account of its sizable position in the market.[115] In terms of the first condition of Art 81(3) EC the Commission found that the agreements served to rationalise the distribution of Bass products, and facilitated the establishment of pubs. In the analysis pursuant to the second requirement, however, it raised the possibility that these benefits would not be passed

[109] See e.g. *British Interactive Broadcasting/Open* ([1999] OJ L312/1); *P&I Clubs* (supra, footnote 67); *Cégétel* (supra, footnote 83); *GEAE/P&W* (supra, footnote 75); *Eurovision* (supra, footnote 99); *O2 UK/T-Mobile UK* (supra, footnote 75); and *UEFA* (supra, footnote 80).
[110] Supra, footnote 75.
[111] Supra, footnote 46.
[112] Supra, footnote 77.
[113] Supra, footnote 75.
[114] Supra, footnote 57.
[115] It should be noted that the decision in *Bass* was fully retrospective in nature. It relates to a period in which the beer industry in the UK was in transition. Prior to 1989 the tied-house construction was a dominant feature of the UK beer supply market. In that year the Monopolies and Mergers Commission (MMC) completed an investigation of the beer supply market, and issued the so-called Beer Orders. The Beer Orders were aimed at relaxing the ties between the brewers and the outlets. This aim was pursued *inter alia* by ordering the largest brewers – including Bass – to divest a substantial proportion of the pubs they controlled. Furthermore in 1995, the Office of Fair Trading (OFT) conducted an enquiry into the UK brewers' wholesale pricing policy. In 1996 Bass notified to the Commission the standard form of lease (including the beer tie) which it had been using since 1991. In the year of notification Bass still tenanted around 1.300 pubs, down from around 4.800 in 1987 and 2.400 in 1991. In the years 1997 and 1998 Bass had sold off almost all remaining pubs. It retained only 20 at the time that the decision was taken, which it intended to sell also.

on to consumers. In support the Commission pointed at a considerable differential in the price of supplies charged to tied-house and independent pub operators, which could be seen as an exercise of market power.

Bass offered an alternative explanation, arguing that the agreements also afforded the tenants a host of benefits, ranging from rent subsidies, to value added services (such as bulk buying and procurement services), and access to direct operational support. Bass further argued that it were the costs incurred in providing these services which were reflected in this price differential. As accurately as reasonably possible the price effect of each of these benefits was then quantified, after which the aggregate benefit for the tied outlets was calculated. A comparison of the two effects yielded that in all but one of the seven years under investigation, the value of the benefits was larger than the price differential. Faced with these facts the Commission rejected the monopolistic interpretation of the price differential. Given that the benefits of the agreements compensated the tenants for the higher price they paid for beer, they were deemed to have brought about an improvement in distribution that benefited consumers.

Although the positive and negative price effects that the Commission estimates can obviously easily be compared to one and other,[116] this is not how the analysis of the same case would be structured in the US. There, a price discrimination claim – assuming for the moment that it would be examined under §1 of the Sherman Act[117] – would have to be made and substantiated in the first phase of the proceedings, where the burden of production rests on the enforcing party. More importantly, Bass' attempt to refute this claim by pointing at other causes for the differential – i.e. independent from the agreement – would also be examined before the burden shifts.[118] This is because it is not a genuine affirmative defence. Acceptance of Bass' argument implied that – seen through the lens of consumer welfare – the agreement simply did not result in a tangible restriction. Therefore, if the legal standard to which US plaintiffs are held applied in the analysis under Art 81(1) EC, this agreement would have received a negative clearance. To show a restriction under US law, the Commission could arguably have tried to present a raising rivals' cost scenario, but no such attempt was made in the actual decision. In *Van den Bergh Foods* the

[116] In fact, as was suggested before, this distinguishes the decision favourably from most US cases.
[117] Supra, footnote 4.
[118] See e.g. *New York v. Anheuser-Busch, Inc.* (supra, footnote 102) where the issue of how to interpret the price rise for transshippers is clearly one that falls under the plaintiff's burden.

Commission did present this argument, but again, only under the scope of Art 81(3) EC.[119]

Van den Bergh Foods

This case involved the provision of free freezer cabinets to sellers of ice cream, on the condition that they could only be stocked with Van den Bergh's products. Given the limited amount of floor-space in the average outlet, this effectively came down to an exclusive purchasing agreement. As in the previous case, the Commission's analysis under Art 81(1) EC follows the framework set out in *Delimitis*.[120] It found that Van den Bergh held a particularly strong position on the market, and that its distribution policy significantly contributed to the foreclosure effects in the market. In the assessment under Art 81(3) EC, the Commission indicated that the exclusivity clauses had the beneficial effect of widening the availability of ice cream products. If low volume or out of the way vendors might stock multiple brands in their freezer cabinet, ice cream manufacturers might find it commercially unsustainable to supply them. This line of reasoning by the Commission allowed Van den Bergh to argue that the outcome of the decision that the Commission favoured threatened to restrict output; that is, if the exclusivity clause was removed from the distribution contracts, it was possible that a number of the lower-volume outlets that Van den Bergh would then no longer provide with a cabinet (on account of the even lower turnover), would not be picked up by one of its competitors. The Commission's solution could therefore result in lower market wide volume output. In response, the Commission noted that the non-exclusive scenario it favoured would present a number of benefits that would compensate for this (slight) restriction. In particular, by allowing the cabinets to be stocked with different brands, prices would move downwards (because Van den Bergh's products would be sold next to competing products and because Van den Bergh's competitors would not be forced to make costly investments in hardware to be able to compete with it) and market wide volume output would increase. In addition, consumers would be offered a wider range of choice.

To see how this case would be treated under US law, it is important to understand what exactly the cost benefit analysis is that the Commission makes and what dimensions of output are affected by the parties'respective claims. In fact, what the

[119] Supra, footnote 46.
[120] Supra, footnote 57.

Commission said is that the existing policy of providing free freezer cabinets allowed Van den Bergh to restrict output and raise prices, by stifling price competition, limiting choice and unnecessarily and considerably raising the stakes of the game. If, as the Commission's Notice on the application of Art 81(3) EC tells us to, we take the effect on consumer welfare as the point of reference, we are forced to conclude that Van den Bergh's defence is again not affirmative in nature. What it argued was that on the contrary, the exclusivity clauses made it possible to supply low-volume dealers, and thus to expand volume output. This argument implies that in the counter-factual scenario, in which no exclusivity clause is attached to the cabinets, consumers are actually worse off, because the consequent termination of low-volume dealers would result in a larger restriction of output. In the given circumstances it is understandable that the Commission was not convinced by Van den Bergh's argument. Arguably, however, if US law applied it would have been for the Commission to first argue that the exclusion led to a restriction of output, and then, in light of Van den Bergh's retort, to show that its interpretation of the facts was more likely, before the burden of production could shift.[121]

Master Card (and the Commission's interpretation of Métropole)

That Art 81(3) EC is used to sort out which of two potential effects of an agreement that by their nature tend to exclude each other will occur, and that, as a consequence part of the investigation of the restrictive effect of an agreement is conducted at the

[121] Recall the discussion above of the US Department of Justice's case against Visa and Master Card (supra, footnotes 22 and 44). These credit card networks were challenged for having excluded American Express and Diner (by prohibiting their member banks from issuing their cards). The pivotal question addressed in the investigation of this case was whether these acts of exclusion had effectively raised American Express' and Discover's costs in such a way that they were constrained to restrict output. The (EU) Commission decision in the case of *Morgan Stanley / Visa* (supra, footnote 79) involved very similar facts and is, thus, illuminating on the differences in approach between the two systems. Visa had refused Morgan Stanley (the parent of Discover) to become a member of its network in Europe. The Commission's finding of an infringement is based on evidence of the exclusion, a showing that Visa and Master Card together had a very high market share, and the argument that Morgan Stanley had significant experience as an acquiring bank and was large enough to achieve economies of scale. Visa claimed that even without Morgan Stanley the market was highly competitive, by pointing to a dramatic fall in merchant service charges. Apparently, however, for the Commission the relevant criterion was not the extent to which merchants were affected, but whether the market was deprived of an able competitor. Note that Gavil et al. (2002: 737) mention that not all US lower courts frame the investigation of exclusionary cases in this way. According to them, a significant portion continues to apply the framework set out in *Tampa Electric* (supra, footnote 17), which is strictly structural in nature and does not impose requirements on the plaintiff to show consumer harm. What is crucial, however, is that even in the cases they refer to, exploitation is the ultimate benchmark. For a discussion on the differences in the treatment of exclusion by dominant firms in European and US antitrust, see Fox (2001).

risk of the defendant in Europe, is also shown by the Commission's decision in *Master Card*.[122]

As we have seen, the Master Card system involves four parties. These are merchants that accept card payments, their banks, consumers, and the banks that issue cards. Master Card argued that the default fee included in its bylaws – even if it set a floor under the fees charged by issuing banks to merchants' banks – worked so as to promote the total output of the scheme. The benefits that either group of customers derives from a credit card system depend on the number of customers in the other group that subscribe. The more Master Cards are in circulation, the more attractive it becomes for merchants to take part, and the more outlets accept Master Cards, the more use they will be to consumers. Master Card argued that in the absence of a default fee issuing banks would not consider the effects in the market for attracting merchants when determining the charges set to merchants' banks. The function of the default fee, in its view, was to correct for such imbalances and optimise the utility of the system for both groups.

Arguably, a US court would require the plaintiff to address an argument challenging his claim that the arrangement (the default fee) harmed consumers before the burden of production could shift to his opponent. Referring to the CFI's judgment in *Métropole*,[123] however, the Commission refused to include Master Card's argument in the analysis under Art 81(1) EC. Positive effects of an agreement are properly examined under the scope of Art 81(3) EC.

Comparison and implications for indispensability

What should be gleaned from the discussion of these three cases is the following. In the first place, they illustrate that an important function of Art 81(3) EC is to sort out which of two potential effects of an agreement that by their nature tend to exclude each other, will occur. Is a witnessed price increase the consequence of the exercise of market power, or of higher input prices?[124] Will the agreement make it more profitable for the defendants to restrict output, or are they better off by trying to sell more units instead? That is, part of the investigation of the restrictive effect of an

[122] Supra, footnote 66.
[123] Supra, footnote 55.
[124] As the case of *New York v. Anheuser-Busch, Inc.* (supra, footnote 102) shows, the two effects can of course occur at the same time. If however a $ 1,- increase in price is caused fully by rising costs of inputs, then that same increase cannot also be caused by the exercise of market power.

agreement is conducted at the risk of the defendant. By contrast, in the US the defendant's burden comes into play only when the existence or likelihood of harm to consumers has been convincingly established by the plaintiff. At that point, what remains for the defendant to show, is that in addition to the restriction, the agreement produces a second effect, an efficiency that taps into a different dimension of output, such as quality, or innovation.[125]

The second point is that in the vast majority of the Commission's decisions, that is, in most other cases examined by means of the effects-based standard than the three that were just discussed, the threat that an agreement poses to consumers is not explicitly brought into focus; neither in the investigation under Art 81(1) EC, nor in the analysis pursuant to Art 81(3) EC.[126] This has important implications for the reach of the indispensability requirement and the capacity of the Commission to regulate firm behaviour by extracting commitments. The case of *TPS* can again be used as an

[125] Clearly, in Europe, balancing can also take this form.

[126] In this regard a distinction has to be made between cases where it has to be sorted out which of two mutually exclusive effects of an agreement will occur and cases in which two opposing welfare effects have to be weighed against each other. In a number of decisions it is hard even to classify the case accordingly, because the precise theory of harm is not elaborated upon – e.g. *Eurovision* (supra, footnote 99) and *Cégétel* (supra, footnote 83). In other cases this is made difficult because the analysis under Art 81(1) EC already applies to the amended agreement, for example in *CEDED* (supra, footnote 91) and *Telenor / Canal+* (supra, footnote 75). Cases in which both negative and countervailing welfare effects are at issue constitute the smaller of the two categories. *Austrian Airlines / Lufthansa* (supra, footnote 99) is an interesting horizontal case in which the positive and negative effects produced by the agreement are felt in distinct markets. However, the parties' combined market share in the negatively affected market is so large (90%) that detailed investigation and motivation are not necessary to justify the conditions imposed. Naturally, vertical restraints are more likely to involve two opposing effects. Yet, apart from *Van den Bergh Foods* (supra, footnote 46) and *Bass* (supra, footnote 75) guidance is quite scarce. The decision in *JCB* (supra, footnote 46), for instance, relates to exclusive distribution. Although in the analysis under Art 81(1) EC it relies on object analysis, an examination of effects is made in the investigation pursuant to Art 81(3) EC. Neither market structure nor inter-brand competition is discussed, however, in determining the net (welfare) effect of the agreement. The decision in *Glaxo Welcome* (supra, footnote 46) regarding the existence of beneficial effects is elaborately reasoned. Given, however, that the existence of such effects is not acknowledged, no balancing is necessary. By far the larger group of decisions are those where it must be established which of two potential effects of a restriction will materialise. *Visa – MIF* (supra, footnote 88), and *IFPI – Simulcasting* (supra, footnote 89) are examples of extensively motivated decisions. Most cases concerning non-compete clauses and exclusivity clauses in horizontal co-operation agreements fall in the same category. What must be established here is whether in light of the parties' position on the market these clauses will allow them to inflict harm upon consumers rather than to compete more vigorously. Generally, in such cases – for example *UEFA* (supra, footnote 80), *O2 UK / T-Mobile UK* (supra, footnote 75), and *Telenor / Canal+* (supra, footnote 75) – some kind of finding is made that the restriction goes beyond what is 'necessary' without drawing the implications of market structure into the analysis. The cases of *TPS* (supra, footnote 82), *P&O / Stena Line* (supra, footnote 83), and *Revised TACA* (supra, footnote 75) are similar. In view of possible changes in market competition the duration of the exemption is limited, instead of describing the conditions under which the agreement would cease to be permissible. In quite a few other cases the lack of precision is understandable given that an emerging market or a new product is involved – for example *GEAE / P&W* (supra, footnote 75) and *British Interactive Broadcasting/Open* (supra, footnote 109).

example.[127] As we have seen, TPS had less than 10% market share, was engaged in fierce competition with its larger rival, and can therefore hardly be expected to have posed a threat to consumers; the Commission acknowledged as much in its discussion on consumer benefits. Nonetheless, the Commission limited the permissible duration of the exclusivity clauses at issue, considering that after three years they would no longer be indispensable to TPS's operations. Similarly, in the case of *P&O / Stena Line*, despite the finding that the joint venture and its parents would not be able to raise prices without loosing customers to competitors, the Commission imposed a time limit.[128] Evidently, the legal standard employed under Art 81(1) EC is such that it allows the Commission to put pressure on firms to alter agreements that are not clearly harmful to consumers.

4.4 Characterisation in terms of uncertainty

Characterisation of the results of the comparison in terms of the conceptual framework of the legal standard developed in Chapter 2 offers a perspective on the origins of the differences found and, more importantly, on the ability of potential offenders to assess the legality of the agreement they wish to conclude.

Both systems divide the burden of producing evidence between the parties, but they do so quite differently. We have seen that US plaintiffs must explicitly address the question of consumer harm before the burden is allowed to shift to the defendant. They are required to show or make plausible that the agreements enabled the defendant to reduce output (in terms of volume, quality, choice, or innovation) that is not compensated for by competitors. Emphasis is put on empirical evidence of such harm. The same dimensions of output are considered relevant in European antitrust, but the enforcing party's burden is differently construed. The European Courts emphasise the importance of analysing the structure of competition in the relevant market. The question whether the restriction actually leads to a reduction of output and may thus harm consumers (non-affirmative defence, efficiencies and consumer pass-on) is dealt with under the scope of Art 81(3) EC, where the burden is on the defendant. And where US courts appear not to be unfavourably disposed towards efficiency arguments, the Commission imposes a rather exacting standard, requiring a

[127] Supra, footnote 74.
[128] Supra, footnote 75.

high level of empirical substantiation. In addition, the burden to show which of two opposing effects on consumer welfare effects dominates is assigned differently. These differences are schematically summarised below in tables 4.1. and 4.2. The question that bedevils us is how to interpret the origins of these differences.

We know that, ultimately, competition is protected in the interest of consumers.[129] This is evidenced by the decision in the case of *Master Card*[130] and the approach adopted by the CFI in its ruling in the case of *Glaxo*.[131] The Commission's Notice on the application of Art 81(3) EC is of particular relevance here.[132] In its discussion of the assessment under Art 81(1) EC, the Commission indicates that restrictions of competition are caught if they affect actual or potential competition to such an extent that negative effects on prices, output, innovation or the variety or quality of goods

Table 4.1. Division of the burden of proof in US *rule of reason* analysis

Enforcing party		Defendant	Enforcing party
(1) Direct evidence of a reduction of output, or (2) analysis of market structure plus spe-cific reasons to fear a reduction of output	Response to non-affirmative defences (e.g. output was not reduced, or price increase caused by exogenous factor)	Affirmative defences only (i.e. yes, there is a reduction of output but the restraint also produces efficiencies that expand another dimension of output,)	Balance (i.e. the negative effects are stronger than the efficiencies)

[129] See the discussion in Chapter 2, Section 2.4.2, of the generic objectives of EC antitrust.
[130] Supra, footnote 77.
[131] Supra, footnote 46.
[132] Supra, footnote 77.

Table 4.2. Division of the burden of proof in EU effects-based analysis

Enforcing party	Defendant		
ECJ/CFI: Analysis of market structure plus implications of the agreement Commission: (1) market structure analysis, or (2) restriction of commercial freedom (when appeal is unlikely)	Non-affirmative defences: (1) output or price were not affected, (2) the change is caused by an exogenous factor	Affirmative defence (i.e. yes analysis of market structure or of commercial freedom shows that there is a restriction, but the agreement also produces countervailing benefits)	Balance (i.e. the efficiencies are such as to compensate for the restriction)

can be expected 'with a reasonable degree of probability'.[133] We know, also, from Chapter 3, that for it to make sense, from an economic perspective, to divide the burden of proof, the initial signal (the evidentiary requirements impose on the enforcing party) must be fairly accurate. If not, the extra error and defence costs that come with a division will soon outdo its benefits.[134]

One way to interpret the differences between the two systems would be to say that European policymakers attach more value to the analysis of market structure as a proxy for consumer harm, implying that they expect an inquiry into actual harm to change the outcome in fewer cases than US courts do. The decision in *Bass* is an example of a case where scrutiny of direct evidence relating to prices, volumes and costs is successfully relied upon to disprove the inferences based on the assessment of the impact on the restraint on the competitive structure of the market.[135] If this is considered highly exceptional, it makes sense to reserve this type of inquiry for the

[133] Id., at para. 24. In this regard the Commission remarks that a mere restriction of commercial freedom is insufficient evidence to presume that such effects will ensue.
[134] See Chapter 3, Section 3.3.2.
[135] Supra, footnote 75.

analysis under Art 81(3) EC. And some degradations of market structure may be so harmful that no exculpation of this kind will be heard, like with the exclusion of a significant potential intra-brand competitor in the recent case of *Morgan Stanley/Visa*.[136]

Yet the Commission's findings in conditional clearance decisions like *UEFA*,[137] *TPS*,[138] and *P&O / Stena Line*[139] – where it stated outright that the firms were not in a position to impose a profitable restriction of output, but still considered the agreement caught under Art 81(1) EC – point in a different direction. These cases suggest that evaluating the probability of harm to consumers is not always the objective of the investigation under Art 81(1) EC: even after the start of modernisation competition continues to be protected for its own sake.[140] This is illustrated, also, by the fact that it is not unusual in such cases for the assessment of the impact of the restraint on market to be based solely on findings of restrictions of commercial freedom.[141]

If we now turn to the implications of the comparison in terms of legal certainty, we come to the following conclusions. The weight of the burden that is imposed on the plaintiff in US antitrust is a function of the plausibility of his theory of harm. If the restriction of output is self-evident, an analysis of the agreement itself will make up the bulk of the investigation. The less obvious the restriction is, however, the tougher the scrutiny to which it will be subjected. If no vocal direct evidence can be adduced, more elaborate analysis including examination of market structure will be called for. Potential offenders (firms in the stage of designing a potentially restrictive agreement) will know, therefore, that the less obvious it is to them that the contract will harm consumers, the less likely it is that it will be successfully challenged. Moreover, firms that are motivated in the design of their contract by a desire to operate more efficiently know that, effectively, an evidentiary presumption in favour beneficial effects is in place.

In Europe no comparable mechanism is in place. As in US antitrust, when special market circumstances so require, exculpation may be heard in case of seemingly

[136] Supra, footnote 79.
[137] Supra, footnote 80.
[138] Supra, footnote 82.
[139] Supra, footnote 83.
[140] It was argued above that, whilst commitment decisions are generally not very detailed, the similarities between the decision in *UEFA* (supra, footnote 80) with those in *Premier League* (supra, footnote 79) and *DFB* (supra, footnote 79) indicate that this practice continues today.
[141] In this regard, see footnote 31 of the Notice on the application of Art 81(3) EC (supra, footnote 77).

obvious restrictions. But there the comparison ends. In particular, there appears to be substantially less legal certainty in European antitrust as regards a range of not obviously restrictive agreements concluded by firms with a larger (but not much larger) than *de minimis* position on the market (that is, non-hardcore agreements concluded by firms with a reduced potential to cause harm). Without rendering harm entirely plausible, the Commission frequently intervenes in such situations by convincing the parties to make amendments to their arrangements. These interventions can be thought of as the type of selection inefficiencies that result from assigning a less encompassing burden of proof to the enforcing party.[142] In particular, the following mechanisms are at work.

To begin with, firms evaluating the legality of their agreement under EC law are confronted with what could be called a duality of standards. We saw that a discrepancy between the position of the Courts and the Commission existed under the notification regime.[143] The investigation made in this chapter tells us that there are divergences even today. Where appeal is unlikely the Commission continues to rely on legalistic argumentation that is incompatible with the case law and with its modernised set of guidelines. This approach implicates more agreements than if their impact on competition were examined in light of the structure of the relevant market. These clearances are not inconsequential, however, since they often do interfere with market behaviour through commitments.

There are problems, also, with understanding how the Commission goes about weighing pro-competitive and anti-competitive effects, which is an area where the Courts have little guidance to offer. The focus in the investigation under Art 81(1) EC (on restrictions of freedom or market structure) is different from the one adopted under Art 81(3) EC (positive welfare effects for consumers). In the three cases discussed in this chapter, the Commission went as far as to express its findings under Art 81(1) EC in terms of their (negative) implications for consumer welfare.[144] This allows for a weighing process to be carried out applying the methodology set out in the Commission's Notice on the application of Art 81(3) EC.[145] In the majority of the

[142] In this regard, see the discussion on dividing the burden of proof in Chapter 3, Section 3.3.2.
[143] See the discussion in Chapter 2, Section 2.3.
[144] This is consistently done in the assessment under Art 81(3) EC. In the case of *Bass* (supra, footnote 75) this resulted in the finding that the agreement produced no negative welfare effects that could be weighed against efficiencies.
[145] Supra, footnote 77. As regards the usefulness of the Commission's guidelines in balancing effects, see also Chapter 5, Section 5.3.3.1. There it is argued that they set out a useful framework, but that they

Commission's decisions, however, no such translation is made and restrictions of freedom or static images of relevant markets are 'weighed' against benefits for consumers. These are conceptually distinct issues[146] and, understandably, this type of Commission decision generally offers very little insight in how it went about balancing them.[147]

It should be realised, also, that, even if a firm considers it unlikely that its agreement would harm consumers, mechanisms are at work in EU antitrust that will suppress its expectations of its ability to withstand the Commission's scrutiny (and pressures to modify the agreement). It should be remembered (see the tables presented above) that European defendants face a significantly higher burden of proof than their US counterparts. In addition, if after consideration of the evidence uncertainty should remain about the net effect of the agreement on consumer welfare the European standard is designed in such a way as to give the benefit of the doubt to the Commission.

This effect is reinforced by the margin of discretion that the European Courts accord to the Commission in the assessment of complex economic questions.[148] Given that the Courts exercise restraint in the evaluation of the Commission's decision, potential offenders will reckon with a reduced probability of prevailing on appeal. The comparison with US Federal Rules of Civil Procedure is complex. As in Europe, evidence is produced only in the first instance. No new trial is held in appeal. Both the district court and the circuit court use a deferential test to review the jury verdict when (under Rule 50) called to assess the sufficiency of the evidence produced at trial. Both courts will reject a verdict 'only if the jury could not reach the conclusion it did'.[149] That this deference is material is shown for example in the case of *Sears v. Visa*,[150] where the trial court allows the jury verdict in favour of the plaintiff to stand even though its own appreciation of the evidence points in the opposite direction. This appears to be comparable to the standard of review applied by the Court of First

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cannot give firms much information on the weight that will be attached to a certain argument in the circumstances of a specific case.

[146] See Hawk (1995 978), who argues that (1) the Commission's notion of a restriction of economic freedom is distant from and partly at odds with micro economic analysis and (2) that it is not based on a clear analytical framework that produces precise and operable legal rules.

[147] See again Hawk (1995: 985) for a similar appraisal of the Commission's reasoning prior to the modernisation process (the Commission's decisions 'marked by consclusory reasoning').

[148] See, footnote 106 and the accompanying text.

[149] *Hollowel v. Orleans Regional Hospital,* 217 F.3d 379, 385 (5th Cir., 2000). Concerning Rule 50 FRCP and the standard of sufficiency of the evidence, see 229 F.R.D. 267.

[150] Supra footnote 22.

Instance. There would seem to be two crucial differences, however. Firstly, the jury is not a party in the proceedings as the Commission is. Secondly, US litigants can file a motion for judgment as a matter of law – that is, for review – to the trial court itself, whilst European defendants have to file appeal to have the sufficiency of the evidence examined. Their costs are, therefore, much higher, making them relatively more susceptible to the Commission's pressure to make amendments.[151]

Seen in combination, these arguments support the finding that, by comparison, European antitrust offers less legal certainty to firms whose position on the market is larger than *de minimis*, but whose agreement is not obviously harmful. In the next chapter we continue our inquiry into the legal certainty provided by the Commission's approach under Art 81 EC. Having considered the substantive aspects of modernisation, as reflected in decision practice, we turn to examine (1) the usefulness to firms of the guidelines issued by the Commission, (2) the implications of the types and number of decisions adopted by the Commission, and (3) the impact of the procedural reforms on firms' capacity to assess the legality of their agreement.

[151] In addition, a considerable number of the US cases included in Annex 1 that reached the stage of trial were bench trials.

CHAPTER 5

The Impact of Modernisation on Legal Certainty

5.1 Introduction

This chapter considers a number of important *outward features* of the Commission's modernisation programme. Our focus remains on its consequences for legal certainty. But, here, the emphasis is not on the *content* of the message sent by the legal standard (that is, case law, decision practice and guidelines) to firms as to the legality of their contracts. Instead, we inquire what sources of information are available to firms and what their relative value will be. In this regard, we pay particular attention to the implications of the shift from *ex* ante screening to *ex post* control. Adding to the concerns raised in Chapter 4, it is argued below that the way modernisation is currently being put into effect by the Commission works so as to reduce legal certainty, whilst increasing the need for it.

The Chapter is organised as follows. In Section 5.2 we study the number and types of decisions that have been adopted since the beginning of the substantive reforms and consider the impact on legal certainty. Next, in Section 5.3, we examine the effects of the procedural reforms. Section 5.4 makes the case for adjusting the effects-based standard of Art 81 EC to improve firms' ability to assess the legality of their intended contracts.

5.2 The impact of substantive modernisation

5.2.1 The shift from a rule-based to a standard-based system

By their very nature the Commission's substantive reforms put some amount of pressure on legal certainty. The shift in focus from legal form to actual effects signifies a change from a rule-based regime to reliance on a standard. Recall that these two forms of legal commands differ as to whether the law is given content *ex ante* or *ex post*.[1] The old approach was to list specific contractual clauses thought either to be distortive (black lists) or beneficial (white lists). After modernisation – in as much as individual assessment is concerned – only a general rule applies that prohibits harmful restraints. The determination of whether an agreement actually hurts consumers is left over to adjudication. This means that modernisation has changed the way in which firms assess the legality of contracts they intend to conclude. Rather than basing themselves on information that is available at that time, the clauses contained in the contract, they are called to make a prediction of its effects and, crucially, of the evaluation of those effects in legal proceedings.

The difference can be easily appreciated by considering the changes announced for both phases of the analysis under Art 81 EC (and by abstracting, for a moment, from our findings in Chapter 4 about how the modernised system functions in practice). We saw that prior to the reforms the Commission's approach under Art 81(1) EC was mixed. In many cases it relied on the notion of a restriction of commercial freedom to infer a violation of this provision. In other cases market structure was examined as well. As regards the first group of cases, it can easily be appreciated that predicting the outcome of the Commission's definition of the relevant market and its subsequent assessment of the agreement in light of market structure (the new approach) will be more difficult than assessing whether the agreement is such that it limits the freedom of the signatories or third parties (the old approach). With respect to the second group, it is important to point out that the way the Commission describes market structure analysis in its guidelines is different from its prior practice. Rather than finding a restriction if the parties' share of the market is larger than *de minimis* (5%), it is suggested that some more comprehensive form of

[1] See Chapter 3, Section 3.3.

assessment of market power will take place. By comparison, the outcome of the latter exercise will be harder to foresee.[2]

The effects of the reforms made to the analysis under Art 81(3) EC are similar. Rather than on the form given to the agreement, fulfilment of the first condition of this provision depends on whether it will produce tangible benefits in terms of cost reductions, innovation or the variety or quality of goods and services. Likewise, the outcome of the balance of positive and negative effects depends on the circumstances of the case and not on the question whether an agreement does or does not possess certain outward features. These observations indicate that, for potential offenders, the evaluation of just how much more permissive the new approach is will not always be straightforward. Two remarks must be made here, however.

The first is that the law regarding some types of agreements was already governed by a standard. The pre-modernisation block exemption regulations were directed at specific forms of agreement.[3] Numerous types of vertical and horizontal agreements were not covered and, although legal form will have played a significant role in the individual assessment of these types of arrangements under Art 81(1) EC, the assessment under the third paragraph depended on case by case evaluation rather than predefined rules. The new approach in the field of horizontal cooperation remains fragmented,[4] but Regulation 2790/99 covers all forms of vertical agreements. Firms that use arrangements that were previously not block exempted, such as selective distribution, and who do not exceed the relevant market share thresholds, must therefore currently find themselves in a better situation. It should be noted, also, that firms whose agreements will be individually assessed can now at least rely on the guidelines issued by the Commission.[5]

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[2] The level of uncertainty firms experience will depend on their size. Initially, the larger firms are, the more uncertain they will be. As they head towards a position on the market associated with dominance, the level of uncertainty experienced as regards the outcome of the assessment under Art 81(1) EC will decrease. Given that the block exemption regulations confer *per se* legality upon agreements concluded by small and medium-sized enterprises, most firms subject to individual assessment – even those that do not exceed the thresholds by much – can be expected to experience some form of uncertainty.

[3] See the discussion in Chapters 2, Section 2.3 and 2.4.

[4] There are block exemptions for separate categories of agreements: Regulation 2659/2000, on the application of Article 81(3) of the Treaty to categories of research and development agreements, [2001] OJ L 304/7 and Commission Regulation 2658/2000, on the application of Article 81(3) of the Treaty to categories of specialisation agreements, [2001] OJ L 304/3.

[5] See the discussion in Chapter 2, Section 2.4, and the Guidelines on vertical restraints, [2000] OJ C291/1; the Guidelines on the applicability of Article 81 to horizontal co-operation agreements (supra, footnote 229); the Notice on the application of Art 81(3) EC, [2004] OJ C101/97, and the Notice on the definition of the relevant market for the purposes of Community competition law, [1997] OJ C372/03.

Second, a loss of legal certainty is not necessarily an argument against the use of a legal standard. We saw, in Chapter 3, that standards are used to regulate complex factual situations. There can be little discussion that the impact of restrictive agreements concluded by larger firms, which depends on a multitude of possible factors, can be classified as such.[6] In such cases clear rules are either prohibitively costly to formulate *ex ante* or seriously inaccurate in their *ex post* application and ultimate effects. In this regard, one can think of the compliance costs imposed on firms under the notification regime, which paid for the scrutiny of large amounts of innocuous agreements and of the straight jacketing effect of the black and white lists.[7] Any inefficient behaviour resulting from uncertainty generated by the shift to a legal standard may, thus, wholly or partially be compensated for. It is very important to realise, also, that the more the standard is applied in practice, the more information firms will have at their disposal about the precise implications of the new approach (that is, the lower the level of uncertainty will be). In the following two sections we look at this latter issue in particular. We identify a number of limitations of the two principle sources of information available to firms, the Commission's guidelines and its decision practice, which fortify the concerns about legal certainty that were raised in Chapter 4.

5.2.2 The guidelines and developments in Industrial Organization

The Commission's Guidelines chart possibilities; they are less useful when it comes to assessing probabilities. Essentially, these documents identify a range of potential anti-competitive and beneficial effects of restraints and, thus, describe the general framework of analysis applied in individual assessment under the effects-based standard. For firms engaged in ex ante assessment of the legality of their agreement, particularly where restrictions are combined with efficiencies, more is needed. They require some indication of the likelihood of one effect prevailing over the other or, to complicate matters further, some indication of how the Commission is likely to appraise the ultimate result. Apart from discussion of the market share screens contained in the block exemption regulations, however, references to such estimations are virtually absent in the guidelines.

[6] See the discussions in Chapter 2, Section 2.4.2, and Chapter 3, Section 3.3.1.
[7] See the discussion in Chapter 2, Section 2.3.2, and in particular the text accompanying footnote 117.

This is understandable if developments in Industrial Organization and the way in which they were incorporated into policy are considered. Faced with a gradually swelling stream of often competing explanations for known forms of behaviour, European policymakers have apparently adopted a somewhat cautious stance in refining substantive law. Although the Commission has internalised the models advanced by economists as instruments for case by case analysis, it is reluctant to commit, in advance, to any specific outcome. The following, stylised, description of developments in the Industrial Organization branch of economics in more detail will help to substantiate this argument.[8]

Early thought, Ordo-liberalism, and the Harvard School

Discussions of the concept of competition in economics generally start with the work of the classical economist Adam Smith.[9] In his book entitled *The wealth of nations* (published in 1776) he argued that the process of competition is a force that drives economies to the best outcomes feasible or, in other words, to a harmony of all interests. If all sellers are free to rival with their colleagues over the prospects of gain that comes with satisfying the needs of buyers and if all buyers are free to choose what they consider to be the best offer, that is, if all are free to act in their own best interest, society as a whole will benefit. Competition, in this view, is as an 'invisible hand' that reconciles the pursuit of private interests with the social good. The emphasis on personal freedom in this classical economic theory of competition has direct implications for the role of the state in the economy. Classical economists generally considered that this role should be limited to ensuring that all persons are able to exercise their freedoms, notably by protecting law and order.[10]

Over time, as economic science progressed, different schools of thought have emerged concerning competition and the scope for government intervention in market behaviour. The origins of these schools can be traced back to a fundamental debate

[8] The following discussion provides a brief and incomplete overview of the developments in thought about competition. The focus is on the main traditions that have influenced European antitrust policy (Ordo-liberalism, the Harvard and Chicago Schools and, to a lesser extend, post-Chicago developments), which is sufficient to illustrate that clear rules regarding agreements that exhibit multiple tendencies (positive and negative) are difficult to draw up *ex ante*. For detailed discussions of developments in economic thought about competition, Hildebrand (2002), Neumann (2001), and Van Cayseele and Van den Bergh (2000).

[9] See e.g. Van Cayseele and Van den Bergh (2000), Hildebrand (2002: 110), and Scherer and Ross (1990: 17). See e.g. Neumann (2001), McNulty (1990), and Van Cayseele and Van den Bergh (2000) about Smith's predecessors and contemporaries in thinking about competition.

[10] See Hildebrand (2002: 110) and more generally Gerber (1998: Chapter II).

that was waged by economists, both in Europe and the US, in the second half of the 19th century. This was a debate about the proper way to gain insights about the effects of competition and restrictions on it.[11] On one side were scholars that stood in the Anglo-American tradition of neo-classicism, who combined a theoretical approach with a strong distaste for government intervention.[12] Fundamentally changing the discourse of economics, they developed a mathematical expression of Smith's theory of the invisible hand, in the form of the model of perfect competition, which played a crucial part in demonstrating the ill effects of interference.[13] On the other side were the so-called historicists; a school of German origin.[14] Although they accepted the basic understanding of the forces that shape market behaviour that was developed in classical economics,[15] they were deeply distrustful of the explanatory powers of models and abstract principles because in practice all markets show some degree of imperfection. Instead, historicists emphasised detailed observation of economic behaviour in its historical and social context. This approach – that looked at competition with fewer pre-conceptions – left more room for government intervention. In Germany, in particular, historicism instilled a tradition of cartel regulation (as opposed to prohibition) that would last until the Second World War.[16]

[11] The following description is to a considerable extent informed by Gerber (1998). In Chapter II, he provides a detailed account of the impact of industrialisation and the world wide economic depression of the 1870s and 1880s on popular and academic thought about competition. He offers explanations, also, relating to the history and cultures of these countries, for why scholars in the UK, Germany, and Austria developed their thoughts in different directions.

[12] This 'Methodenstreit' also involved scholars working in the Austrian neo-classical tradition. In this regard, see Chapter III of Gerber (1998) and Hildebrand (2002: 154). Several members of this school fled to the US and the UK during the Nazi-period. The works of these neo-Austrians is generally more radical than that of the Chicago School discussed below.

[13] The work by the British scholar A. Marshall played a crucial role in this regard. See Hildebrand (2002: 112) and Zablotsky (1995). The turn to mathematics in economics somewhat shifted the interest from competition as a process to competition as the state of a market. See e.g. Van Cayseele and Van den Bergh (2000), Neumann (2001), and Hildebrand (2002). Recognising that few real-life markets are perfectly competitive, scholars working in this tradition developed a considerable number of other models to describe the outcomes generated by departures from this ideal. These include oligopoly (pioneered by A. Cournot and J. Bertrand) monopolistic competition (associated with the names P. Sraffa, E. Chamberlin and J. Robinson), monopoly and monopsony.

[14] See Gerber (1998: 84). The Historical School's central claim was that economic knowledge was historically conditioned and that, as a result, abstract general principles concerning economic behaviour – such as Smith's invisible hand – had limited value. Economic conduct occurred within specific cultural and historical contexts, they argued, and it could not be understood without understanding these contexts.

[15] See Gerber (1998: 86).

[16] On pre-World War II competition policy in Germany see Chapters II, IV and V of Gerber (1998). See in particular his discussion (at p. 91 and following) of the Saxon Wood Pulp case of 1897, which established the legality of cartels under German law and remained authoritative for more than 50 years.

It was in reaction to these failed policies of the Weimar period and the abuses of the Nazis that a group of lawyers and economists at the University of Freiburg developed a body of thought concerning the economy, competition, and law that was to have a profound impact on European antitrust policy.[17] These scholars, often referred to as Ordo-liberals, faulted historicists for being unguided in their analysis and theoretical economists for being out of touch with the complexities of real-life markets.[18] In their view, also, the strong links that had existed between industry and the state contributed significantly to the derailment of Weimar-Germany's political institutions in the 1930s.

Law played a crucial part in the bold new theory that the Ordo-liberals developed for ordering the state and the economy, notably by regulating the interaction between these two spheres.[19] Thus, the scope for state intervention in the market would have to be clearly circumscribed and, more importantly, the law would be used as an instrument to ensure the dispersal of economic power. This is a vital element of the Freiburg agenda. Law and law enforcement were intended to reshape the economy and create the conditions of perfect competition.[20]

The primary function of antitrust law in this legal framework was to rigorously protect the contractual freedom of market participants, so that private regulation of business affairs would not substitute competition. This idea is clearly reflected in the wide notion of a restriction that the Commission adopted to the analysis under Art 81(1) and in the design of the first generation of block exemption regulations.[21] This influence of Ordo-liberal thought on EU antitrust is explained, at least in part, by the fact that several of its supporters played an important role in the negotiating process

[17] For more detailed discussions on Ordo-Liberal thought and its influence on EU antitrust, see Chapter VII of Gerber (1998), Hildebrand (2002: 158), Razeen (1996), Streit (1992), and Möschel (1989).

[18] Both approaches in economics, empirical and theoretical, which in their view had led largely separate lives, had to be integrated. In this regard, thinking in terms of 'economic orders' was fundamental to members of the Freiburg School. The basic idea was that that real-life markets, which – though endlessly complex, differentiated, and conditioned by historical circumstances – were governed by fundamental ordering patterns. These ordering patterns can be thought of as the rules of the game in an economy: how are values assigned to goods, who are the decision makers, what constraints do they face, etc. The task for economists, according to this tradition, was to discover these fundamental patterns.

[19] Ordo-liberals realised that many rules of the game in an economy (in this regard, see footnote 62) were in fact anchored in law. They had to be, in a system based on free competition, since unchecked private power may lead to the destruction of the system itself. Government policies were needed to create and maintain a competitive system (in this regard, they used the distinctive term *Ordnungspolitik*). This realisation is at the core of the close link between law and economics in Ordo-liberal thought. In this regard, see Gerber (1998: 246), Razeen (1996), and Streit (1995: 678).

[20] See Gerber (1996: 250 a.f.).

[21] See the discussions in Chapter 2, Section 2.3.

that lead to the founding of the EC Treaty and that others went on to occupy important positions within the new competition directorate.[22]

Ordo-liberalism, however, was not the sole influence on the concept of competition that underlies EC antitrust policy. The ECJ's earliest cases on effects-based analysis, such as *Société Technique Minière*[23] and *Brasserie de Haecht*,[24] prescribe a broader framework of analysis in which legal form is but one of the circumstances to be taken into account. These and later cases on Art 81 EC, in particular the 1999 ruling in *Delimitis*,[25] appear to reflect concepts developed in the Harvard tradition in Industrial Organization.[26]

Early work at the Harvard School drew considerable inspiration from German historicism.[27] By comparison, however, it was less hostile to theory and developed a more focused research agenda. Harvard scholars shared with neo-classicists the fundamental idea that the number and characteristics of the participants on both sides of the market determine their behaviour and thus the outcomes generated on that market (in terms of prices, quality, and innovation). But, rather than trying to capture variations in structure in rigid models to understand the nature of the outcomes that each type (monopoly, oligopoly, differentiation) would generate, they engaged in empirical research of actual markets and industries to try to identify what combination of these factors leads to unacceptable results or, in other words, what would constitute *effective* competition.[28] Initially, this involved mostly detailed case studies of particular industries, mostly those were antitrust proceedings had produced the

[22] See Gerber (1998: 263 a.f.).
[23] *Société Technique Minière v. Maschinenbau Ulm*, Case 56/65, [1966] ECR 35.
[24] *Brasserie de Haecht v. Wilkin*, [1967] ECR 407).
[25] *Stergios Delimitis v. Henninger Bräu*, [1991] ECR I-935).
[26] This is different for Art 82 EC. The concept of abuse employed there, to prevent dominant firms from engaging in conduct that market forces would not have allowed them to under competitive conditions, has strong roots in Ordo-liberal theory. Regarding Ordo-liberal thought on dealing with dominance, see Gerber (1998: 252). For authors who argue that EU antitrust law in general should be interpreted in light of the Harvard tradition, see Van Cayseele and Van den Bergh (2000), and Martin (2001).
[27] See Hovenkamp (1989-1990).
[28] This term was introduced by J.M. Clark. In earlier works, notably Clark (1941) he used the term workable competition. The basic idea behind this concept is the following. The assumptions underlying the neo-classical model of perfect competition are so exacting that they will never be met in real-life markets. At the same time, it was realised that even imperfectly competitive markets might perform in a way that could not be improved by means of government intervention. Clark, therefore, set out to identify factors that led to the closest thing to perfect competition that was possible in the real world. For a discussion, see Hildebrand (2002: 120). It is worth noting, also, that this term is frequently used in the ECJ's case law. See e.g. *Metro SB-Grossmärkte v. Commission*, case 26/76, [1977] ECR 1875, at point 20 a.f.

revealed the necessary information.[29] Around the middle of the 20th century, these efforts changed in character. The first step in this process was the development of the Structure-Conduct-Performance framework.[30] The next step came with the turn to inter-industry statistic studies, which made it possible to analyse data drawn from many markets.[31] This approach was used in particular to test the hypothesis that high levels of concentration were related to elevated profits and, thus, poorer performance.[32] The many hundreds of studies carried out in this tradition were, for a long time, generally interpreted to confirm this hypothesis. Later work (roughly from the early 1980s onwards) raises questions about the correct inferences to be drawn from these studies and indicates that the correlation is rather between sellers' individual market shares and profits.[33]

Still, the general implications for the scope of government intervention in markets are clear: antitrust enforcers should focus on markets with a structure that is weakened by the presence of large firms. There can little doubt that this line of work provides much of the basis for the emphasis on structural analysis in European antitrust.[34] Note that the Harvard conception of the competition laws is considerably narrower than that advanced by Ordo-liberals, who, in their purest form, oppose any restriction of commercial freedom regardless of firm-size. A third source of inspiration for the generic (economic) objectives underpinning EC antitrust lies in the teachings of scholars working in the Chicago tradition. These scholars, who were able to demonstrate the potential for generating efficiencies of a range of practices whose effects on structure were regarded as suspicious by Harvardians, advanced yet another

[29] See Schmalensee (1989: 952) and Hovenkamp (1989-1990).
[30] The Harvard-based economist E. S. Mason was instrumental in the development of this framework. For a discussion of his work, see Hildebrand (2002: 126 a.f.) As we saw in Chapter 2, Section 2.4.2, the SCP framework of analysis is based on the idea that the results achieved on a market (the welfare consumers derive from it, as well as the level of employment, and the advances in R&D), are dependent on the conduct engaged in by mainly the sellers on that market (pricing, investment, advertising etc), and this in turn is determined by the structure of a market (particularly the number and size of market participants, and entry conditions).
[31] The initiative, in this regard, was taken by the economist J. Bain. For a discussion, see Chapter 11 of Scherer and Ross (1990), Schmalensee (1989), and Hildebrand (2002: 130).
[32] More specifically, the main hypothesis tested in this tradition was that given the pricing behaviour expected under monopoly or tight oligopoly, the average profit return realised by firms in highly concentrated industries will tend to be significantly higher than that of firms in more competitive industries (that is, with larger numbers of smaller sellers active on the market). See Chapter 11 of Scherer and Ross (1990).
[33] See Chapter 11 of Scherer and Ross (1990), Schmalensee (1989), and Van Cayseele and Van den Bergh (2000).
[34] See e.g. Hildebrand (2002), Martin (2001), and Van Cayseele and Van den Bergh (2000).

policy agenda, one that left almost no room for government interference in business behaviour.

Chicago and game theory

Like Ordo-liberalism, the Chicago Movement, which took off in the 1950s, was the fruit of close co-operation between economists and lawyers. The School did not start with a universal theory of antitrust, however.[35] Initially its participants challenged only specific elements of Harvard thought, basing themselves on neo-classical price theory. They used tailor-made models to examine the implications of restrictive practices, assuming always that firm behaviour is driven by a desire to maximize profits. By searching for rational explanations of firm behaviour, Chicago scholars were able to show that many policy implications derived from previous studies, which underemphasised conduct so as to focus on structure instead, led to over-inclusive results.[36]

Telser's (1960) discussion of resale price fixing provides a classical example. Traditionally this practice was understood as an aid to collusion by dealers. If manufacturers are motivated by the desire to maximize profits, however, what reasons would they have to encourage that? In principle, raising prices at the retail level should be expected to hurt their business. To explain why minimum resale price maintenance could be attractive to them, Telser advanced the free-rider argument. The extra income for retailers may be intended to provide retailers an incentive to offer services that increase overall demand. The same argument has since frequently been advanced in relation to exclusive dealing and exclusive territories.[37] Efficiency explanations were similarly proffered for a host of other practices, including tying,[38] and vertical integration.[39]

On the basis of these studies a more general agenda for antitrust emerged.[40] It reflected a much reduced image of the circumstances under which market failure may occur. Crucial in this regard, was the structuring of the notion of market failure by

[35] See Page (1989: 1231).
[36] Id.
[37] See Marvel (1982).
[38] See e.g. Director and Levi (1956), and Kenney and Klein (1983).
[39] See e.g. Bork (1978).
[40] The first encompassing overview of this agenda was provided by Bork (1978).

means of the concept of market power.[41] Market power, as was suggested above, is the power to profitably restrict output, which harms consumers because they have to pay more, or have to turn to second-choice products. In addition, the scope for inferring such power was taken to be quite narrow, as Chicagoans defined entry barriers considerably more narrowly than was done in traditional theories.[42] From a long-term perspective, it was argued, most markets could be seen to be (near to) perfectly competitive, despite temporary bouts of concentration.[43] Such concentration is, in fact, most likely to be indicative of efficiency. The resulting scope for antitrust intervention, as perceived by Chicago scholars, was extremely limited in comparison to the policy agenda advocated by the Harvard School. A telling example is provided by Posner's (1981) call to treat certain vertical restraints as *per se* legal.[44]

The influence of this school of thought is clearly reflected in the various documents in which the Commission describes its modernised approach to competition analysis. The Vertical and Horizontal Guidelines show that the Commission is open to many of the new efficiency explanations, such as the free-rider argument. But its prior beliefs as to the relative frequency with which a certain type of practice will produce positive and negative effects have evidently not been neatly rearranged along the lines set out by Chicago. The new generation of block exemption regulations confers *per se* legality upon vertical restraints and certain forms of horizontal co-operation, but only when small and medium sized enterprises are involved. Where individual assessment is concerned, it is obvious that the new efficiency scenarios are not considered to cancel out the old restrictive interpretations.

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[41] See e.g. Easterbrook (1984), for the importance attached to the concept of market power as a 'screen' in US antitrust analysis.

[42] For a discussion on this topic see Van Cayseele and Van den Bergh (2000). Bain (1956) argued that entry is conditioned by the advantages of established sellers in an industry over potential sellers and identified three types of advantages (barriers): economies of scale enjoyed by incumbents (which force the new firm either to invest in a very large plant which would depress price levels or to produce smaller quantities at higher costs), product differentiation and absolute cost advantages. Stigler (1968), on the other hand, defined entry barriers exclusively as production costs that must be borne by an entrant but not by an incumbent.

[43] For further references on the theory of contestable markets, see the discussion in Van Cayseele and Van den Bergh (2001).

[44] At the time, adherents of the Harvard School (and policymakers) were suspicious of vertical restraints. They could lead to higher prices charged by unchecked distributors, facilitate collusion amongst them, and could serve to fracture the Common Market, to name just a few. A supplier would normally have no legal interest in protecting its dealers from competition between each other. The lower the price they charge, the more units would be sold, and, ceteris paribus, the more profit would be made upstream. Only under specific and limited circumstances, for example to protect an investment in the distribution by the manufacturer or to secure such an investment by the distributor, could an exception be granted. See Van den Bergh (1996).

Rather, the two are seen as alternative possibilities, neither of which can be ruled out in advance. Understandably, then, the Guidelines indicate the conditions that must pertain in order for a certain effect to materialise,[45] but remain inconclusive as to the outcome in cases where opposing effects occur (for example, a restriction of inter-brand competition in a distribution agreement that contributes to improving quality).

It is worth mentioning that the results of more recent research in Industrial Organization can only work to reinforce this effect. The distinguishing characteristic of this contemporary work lies in its reliance on game-theory. Game-theory delves deeper in understanding firm behaviour than price-theory does, by analysing the different strategies that market players can adopt and underscoring the importance of the information available to them. Topical as most of these models are, this approach does not yield a unified vision of the scope for antitrust intervention. Krattenmaker and Salop (1986), for instance, show circumstances under which vertical restraints can be used as a strategy to gain or fortify market power.[46] Other studies, however, have clearly confirmed efficiency explanations advanced by Chicago.[47]

Implications for the usefulness of the Guidelines

Each of these different schools advances a different theory of what constitutes harm to competition, what factors may contribute to causing such harm, how frequently it may be expected to occur (*ex ante*), and how instances of market failure may be identified (*ex post*). The Commission's guidelines – which set forth ideas that appear to fit in the Harvard tradition and ideas that fit in the Chicago tradition – reflect this multiplicity. The Notice on the application of Art 81(3) EC describes the general framework of analysis. The Vertical and Horizontal Guidelines and the Market Notice fill in the picture by listing different factors and associated categories of evidence that may have a bearing on the ultimate outcome.[48] Understandably, given the range of possibly relevant considerations, they do not indicate in any measure of detail how different

[45] See e.g. paragraphs 103 to 119 of the Vertical Guidelines (supra, footnote 5).
[46] In our discussion of the case of *Van den Bergh Foods* ([1998] L246/1), above in Chapter 4, Section 4.3.2, we saw that the Commission's argumentation in this case could be said to be inspired on the 'raising-rivals'-costs-scenario' that these authors developed. By comparison, the use of game theory is more common in the US. See e.g. Ten Kate and Niels (2002), Scherer (2001), Hovenkamp (2001), Coate and Fischer (2001), Pierce (2000-2001), Brennan (2000-2001), Kobayashi (1997), and Sullivan (1995).
[47] See the discussion by Van Cayseele and Van den Bergh (2001).
[48] Supra, footnote 5.

combinations of such factors will be appraised.[49] This remains a question for ex post assessment.

The above should not be taken to suggest that the description of the analytical framework laid out in the Guidelines can be of no use to potential offenders. The point made is that – on their own – they cannot fully compensate for the deficit in legal certainty that was created by the shift from a rule-based system to a genuine legal standard. Decisions taken after the reforms – and reflecting these reforms – are an indispensable complement. This is because they provide essential information on how the Commission proceeds in the evaluation of cases where multiple tendencies are present, in particular by giving hints about the probability with which one or several of these tendencies can be expected to outweigh others in given circumstances. Together, a substantial body of decision practice – or at least an expanding body of precedents – and a set of detailed guidelines could be expected to keep the negative effects on legal certainty caused by the almost simultaneous substantive and procedural overhauls in check. The following sub-section takes a closer look at the available post-reform decision practice.

5.2.3 Substantive modernisation in practice

A decade after modernisation was announced in guidelines and notices, it can be said that there is a general paucity of insightful decisions reflecting the new approach (and, as we saw, much of what is available suggests that modernisation is not practiced exactly as preached). Let us start with the small number of detailed decisions. To begin, a distinction should be made between the value of the information that potential offenders can be expected to glean from infringement decisions on the one hand and exemption or commitment decisions on the other. As a rule, infringement decisions will offer considerably more insight. This is the case for the simple reason that infringement decisions tend to be much more thoroughly reasoned on matters of fact and economic evaluations. Particularly commitment decisions, the equivalent of the exemption with conditions under the new enforcement regime, tend to be motivated in abbreviated form.[50] It is indicative, for instance, that the commitment

[49] It should be mentioned that the Horizontal Guidelines (supra, footnote 5) do contain examples illustrating the interaction between different factors. As is indicated by several of the organisations that reacted to the Commission's consultation on the functioning of its policies with regard to horizontal cooperation, these are quite abstract and, therefore, of little use in deciding complex cases.
[50] See Art 9 of Regulation 1/2003, [2003] OJ L1/1.

decisions thus far adopted count no more than 13 pages on average, compared with 241 pages for the most recent infringement decision.[51] This difference in the intensity of scrutiny is understandable, given that in the former type of case the probability of appeal, and thus the risk of being overturned, is substantially reduced. It should be realised, also, that exemption decisions need not indicate the outer limit of the law. In the European context, such a decision may well sanction an effectively innocuous agreement; one that is less restrictive than ultimately permissible.

Infringement decisions are very few, however. Only four of the 32 pure effects-based cases listed in Appendix A lead to a finding that Art 81 EC was violated; one concerning a vertical restraint and three relating to horizontal co-operation. Four of the 28 remaining decisions involve commitments and 24 are exemptions.

The savings made in the motivation of the latter two groups of decisions affect a number of aspects of the Commission's analysis that are crucial to potential offenders in assessing the likelihood that their agreement will be challenged. As regards the assessment under Art 81(1) EC, it was shown in Chapter 4 that the Commission seldom completes the analysis of market power in the way described in its Guidelines.[52] It defines the relevant market, at times moves over to consider market structure as well, but generally fails to develop a clear theory of harm that links the agreement to the structure of the market. Closely related is the fact that the Commission continues to rely on the legalistic approach that modernisation was meant to do away with. In several exemption decisions a restriction of contractual freedom is the only real argument that the Commission advances to support its finding that the agreement falls foul of Art 81(1) EC.[53] Lastly, in quite a number of cases that result in a finding that Art 81(3) EC applies, balancing isn't really engaged in at all. In such cases, once the Commission finds plausible efficiencies, it concludes that the second condition of the third paragraph is met, without drawing the results of the investigation under Art 81(1) EC into the analysis.[54]

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[51] The following commitment decisions (listed in Appendix A) were looked at: *DFB* (Commission decision of 19 January 2005 in case COMP/C-2/37.214), *PremierLeague* (Commission decision of 22 March 2006 in case COMP/C-2/38.173), *Repsol* (Commission decision of 12 April 2006 in case COMP/B-1/38.348), and *Cannes* (decision of 4 October 2006, published on the Commission's website). The number of pages of commitment decisions is given without counting the description of the commitments proposed by the parties. The infringement decision referred to is *Master Card* (decision of 19 December 2007, published on the Commission's website).

[52] See Chapter 4, Section 4.3.1.

[53] Id.

[54] See Chapter 4, Section 4.3.2., and the cases referred to in footnote 125 of that chapter.

The record of infringement decisions also leaves crucial issues unaddressed. A detailed discussion of the possible implications of the agreement for consumer welfare (or of a differently conceived kind of harm) and the balancing of opposing effects is often avoided by claiming indispensability, that is, by arguing that – whatever the precise impact of the agreement – a less restrictive alternative was available to achieve the same efficiencies.[55] It is particularly important, also, to mention the cases of *Master Card*[56] and *Morgan Stanley / Visa*[57], since both infringement decisions were adopted after the publication of the Commission's Guidelines on Art 81(3) EC in 2004.[58] We saw that these guidelines offer the most complete and integrated overview of the framework of analysis that the Commission relies on in effects-based analysis under Art 81 EC and that they clearly identify the effects produced on consumer welfare as the relevant benchmark in the assessment of restraints. In neither of these otherwise elaborately motivated decisions were arguments by the defendants – to the effect that the Commission's allegations under Art 81(1) EC ignored clear indications that the agreement left output unaffected – picked up and subjected to serious scrutiny.[59] A crucial element in the new conceptual framework – how does the Commission establish that harm has indeed occurred – is thus left unclear. This is especially problematic since this element is somewhat underdeveloped in the guidelines themselves, which puts emphasis on aspects of the analysis that are dealt with at a later stage under the scope of Art 81(3) EC.

To understand the effects on potential offenders of the situation described above, we must first of all realise that exemption and commitment decisions are generally not simple clearances. A considerable number involves an implicit prohibition. In 19 of the 28 cases that fall into one of these categories, the clearance is subject to conditions of some form. In 11 of these cases the conditions involve obligations for the parties to refrain from certain type of behaviour or to engage in some form of action, thus

[55] See e.g. the decisions in *Van den Bergh Foods* (supra, footnote 46) and *EATA* ([1999] OJ L193/23), where the indispensability played an important role. Indispensability was also of crucial importance in two border-line infringement decisions that were not included in the list of effects-based decisions in Appendix A: *JCB* ([2002] OJ L69/1) and *Belgian Architects* (decision of 24 June 2004, published on the Commission's website).
[56] Supra, footnote 51.
[57] Decision of 3 October 2007, published on the Commission's website.
[58] Notice containing Guidelines on the application of Art 81(3) EC, [2004] OJ C101/97.
[59] See the discussion of the decision in the case of *Master Card* (supra, footnote 51) in Chapter 4, Section 4.3.2 (this case, and the point made here, is extensively also discussed in Chapter 7, Section 7.2). As regards the case of *Morgan Stanley / Visa* (supra, footnote 57), see Chapter 4 (at footnote 70) and, in particular, the extensive discussion in Chapter 7, Section 7.2.

modifying the original agreement. In addition, in 22 of these cases the original version of the agreement was amended during the proceedings so as to remove objections raised by the Commission.[60]

Firms would be unwise, therefore, to ignore this part of the Commission's practice and focus solely on infringement decisions to discover the outer boundary of the law. As suggested, however, the Commission tends to motivate these decisions in abbreviated style that frequently invokes associations with the old expansive approach. And genuine infringement decisions – not entirely free of confusing elements themselves – appear to point in the opposite direction, by using language that is compatible with the framework of analysis set out in the Commission's new generation of guidelines. As a consequence, it is submitted, potential offenders will experience uncertainty about the legality of a wider range of behaviour than before. In particular, they will reckon with a non-negligible probability of being challenged over a range of behaviour that stretches between the old legal standard and the more permissive prescriptions of these guidelines. With help of the conceptual model developed in Chapter 3 it is argued below in Section 5.4 that this can be expected to lead to the conclusion of inefficient contracts. First, however, the reforms made to enforcement are examined, which suggests that potential offenders' demand for legal certainty has increased.

5.3 The impact of procedural modernisation

Procedural modernisation did not directly alter the calibration of the legal standard, as the substantive reforms did. But by changing the timing of legal intervention, from *ex ante* to *ex post*,[61] it has affected firms' capacity to predict the outcome of proceedings. At the same time, by raising the level of expected fines the importance of being able to correctly assess the legality of intended agreements – that is, the demand for legal certainty – has grown.

It can easily be appreciated that concluding a contract on the basis of one's best guess as to the way its effects on the market would eventually be evaluated carries

[60] See Appendix A.

[61] On the optimal timing of legal intervention, see notably Wils (2001, and 2004). Note, however, that these works compare the efficiency of *ex ante* screening and *ex post* intervention in the context of EC antitrust. The aim of this thesis, however, is not to determine whether the present enforcement regime produces better results than the former, but simply to evaluate the functioning of the present system as it has been put into practice.

more risk than seeking the Commission's endorsement before implementation. This was, in fact, one of the main points of critique that was raised against the Commission's proposal for reform of the enforcement regime.[62] In reality, however, the contrast between the two systems is not quite as stark as it might seem. Due to the constraints on the Commission's capacity only a fraction of notifying firms actually got a formal clearance or exemption decisions; the bulk had to make do with the lower level of certainty provided by a comfort letter.[63] In addition, the span of time between notification and the adoption of such a formal or informal decision was generally much to long to wait with implementing the agreement.[64]

But even if the old system did not swiftly provide full certainty about the legality of contracts, the decrease in legal certainty due to the introduction of Regulation 1/2003 is apparent.[65] Contacts between firms and the Commission played an important role in notification proceedings. A survey conducted by Neven et al. (1998) found that 69% of firms involved in notification procedures had contacts with the Commission before submitting their form. Such contacts allowed firms to discover the Commission's views on specific features of the intended agreements and to make the modifications necessary to remove obstacles to clearance. The survey showed that 59% of pre-notification contacts led to modifications. In 96% of the cases the modified version was cleared. Where necessary, such contacts continued after notification. We saw above that in 79% of decisions taken in the period between the two reform processes the original version of the agreement was amended during the proceedings so as to remove objections raised by the Commission.[66]

Under the new system the possibilities for consulting the Commission prior to implementation have been seriously reduced. The only real option available to firms is to request a so-called guidance letter.[67] There is no provision in Regulation 1/2003 concerning such letters, but the possibility that firms wish to seek informal guidance

[62] In this regard, see the Commission's summary of the observations submitted to its white paper for reform of Regulation 17/62 (of 29 February 2000, published on the Commission's website) and e.g. Pirrung (2004), Hawk and Denaeijer (2001), Jenny (2001), Bartosch (2001), Gustafsson (2000), Holmes (2000), Möschel (2000), Paulweber (2000) and the discussion in Chapter 2, Section 2.5.
[63] This was an informal decision indicating that the evidence available to the Commission gave no grounds for starting proceedings. See Chapter 2, Section 2.3.2.
[64] See the discussion in Chapter 2, Section 2.3.2.
[65] Supra, footnote 50.
[66] That is, 22 out of 28. See the text accompanying footnote 60.
[67] It should be mentioned, also, that pursuant to Art 10 of Regulation 1/2003 (supra, footnote 50) the commission may still adopt an express clearance decision. No such decision, however, has been adopted since the introduction of this regulation in 2004. It seems understandable that, in order to make the system of *ex post* control work, the Commission intends to use this instrument sparingly.

from the Commission is considered in the preamble.[68] This recital was introduced at the very end of the discussion in the Council, in order to meet the concerns expressed by some delegations and by many commentators.[69] The Commission has given effect to these words by issuing a notice, which imposes a number of strict conditions that must be met before a request for informal guidance can be made and emphasises the Commission's margin of discretion in evaluating the appropriateness of issuing a guidance letter.[70] The most important of these conditions are that the question must be novel and significant both to the parties and from the perspective of the development of Community competition law; in addition, it must relate to a real case (no hypothetical) and must be accompanied by sufficient facts so that an answer can be given without gathering further information.[71]

Until December of 2008, however, few requests for guidance have been made and no guidance letters have been issued.[72] Given the many calls that have been made in response to the Commission's public consultation on the functioning of Regulation 1/2003 for increased guidance,[73] the explanation for these facts must probably be sought in the considerable risks involved with filing such a request.[74] The notice expressly indicates that the Commission remains free to initiate formal proceedings in relation to the facts described in the request,[75] that it may use information contained in the request in subsequent proceedings even if it is withdrawn,[76] that the Commission may share the information contained in the request with national competition authorities[77] and that if a guidance letter has been issued the Commission may subsequently re-examine the case.[78] Finally, it should be noted that the notice does not bind the Commission to a timeline for adopting a guidance letter.

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[68] Supra, footnote 50, at recital 38: 'Legal certainty for undertakings operating under the community competition rules contributes to the promotion of innovation and investment. Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission. This Regulation is without prejudice to the ability of the Commission to issue such informal guidance.'
[69] See Gippini-Fournier (2008: 54).
[70] Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), [2004] OJ C101/78.
[71] Id., at paras. 8-11.
[72] See e.g. Gippini-Fournier (2008) whose report dates from June. For the additional period a search was made on the Commission's website.
[73] See the discussion of this consultation round in the next section.
[74] See e.g. Gippini-Fournier (2008). The same point is made in numerous observations submitted to the Commission in response to its consultation on Regulation 1/2003 (supra, footnote 50).
[75] Supra, footnote 70, at para. 11.
[76] Id., at para. 18;
[77] Id., at para. 16;
[78] Id., at para. 24;

It is important to realise that the reduced possibilities of consulting the Commission has significant implications for the value of accuracy in adjudication. In a system based on broad spectrum *ex ante* screening, compliance does not necessarily depend on a high level of precision in the analysis and the motivation of decisions. To begin with, existing decision practice is not the sole source of guidance for firms designing new commercial agreements, possibly not even the most important source. And in the event that imperfections in existing decisions do lead potential offenders to inefficient results (that is, to sign undesired contracts), these can easily be filtered out in the notification process.

Under *ex post* control firms can no longer count on the Commission to provide them with 'quick-look' advice tailored to their specific circumstances. Therefore, the importance of existing decisions in evaluating the legality of an intended agreement increases substantially. Needless to say that with it grow the consequences of vaguely argued decisions; these are more likely to lead subsequent potential offenders to implement inefficient agreements. These difficulties for potential offenders are compounded by an increase in the level of expected fines.

Under the old regime firms were granted immunity from fines upon notification.[79] The rationale for this form of leniency is the following. Firms that were uncertain about the legality of their agreement might try to conceal it from the Commission out of fear for fines. The guarantee that no sanctions would be imposed served as an incentive for such firms to subject their contracts to scrutiny by the Commission. As a consequence, firms were relatively free to seek the edges of what they considered legal in designing and notifying their agreements.[80] If need be, they could always negotiate with the Commission during the course of the proceedings so as to fine tune the final version.

Regulation 1/2003 does away with pre-screening and extends the system of *ex post* control that was reserved for non-notified agreements to the field of effects-based analysis.[81] Because in such a system only a fraction all agreements concluded by European firms can be expected to be scrutinised, the threat of sanctions is essential to create sufficient deterrence.[82] As a consequence, seeking the edges of legality will

[79] See Art 15(5) of Regulation 17/62, [1962] OJ 13/204, and the discussion in Chapter 2, Section 2.3.1.
[80] In this sense, see Neven (2001) and Pirrung (2004).
[81] Supra, footnote 50.
[82] Barros (2002) and Neven (2001) make the same argument. Note that, since the introduction of Regulation 1/2003 (supra, footnote 50) fines have been imposed only in the case of *Morgan Stanley /*

involve more risk.[83] Arguably, the increased threat of fines can be linked to the dearth of well motivated effects-based decisions that was reported above. The higher the sanctions they face, the more willing defendants will be to offer commitments, and the lower the probability that its decision will be appealed, the fewer incentives the Commission will have to devote resources to an elaborate motivation.[84] Paradoxically, therefore, although both the procedural and the substantive reforms have increased potential offenders' demand for legal certainty, they engender the adoption of scantly reasoned decisions. In the next and final section of this chapter discusses ways to remedy this problem.

5.4 The case for increased requirements to show harm

The arguments presented in Chapters 4 and 5, which do not challenge the reasoning that led the Commission to reform European antitrust policy, raise questions about the way this programme was put into practice. Let us briefly summarise these arguments.

Modernisation as practiced

Over the course of the past century, Industrial Organization scholars have advanced competing explanations for a great number of vertical restraints and horizontal co-operation agreements. In many instances – specifically, in those cases that policymakers subject to effects-based analysis – neither outcome can be discounted in advance. In response, the substantive reforms eventually shifted the focus in antitrust proceedings from the terms of the agreement (a rule-based approach) to the effects that are actually produced (a standard). This has clear implications for the level of certainty with which firms can assess the probability of intervention. They will now

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Visa (supra, footnote 57). As regards the decision in *Master Card* (supra, footnote 51), the second infringement decision adopted in this period, remember that proceedings in this case were started well before the introduction of Regulation 1/2003 and followed a long history of notifications.

[83] In this sense, see again Neven (2001).

[84] This can be illustrated as follows. Let us analyse what the defendant's options are once the Commission has signalled that it objects to his agreement, for instance after receiving a complaint. The defendant faces a choice between fully litigating the original agreement and negotiating a less restrictive alternative agreement with the Commission. To decide he will weigh the expected value of the two options. He will choose not to offer commitments and challenge the Commission's decision in appeal if $p\pi - C \geq 0$ that is, if $p\pi \geq C$ (where the term p stands for the chances of prevailing over the Commission, π for the extra commercial profits he will make if he manages to get the more restrictive original version of the agreement cleared, and C for the extra costs of litigation (including fines) that he incurs in case he decides to challenge the Commission's decision). Now, let us look at the effect the procedural reforms. A (perceived) increase in the level of sanctions (that is, C grows larger) will mean that challenging the Commission is an attractive option in fewer cases.

have to work on the basis of a prediction (of the effects), rather than on an evaluation of evidence that is available *ex ante* (the terms of the agreement). In addition, where before firms could rely on the advice of the Commission, they must now independently make this assessment, whilst the risks involved in assessing legality have increased as – upon the finding of an infringement – fines are more likely to be imposed in an enforcement system based on deterrence.

In predicting the likely appraisal of a contract by the Commission, firms may rely on the guidelines, to learn about the framework of analysis, and its decision practice, which gives crucial information about the weight that will be attributed in individual cases to the different types of arguments and evidence that are listed in those guidelines. We have seen that the decision practice has a number of shortcomings. To begin, a certain vagueness surrounds the use of the primary instrument at the disposal of firms to assess the legality of an agreement *ex ante*: the analysis of market structure to infer market power.[85] The analysis of market structure is particularly suited to study market power from an *ex ante* perspective, because significant elements of the analysis – the position of the defendants and their competitors on the market – will be known at that time. The Commission's record of exemption and commitment decision casts doubt on the importance of market power in the assessment. We have discussed several examples of clearance decisions where interventions are made in unconcentrated markets and where restrictions of intra-brand competition are not discussed in light of inter-brand competition.[86] And even in infringement decisions,

[85] See Chapter 4, Section 4.3.1.

[86] The Commission's Guidelines suggest that market power – the power to profitably restrict output in terms of volume, quality, or innovation – is the foremost indicator for intervention. In fact, in cases such as *UEFA* ([2003] OJ L291/25), *TPS* ([1999] OJ L90/6), *P&O / Stena Line* ([1999] OJ L163/61) the evidence presented by the Commission raises doubts whether market power could be made plausible at all. *UEFA* involved the joint selling of broadcast rights by football clubs participating in the UEFA Champions League. After carefully defining the relevant market (acquisition of TV broadcasting rights to football), the structure of this market and the impact of the agreement thereon are hardly considered. All that the Commission notes, in the context of examining the appreciability of the effect on competition (*de minimis* test), is that UEFA matches make up 20% of the money paid for broadcasting rights in the market. In the legal assessment that follows, the clause prohibiting individual marketing of broadcasting rights by clubs that is the focus of the Commission's attention is not discussed in light of these structural conditions, that is to say, it is not explained why UEFA's market position gives cause for concern about its joint selling arrangement, as, arguably, the Courts require it to do. *TPS* involved a joint venture to provide pay-television in France. The relevant market was, at the time, heavily dominated by one player, Canal+, with over 4 million customers. There were two much smaller competitors in the market, including the joint venture, which had some 400.000 customers. In the Commission's legal assessment – which contained a specific section devoted to the application of Article 81(1) EC to the contractual clauses – it found a provision in the agreement granting the joint venture the right of first refusal to programmes in the portfolios of its parents to be restrictive, without discussing market structure. *P&O / Stena Line* provides a possibly even more telling example. Even

defences based on indications that the adverse effect on the process or structure of competition that is advanced by the Commission does not result in a restriction of output and, thus, consumer harm, are seldom treated in detail.[87] This has implications for our ability to understand the way in which the Commission evaluates positive and negative effects. Since the restrictions of the process or structure of competition found in the analysis under Art 81(1) EC are conceptually distinct from the positive welfare effects identified in the assessment under Art 81(3) EC, the outcome of the weighing process is often scantly motivated.[88] Finally, it should be mentioned that only relatively few decisions have been adopted since the process of modernisation started and most of these are motivated in abbreviated style.

Some anecdotic evidence

These arguments suggest that modernisation – as it has been put into practice – has deteriorated firms' capacity to assess the legality of an intended restrictive agreement, that is, the probability of antitrust intervention. It is interesting, in this regard to consider the submissions by law firms consultancy firms and industry organisations in response to the Commission's public consultation in view of the evaluation of Regulation 1/2003.[89] Whilst most of respondents start by noting that they consider the shift from the notification regime to *ex post* enforcement a success, a very considerable portion notes that this shift has been accompanied by a significant loss of legal certainty.[90] Numerous contributions make a link with the state of development of substantive law.[91] In this regard, consider the following quotes.[92]

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though the Commission found that the joint venture "would be unlikely to be able to raise prices without losing their competitors" it considered that its 30% market share was sufficient to find a restriction in the sense of Art 81(1) EC.

[87] See the discussion of the cases of *Bass* ([1999] L186/1), *Van den Bergh Foods* (supra, footnote 46), *Master Card* (supra, footnote 51), and *Morgan Stanley / Visa* (supra, footnote 57) in Chapter 4, Section 4.3.2.

[88] See Chapter 4, Section 4.3.2.

[89] At the time of writing the Commission has not yet published a summary of the observations made. The comments are published on the Commission's website. The Commission has also launched a consultation procedure in view of the evaluation of its policy with regard to horizontal cooperation. The observations made in response to this call are largely similar to those reported below, where the substance of the law is concerned.

[90] In addition to the quotations below, consider the following observations submitted by the *Association Française des Entreprises Privées* (at p. 3: 'After several years of practical experience, companies believe that this system conceial many uncertainties which are unfavourable to business and, in particular, create considerable legal insecurity. […] Regulation 1/2003 has taken away the earlier procedural mechanisms which gave companies real legal security. These have not been replaced with any mechanism providing security, particularly for agreements between companies which require major financial investments and entail risktaking which is equally considerable.'); *Lovells* (at p. 1:

'From our clients' perspective, there has been a notable loss of legal certainty. Competition analysis is complex and turns on questions of judgment and often of inherently uncertain ex ante analysis. It is not unusual for experts to disagree on the correct analysis. Where planned commercial arrangements required significant investment, even where the competition risks were not judged to be particularly high, it was not unusual for clients to consider, pre-modernisation, that the costs and delay involved in notifying the arrangements to the Commission for formal clearance/exemption were justified given the importance of the arrangements and the significance of the investment required. In such cases, clients continue to look for legal certainty. The withdrawal of formal notification has eliminated the possibility for absolute legal certainty as regards the application of Article 81(3). Moreover, the impact of the loss of legal certainty through notification has been magnified by the Commission's decision to narrow the scope of less formal consultation solely to novel questions – a procedure which has not in fact been used since Regulation 1/2003 came into force. Clients have found this sea change from the possibility of notification for clearance or exemption to

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'There is currently a large and expanding body of legal instruments and documents which facilitate self-assessment. […] Despite the existence of these documents, however, we believe that the abolition of the notification system has led to a reduction in legal certainty for business in certain instances.'); the *European Banking Federation* (p. 1: [S]ome of our members believe that a greater legal uncertainty has been created for businesses as a result of the implementation of this regulation […]. In the current legal framework, business have to assess themselves the legitimacy of their agreements and, regularly, at the end problems raised are not covered by the existing jurisprudence (case-law/statute law), considering the lack of sufficient cases (especially as regards to article 82 e.g.). The conditions laid down in article 81. 3 appear also to be subject to evolving interpretations, it is therefore difficult for a company to assess compliance with the rules just by looking to past decisions.'); the *Gesamtverband der Deutsche Versicherungswirtschaft* (p. 2: 'It should be stressed, however, that the direct application of Art 81(3) EC involves considerable legal uncertainty for companies even four years after the Regulation has entered into force. Therefore, there is still a risk that desirable conduct is refrained from due to the legal risks involved.'); and the The *Associazione Nazionale delle Imprese di Assicurazione* (p.2: 'EU antitrust law cannot be considered completely consolidated as for its general principles, and its perception by national Authorities is consequently still uncertain and troublesome in many cases. A higher legal certainty on the one hand and, on the other hand, a right balance between actions to be undertaken and the rights of defence, are still lacking.').

[91] Another cause for uncertainty that emerges from the observations is the perceived risk of inconsistent application by national competition authorities and courts. As explained in Chapter 2, Section 2.5, uncertainties caused by the decentralisation of enforcement are not considered in this thesis.

[92] Most of these observations are laid down in reports that span several – and in some cases scores – of pages and which in many cases dedicate a significant portion to the issue of legal certainty (and its consequences). Here, there is room to present only short selections. To understand the full context in which these statements were made and, thus, their precise meaning, readers are advised to consult the full reports on the Commission's website.

negligible opportunities for fact-specific consultation rather unsettling and it is certainly the case, in our experience, that the business community feels that there has been a loss of legal certainty as a result of modernisation.'
(Extract from the observations submitted by *Ahurst*)

'[I]n our experience, direct applicability of Article 81 (3) EC and the abolition of the former notification system has increased legal uncertainty for undertakings. As undertakings are forced to self-assess the compatibility of agreements, decisions and practices with competition law we have seen an increase in the need for legal advice on competition matters. There also appears to have been an increase in compliance programs and trainings for employees in competition matters. Some clients expressed their concerns about the costs which these incur. The loss of legal certainty makes it more difficult for undertakings to decide whether their actions are compatible with competition law. This particularly applies to borderline cases. We have noted that in such cases undertakings are often not prepared to take the risks involved. They are in particular afraid of fines. Undertakings hence frequently over-comply and do not make use of the entire legal framework provided by competition law. They prefer to stay on the "safe side" of competition law. This substantially reduces their commercial freedom.'
(Extract from the observations submitted by the *CMS Competition Practice Group*)

'CC does, however, have some concerns that certain aspects of the self assessment regime tend to deter businesses from entering into joint ventures and other commercial arrangements that may benefit from exception under Article 81(3). CC has been called on to provide legal opinions as to the applicability of Article 81(3) on relatively few occasions. In part, this is because many joint ventures can be structured so as to fall outside the scope of Article 81(1) without a significant loss of efficiencies. However, where this is not the case many clients have, in our experience, preferred to abandon commercial arrangements for which

there are prima facie good arguments for exception under Article 81(3), or to restructure them either so that they fall outside the scope of Article 81(1) - but with a loss of significant efficiencies that would have been passed on to consumers - or so that they constitute a full function joint venture, and can therefore benefit from the legal certainty afforded by a clearance decision under the EC Merger Regulation (or national equivalents). CC considers there to be two main reasons for this tendency, both of which pertain to business certainty. The first reason is the difficulty in arriving at a sufficient level of certainty that the Commission, a national competition authority ("NCA") or a court would adopt the same analytical approach as the parties and their business advisers to the theories of harm against which the economic effects of a particular agreement should be assessed, and to the assessment of those effects. […] While the Commission's Guidelines on the application of Article 81(3)1 provide a useful framework for considering the applicability of Article 81(3), they are necessarily incapable of providing guidance in respect of specific circumstances in any given market, and the appropriate techniques of economic analysis in those circumstances (e.g. the determination of which costs and efficiencies should be taken into account). Moreover, while one of the justifications for the abolition of the notification procedure was that industry and practitioners could refer for guidance to the large number of Article 81(3) exemption decisions that had been published prior to the implementation of Regulation 1/2003, CC considers that many – if not most - of those decisions are of ever-decreasing value as precedents. In particular, while it is now widely recognised that the effects of a particular agreement that risks falling within the scope of Article 81(1) require detailed economic analysis, such analysis is not reflected in many Article 81(3) exemption decisions (older decisions in particular). Where decisions do contain detailed descriptions of the analytical approach taken by the Commission to the assessment of economic effects, it is often not possible to advise clients with a high degree of certainty that the same analytical approach would be followed today, given the (albeit gradual) evolution of economic theory in a number of areas. The second reason is that it is no longer possible to obtain the certainty of exemption

for a fixed period. […] The result of the factors described above is that there is a (relatively small) number of cases in which the optimal commercial structure for a joint venture or information sharing arrangement is not pursued, with an attendant loss of consumer benefits.'
(Extract from the observations submitted by *Clifford Chance*)

'[B]oth companies and their legal advisors usually remark that the existing Community case-law and Commission notices provide some guidance, but do not cover all issues which may have a practical relevance for the self-assessment of an agreement. Moreover, in application of article 81 to non hard-core cartels, proceedings by the Commission and by national competition authorities are often concluded with a commitment decision, which does not ascertain whether there has been an infringement or whether after the adoption of commitments the infringement has been brought to an end. The increasing use of commitment decisions, while contributing to a more rapid conclusion of proceedings, does not help to enrich the case-law to which companies may refer to obtain guidance.'
(Extract from the observations submitted by the *Associazione fra le società italiane per azioni – Assonime*)

'[We] have been involved in cases where these guidelines and the Commission's precedents have been of little assistance because the Commission has changed its previous approach, thereby undermining confidence in the guidelines. In such cases, the application of Article 81(3) is difficult and causes uncertainty to parties and their legal advisers. To minimise the incidence of such situations, we suggest that it would be useful for the Commission, when departing from analysis in a previous case, to indicate clearly the reasoning that has caused it to do so and to indicate whether it envisages that this change in approach is likely to apply only to cases of this kind or represents a broader change of policy.'
(Extract from the observations submitted by *Freshfields Bruckhaus Derringer*)

> ‘Regulation 1/2003 therefore abolished the cumbersome notification system for agreements. In the vast majority of cases, this has been a valuable reform […]. Most cases are self-assessed without undue difficulty. However some agreements arise from highly-complex economic and market circumstances, where self-assessment can resolve the competition law questions only up to a point, and where no novel question of law arise where the Commission might be minded to issue a guidance letter […]. Thus, in this small but economically significant category of cases, the injunction that “business is accustomed to taking risk and competition law risk is no different” is unhelpful, and may lead to a significantly chilling effect on innovation and economic development.’
> (Extract from the observations submitted by *Bird & Bird International Competition Group*)

Raising the level of certainty

It must be acknowledged that, although we have good indications that uncertainty exists, this amounts to no more than indirect evidence of inefficient behaviour.[93] Our insights into the way firms make decisions under uncertainty about the location of the legal standard give good grounds to *expect* that the uncertainty generated by the way modernisation was put into practice leads to inefficient results. Firms may be led to sign harmful contracts – because they assess the risk of intervention not to be much higher than if they were to stay in the clear – or they might take socially excessive precautions so as to avoid intervention. We even have indications that such behaviour occurs. The Commission’s infringement decisions tell us that situations will arise where firms are under-deterred. Yet we cannot establish, by reference to these decisions, to what extent uncertainty contributed to this result, although the sheer length and complexity of these decisions suggest that this contribution may have been more than negligible. Similarly, the observations made by law firms, consultancy firms and industry organisations as to the performance of Regulation 1/2003 yield significant indications that uncertainty pushes other firms to opt for safe forms of agreements. Still, since the privately more beneficial alternatives that they were led to discard have not been subjected to Commission’s scrutiny, we do not know whether

[93] See also the discussion on methodolody in Chapter 2, Section 2.5.

they might have passed the test and, thus, whether welfare was not created. It is submitted, however, that on balance it is more probable that some welfare is destroyed or foregone due to uncertainty. If the law itself is not able to communicate clearly, through ex post decisions, what constitutes inefficient behaviour, why should we assume that it nonetheless produces uniform *ex ante* incentives for firms to behave efficiently?

Note that without intervention the level of certainty provided to firms in (Art 81 EC) effects-based analysis cannot be expected to increase. It follows from the analysis made above that what is needed are more detailed insight as to the implications of the new analytical framework in practice and an end to the reliance on more restrictive standards. It is true that the reforms are still recent. In principle, therefore, one could expect the implications of the new system to become increasingly clear over the coming years. In EC antitrust, however, this evolutionary process is hampered by factors of an institutional nature.

In current practice, defendants (in the analysis under Art 81(3) EC) face an encompassing burden that is held against an exacting standard.[94] The increased difficulties in predicting the outcome of proceedings combined with an increased risk that fines will be imposed if they decide to oppose the Commission will make defendants relatively more prone to accept a settlement than before. As argued before, settlement decisions tend to contribute very little to firms' ability to locate the legal standard in subsequent cases. On the contrary, they may create confusion by appearing to suggest that more inclusive criteria than those applied in infringement decisions continue to be of relevance. Moreover, we saw in infringement decisions that the Commission's comparably low burden of proof under Art 81(1) EC gives it extra room in the assessment under Art 81(3) EC to invoke the indispensability requirement and avoid a thorough discussion on issues of antitrust harm. For these reasons, we cannot expect, as we ordinarly should, that expansion of the body of available decisions will mean that firms are better able to predict how the Commission will assess future cases.

It is submitted that the Commission, which has many enforcement priorities and institutional interests in other fields of competition policy, is not very likely to start, of its own accord, to reduce its reliance on commitment decisions, to devote more

[94] See Chapter 4, Section 4.3.2.

attention to the motivation of its decisions and to completely discard its less permissive standard. Some institutional change will be needed to ensure that EC antitrust policy is applied in a way that is faithful to the framework set out in the guidelines and that increases the understanding of these guidelines. These arguments tell us, also, that a simple expansion of the possibilities to consult with the Commission will not be an adequate solution to the problem of reduced legal certainty.[95] A commitment to issue more guidance letters will leave the Commission's bargaining power *vis-à-vis* firms unaffected and will not contribute significantly, therefore, to curtailing its ability to intervene in market behaviour of which it is dubious (at least without further explanation) whether it may result in harm.[96]

This suggests that, to genuinely improve legal certainty, a change in the standard of proof is required. In principle, this can be envisaged in two ways. One option would be to lower defendants' burden of proof, the other would be to increase the Commission's burden of proof. Upon closer inspection it turns out that there is no distinction between the two. Conceptually, there are four phases in effects-based analysis: (1) the examination of the competitive process and structure, (2) interpretation of these findings – and of possible evidence of expanded market-wide output – to determine whether firms in question have exercised the capacity to inflict the type of harm that the antitrust provisions are designed to prevent, (3) an investigation of efficiencies, and (4) an assessment of the magnitude of these opposing effects to see which is stronger. The second of these phases, which in practice falls under the heading of Art 81(3) EC,[97] is often jumped over in decisions (and, as a consequence, the fourth phase is also surrounded by uncertainties). If we want to relieve the defendant of this part of his burden of proof and, at the same time, want to ensure that decisions will be more informative on this point, the only option is that the Courts hold the Commission responsible for this element of the analysis.

We saw in Chapter 3 the enforcement mechanism is complex and adjusting one part may produce effects elsewhere. It can easily be appreciated that requiring the Commission to make more effort in exposing the harmful effects of agreements will have a price in terms of the level of enforcement, that is, the number of cases the

[95] This solution is advanced by many of the law firms and organisations that responded to the Commission's call for submissions evaluating the performance of the current enforcement regime.
[96] It should be noted, also, that an ease in the requirements to obtain a guidance letters might lead to a flood of requests that would, once again, limit the Commission's capacity to deal with real infringements.
[97] See the findings made as regards the division of the burden of proof in Chapter 4, Section 4.3.2.

Commission can be expected to bring. This, in turn, may lower deterrence; possibly more so than the increase in accuracy can off-set. Part Three of this book examines the costs and benefits of improving legal certainty, the specific adjustments to be made to the legal standard, and the complementary measures that help to mitigate undesirable effects. To start, the next chapter develops our thoughts on the effects on the Commission and potential offenders of increasing the burden of proof under Art 81(1) EC.

PART 3

IMPROVING THE PERFORMANCE OF THE EFFECTS-BASED STANDARD

CHAPTER 6

Costs and Benefits of Improving Accuracy

6.1 Introduction

Raising the Commission's burden of proof under Art 81(1) EC could produce a side effect with ambiguous implications. More investigative requirements may translate into less enforcement activity and, consequently, in a lower level of deterrence. In this chapter we adopt a theoretical perspective to examine the potential of improving accuracy in adjudication as a means to increase the efficiency of enforcement. Section 6.2 looks at the costs and benefits of an increase in the Commission's burden. Finding that these are different depending on whether firms are prone to under or over-comply, the section continues to examine whether either of these effects can be expected to occur more frequently in the field of effects-based analysis. Next, Section 6.3 discusses the implications for different types of firms in more detail and advances a number of complementary measures that can be adopted to keep possible drawbacks of improving accuracy in check.

Note that in this chapter the issue of adjusting the legal standard will not primarily be considered from a substantive point of view. The precise evidentiary implications of the changes to the legal standard needed to improve certainty are discussed in the next chapter. It should also be mentioned that we will be working on the assumption that that requiring the Commission to show that the agreements it challenges have adverse effects on consumers will make it more difficult to discharge its burden of proof. This assumption will also be addressed in Chapter 7.

6.2 Improving accuracy: incentives under current conditions

Adopting decisions that are more detailed in their analysis of harm (and producing such decisions in greater number) will have two types of benefits. At the litigation stage, it should result in fewer erroneous decisions and it should lead to more focused enforcement that implicates fewer low-value infringements and more high-value infringements.[1] More importantly, is should give firms a better *ex ante* view of the dividing line between permissible and impermissible agreements. This will work to reduce the expected sanction costs of engaging in permissible behaviour *vis-à-vis* those of engaging in impermissible behaviour. As a result, firms will have more incentives to sign desirable contracts.

At the same time, standard theory on improving accuracy in adjudication identifies cost effects as a major constraint.[2] As suggested, requiring enforcers to present more compelling evidence of consumer harm can be expected to require more effort, leading to an increase of costs. And with rising investigation costs, the level of enforcement – and thus deterrence – is likely to suffer. In as much as firms were over-deterred in the pre-existing situation, this drop in enforcement is desirable. But such a drop could also mean that firms that were previously under-deterred end up being equally or more prone to infringe Art 81 EC. A complementary rise in the level of sanctions will be helpful to reduce such incentives, but it should be realised that this might re-inflate incentives to over-comply for others.

We saw in Chapters 3 that uncertainty about the location of the effects-based standard applied in EC antitrust can result in both types of effect. In general, at the stage where they recognise that the actions they contemplate have antitrust implications, firms will face a range of different options (forms of agreement) that will differ in terms of restrictiveness. In such situations it is the pace at which expected costs and benefits change in moving from one option to the other that determines whether firms cross the line or exercise too much caution.[3] On the other hand, the decision to engage in certain forms of exclusionary behaviour, in particular, appears to be of a binary nature. In such cases uncertainty will always tend to inflate

[1] For a discussion of these types of errors, see the discussion in Chapter 3, Section 3.3.2.
[2] See in particular Kaplow (1994).
[3] They will choose the level of restrictiveness that minimizes the combination of expected sanctions and foregone profits. For instance, if it pays for the contracting parties to reduce the level of restrictiveness of their intended agreement because the gains in terms of a reduced exposure to fines exceed the associated loss in revenues, they can be expected to alter the design accordingly.

incentives to under-comply. And as suggested at the end of Chapter 5, there is evidence of both types of inefficiencies. Given the importance of the distinction for making an increase in the burden to show harm work, it is worth considering, first of all, whether any statements can safely be made as to which of these inefficiencies prevails in the current situation. As was done before, we make an analogy with the literature on negligence law.

Incentives in the field of negligence

Both Craswell and Calfee (1986) and Kahan (1989) have attempted to ascertain whether uncertainty about the negligence standard results in under or over-deterrence. They use the same framework of analysis that allows for a range of increasingly negligent (restrictive) behaviour. Still, they reach diametrically opposed conclusions. This is explained by a divergence in their interpretation of the law on negligence, which leads them to make different assumptions about the marginal incentives.

A defendant is liable under the rule of negligence if at the time he acted the costs of preventing the accident were lower than the expected losses.[4] In order to understand the differences between the theoretical positions of Craswell and Calfee, and Kahan, it is important to recognise that accidents can occur even if the required level of care is undertaken and hence no liability ensues.[5] Craswell and Calfee assume that if the potential offender failed to take due care, he becomes liable for the harm that his actions have caused, including all damages that would have been inflicted even if he had taken the precautions required. This implies that in the area of behaviour where the potential offender assumes that liability is most likely to attach,[6] expected damages will rise quite abruptly, presumably more so than precaution costs

[4] See *Conway v. O'Brien* (111 F.2d 611 (2nd Cir. 1940), at 612) for a more eloquent expression in US case law by judge Learned Hand, and for a general discussion on negligence (and a comparison with strict liability) see Schäfer and Schönenberger (2000).

[5] It is useful to illustrate this with an example. Assume that liability for driving accidents is governed by the rule of negligence and, also, that the speeding limit is set at the socially optimal level of care. Drivers that exceed the speed limit take insufficient care and when this leads them to cause an accident they are held liable. It is possible, however, that persons respecting the speed limit get involved in accidents. It could, for instance, be that their breaks fail despite regular maintenance checks. In such a case the person in question will not be held liable for the damages inflicted upon others. If however the same person was speeding, Craswell and Calfee assume that he will be held liable, regardless of the fact that the accident would also have occurred if he had respected the speed limit.

[6] In this regard it is useful to think in terms of the graph that was presented above in Chapter 3, Section 3.4 and which is copied at the end of this section as Figure 6.1 (see footnote 34 and accompanying text). In the area shaded grey where potential offenders reckon with a significant probability of being caught, expected sanctions will rise more sharply if they are calculated in such a way as to reflect more than only the harm caused by breaking the rule.

decline.[7] Applying the logic of marginal incentives, Craswell and Calfee argue that in most situations potential offenders will end up taking too much precaution.[8]

In contrast, Kahan submits that a defendant can only be liable for the damages caused by his negligence, i.e. the harm that would not have been inflicted if he would have taken due care.[9] In this context, damages will rise incrementally, rather than abruptly, from the beginning. Given how the negligence standard is defined, we know more about marginal effects in this situation. At the level of behaviour that corresponds to the legal standard, the costs of taking more precaution necessarily exceed the extra costs of liability. Consequently as behaviour becomes less restrictive, precaution costs rise faster, whilst when moving away from the standard in the opposite direction, liability costs increase more strongly. In this situation, it is submitted that no rational actor will feel the urge to take additional precaution. Uncertainty can then only induce potential offenders to take less than optimal care. This is because the less than full probability of being found negligent that the potential offender takes into account when deciding on his behaviour, has the effect of lowering the value of expected liability. Thus, it becomes clear that the behaviour that allows a potential offender to minimize precaution and liability costs corresponds to a lower level of precaution than the standard prescribes.

Summarizing, it can be said that both Craswell and Calfee and Kahan describe a *factual* situation where potential offenders face a range of choices about the actions they can undertake.[10] They make different assumptions, however, about the nature of the damages that courts will take into account in assessing negligence and, thus, about the expected liability costs that potential offenders will attribute to these different

[7] There is no reason to suspect a sudden kink here, they are assumed to decline gradually.

[8] This is so particularly for situations in which the amount of harm that can be legitimately inflicted is potentially large, and uncertainty is very concentrated around the legal standard, because in that case expected liability rises very rapidly in the area around the legal standard. If on the other hand such legitimately inflicted harm will be small, and uncertainty is spread out, the results are more like those reached by Kahan.

[9] Although from a doctrinary point of view Kahan's assumption is the right one, separating these two forms of damage is often unfeasible in practice, and defendants end up paying full damages. Schwartz (2000) argues that the Craswell and Calfee model is probably more accurate in describing reality, therefore.

[10] The main example that Kahan relies on in his article involves a fence. The fence is presented as a means to prevent damages being inflicted on neighbouring properties. A higher fence costs more to build than a lower fence. The proprietor will be liable if by building a sufficiently high fence to prevent the accident he would have spent less than the damages incurred by his neighbour. As suggested, Kahan argues that uncertainty about the location of the legal standard can only result in the erection of a fence of less than the optimal height. This does not mean, of course, that he sees physical obstacles to the construction of a fence that is higher than necessary.

choices. It is these differences in their interpretation of the *law*, which make that these authors reach different conclusions on the effects of uncertainty about the location of the legal standard. Craswell and Calfee hold that, of the two possible outcomes, over-deterrence is likely to occur more frequently, whilst Kahan concludes that under-deterrence is the only possible effect.

Although the underlying *factual* situation in European antitrust is the same, neither the assumption about the *law* made by Craswell and Calfee, nor the one Kahan relies on is valid in European antitrust. This means that we can only say that both under-deterrence and over-deterrence are possible in European antitrust and that it is not possible to determine which effect prevails over the other. Let us start with the theory advanced by Craswell and Calfee.

Craswell and Calfee's theory applied to antitrust

Recall that these authors assume that expected liability costs increase dramatically in the area immediately surrounding the legal standard because the defendant expects liability not only for the damages he has caused by taking inadequate care, but also for the damages that would have occurred if he had exercised due care. To see whether this reasoning can be transposed to the antitrust setting we will first look at the Commission's method of setting fines and, in particular, at the question whether expected fines rise incrementally from zero or whether they be expected to start with a jump. Next, we will turn to the question of follow on litigation, to see whether the prospect of a private damages suit could make expected fines rise sharply.

Pursuant to Art 23 of Regulation 1/2003 the Commission may impose fines on undertakings that infringe Art 81 EC.[11] The way it exercises this power is set out in a notice containing guidelines.[12] This provision and these guidelines make clear, first of all, that a fine need not always be imposed if a violation is found. This is evident, also, in Art 9 of Regulation 1/2003, which determines that a commitment decision can only be adopted in cases where it is not necessary to impose a fine. The guidelines are not explicit on how this determination of necessity is made. They provide information on how a fine is calculated once it deemed necessary to impose one. It seems reasonable,

[11] [2003] OJ L1/1.

[12] See the Commission's guidelines on the method of setting fines pursuant to Article 23(2)(a) of Regulation 1/2003 ([2006] OJ C210/2).

however, to assume that the factors that determine the height of the fine have a bearing on the evaluation of the need to impose one.

The procedure for calculating fines that is described in the guidelines consists of two phases. First, a basic amount is set, which is a variable proportion (maximum 30%) of the defendant's sales in the relevant product and geographical market. The size of this proportion is dependent on an assessment of the nature of the infringement, the combined market share of the defendants, the geographical scope of the violation and its duration. In the second phase the basic amount can be adjusted to take into account mitigating or additional aggravating circumstances (yet under no condition can the fine imposed exceed 10% of the defendant's total turnover).

The guidelines can be summarised by saying that minor infringements will be punished mildly (if at all) and that serious infringements will be punished more severely. Adjustment mechanisms have been incorporated in both phases of the procedure, apparently to ensure that a fine reflects the harmfulness of the agreement.[13] There is no particular reason to expect, therefore, that an agreement that causes very little harm will be met with a sizable fine.[14] This appears to be confirmed by the Commission's decision practice. As noted in preceding chapters, four out of the six effects-based decisions taken after the entry into force of Regulation 1/2003 are commitment decisions (that is, no fine is imposed). In only one of the two remaining infringement decisions, *Morgan Stanley / Visa*, a fine of 10.2 million Euros was imposed.[15] This case can be considered to be a serious effects-based violation, since Visa is a large player on an important market and, above all, since the Commission found no evidence at all of possible efficiency justifications for its behaviour. Still, the amount of 10.2 million Euros is not particularly high in comparison to cases where

[13] See also para. 6 of the Guidelines (supra, footnote 16), where the Commission states the following. 'The combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement […].'

[14] It stands to reason, also, that practices examined under the effects-based standard will not be met with the biggest of fines. In this regard, see particularly para. 23 of the Guidelines (supra, footnote 16) where certain per se practices are singled out as meriting the setting of a high basic amount.

[15] Decision of 3 October 2007, published on the Commission's website. The second post-2004 infringement decision was adopted in the case of *Master Card* (decision of 19 December 2007, published on the Commission's website). Note that this case was initiated by the notification of the agreement involved and that substantial efficiency arguments were advanced and examined at length. It it not surprising, therefore, that no fine was imposed. The two other effects-based infringement decisions listed in Appendix A were both, also, initiated by the notification of the agreement involved and no fine was imposed.

effects-based arguments are mixed with an object-based analysis or a *per se* analysis stands alone, such as *JCB* (40 milion Euros)[16] and *Volks Wagen* (102 milion Euros).[17]

Whilst fines may thus be assumed to rise incrementally from zero as firms consider increasingly harmful behaviour, it could still be that firms expect effective penalties, even for minor infringemens, to be higher. Craswell and Calfee argue that defendants should expects liability not only for the damages they have caused by taking inadequate care, but also for the damages that would have occurred if they had exercised due care. Clearly such legitimately inflicted harm, as opposed to harm to consumers, exists in the antitrust law context. It is, in fact, the essence of the competitive process that firms strive to increase their profits at the expense of their rivals. Such efficient behaviour is to be protected rather than deterred by the antitrust laws. It was precisely this reasoning that justified the adoption of the so-called *antitrust injury* doctrine in the US, which bars plaintiffs from recovering for harm of any other sort than those that the antitrust laws were designed to protect.[18] Under this doctrine a competitor can sue for profits lost due to the restriction, but not for damages that would have occurred absent the restriction. These are seen as the result of healthy competition.

Even though there is not a clearly articulated European antitrust injury doctrine,[19] it is highly unlikely that firms in Europe are much afraid of follow-on litigation by competing firms that would include legitimately inflicted harm in their damages claims. To begin, private enforcement in the field of effects-based analysis is virtually non-existent at present.[20] Moreover, given the importance of this issue in achieving the goals of antitrust, it is to be expected that if such cases would come up national civil courts will impose the same limitations on damages claims as their US counter parts. This is particularly so since this approach would nicely fit the practice at least

[16] [2002] OJ L69/1.
[17] [1998] OJ L124/60, later reduced by the CFI to 90 million ([2000] ECR II-2707).
[18] On the antitrust injury doctrine, see e.g. Page (1985) and the discussion below in Section 6.3.
[19] Jones (1999: 191 a.f.) argues against a US antitrust injury doctrine in Europe because of a difference in the substantive criterion: a mere distortion of the process of competition in Europe, rather than consumer harm as in the US. Clearly, this concern will fall away if the change in the legal standard proposed above is adopted. Brkan (2005) argues that such complicated issues as are involved with antitrust injury should be dealt with in the actual proceedings, not in its initial screening. Her opposition stems from a misunderstanding of this doctrine. As is explained in more detail below in Section 6.4, the antitrust injury doctrine is not about the complicated task of establishing causality, as she suggests. Rather, the admissibility of the plaintiff's claim is scrutinized assuming that all underlying facts can be proven. In this way, claims by plaintiffs that cannot have sustained the type of harm that the antitrust laws protect against can be filtered out at an early moment in the proceedings.
[20] See the discussion on private enforcement in Chapter 7, Section 7.3.2.

of the considerable number of continental tort systems that have adopted the so-called S*chutznorm* doctrine, which, in clear contrast to the assumption made by Craswell and Calfee on (US) negligence law, holds that a tortfeasor is liable only for such damages as the norm he violated was intended to safeguard against.[21]

These arguments suggest that expected sanction costs rise incrementally over the range of possible behaviour, rather than suddenly or with kinks. As Kahan does in his analysis of negligence law, therefore, we should examine whether we have reasons to believe that they do so at a slower pace than expected profits, particularly at the point where agreements are likely to be held in violation of the Treaty. If so, firms should be expected to respond mainly in the form of under-compliance.

Kahan's theory applied to antitrust

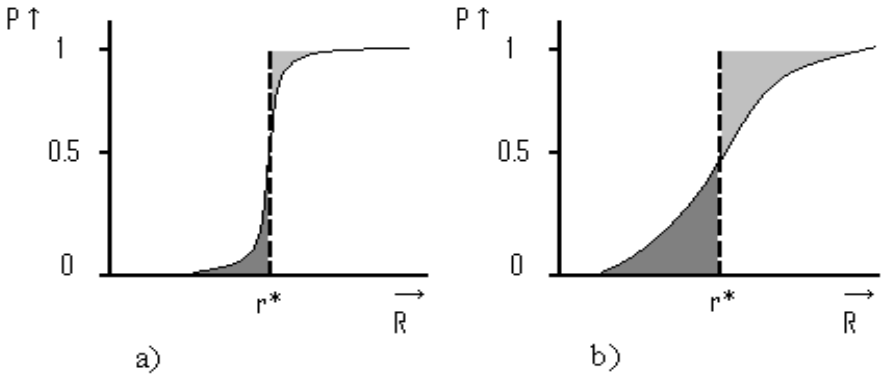
Arguably, reliance on a proportion of the sales volume affected by the restriction (the basic amount) as the criterion for setting fines may work to suppress the rate at which sanctions rise in comparison to profits in European antitrust. This can be appreciated as follows. For firms in most industries, even if there are market failures, turnover may be assumed to consist of a relatively large cost component. Moreover, a considerable part of these costs (such as those incurred in paying for material inputs, wages, production plants, etc.) will be unaffected by the different forms of agreement that a firm can choose from (for example, from different forms of distribution contracts).[22] As a consequence, the difference between the various options in terms of their effect on turnover and, thus, expected fines, will tend to be smaller than the differences in terms of profits.[23]

The pace at which expected fines increase may also be suppressed because, as was argued in Chapter 4, uncertainty is currently spread out over a rather wide range of

[21] For a discussion of European tort systems and on the S*chutznorm*, see Van Gerven, 2000).
[22] For discussions on industry profitability, see e.g. Scherer and Ross (1990) and Schmalensee (1989).
[23] The Commission's approach of relying on turnover to set the amount of a fine has been criticised in the literature, notably by Wils (2002: 33 and 71). Taking a somewhat different angle than the one presented here, he argues that there is no legal reason to calculate fines as a proportion of turnover, nor an economic justification. To achieve effective deterrence, fines should optimally be equal to the harm caused by the infringement, or alternatively equal to the benefit gained by the violator plus some safety margin, divided by the probability of detection and punishment. Bos and Schinkel (2006) show that the Commission's scope for setting fines is considerably constrained by the 10% of world wide turnover cap provided for in Art 23 of Regulation 1/2003 (supra, footnote 15). This is to say that this cap will relatively frequently and, particularly, in more serious cases prevent the Commission from setting a higher fine following by following the methodology set out in its Guidelines (supra, footnote 16). They conclude that since there generally exists a positive relationship between the illegal gains from competition law infringement and the value of the affected commerce, it will in many circumstances be difficult to meet the guidelines' overall objective to deter breaches of the competition rules.

behaviour.[24] This can be appreciated by considering the probability distributions depicted below in Figure 6.1.[25] Graph a) depicts a situation where firms are relatively certain about the location of the legal standard, whilst graph b) reflects a situation where firms are relatively uncertain.[26] Over the range of behaviour that is shaded grey (in both graphs) firms take into account a significant probability that they will be challenged. Notice that this range is narrower in graph a). In this situation the

Figure 6.1



probability of being held in violation shoots up from 0 to 1 over a rather narrow range of restrictive behaviour surrounding the legal standard. In graph b) the rise is much more gradual. This affects the rate at which expected fines increase. The wider the range of behaviour that is considered risky in the sense that it may become the subject of antitrust proceedings, the lower the rate at which expected fines rise.

Nonetheless, the possibility of upward adjustment provided for in the Commission's fining policy makes that we cannot exclude the possibility that certain

[24] See Chapter 4, Sections 4.3 and 4.4. The decision practice that was discussed there shows that in some cases, such as the *Master Card* decision (supra, footnote 19), it focuses almost exclusively on consumer harm issues and thus on firms that may genuinely be in a position to exercise market power. In other cases, however, such as *P&O/Stena Line* ([1999] OJ L163/61) it modifies agreements by firms of which it acknowledges that they have no market power at all. This means that the Commission intervenes in a rather wide range of business behaviour. The argument made here is that the wider the range of behaviour that firms consider may be found to be in violation, the slower the pace at which expected fines rise.

[25] As was explained in Chapter 3, Section 3.4, a probability distribution maps the combination of potential offenders' best guesses of the probability of being found to have violated the law that they associate with each of the possible forms of agreements that they can choose from. These options are grouped on the horizontal axis with less restrictive (and innocuous) agreements on the left hand side, and more restrictive (harmful) agreements on the right hand side. The vertical axis measures the associated probability of being found to have violated Art 81 EC.

[26] I.e. as suggested in footnote 34 and accompanying text,, the wide spread of uncertainty means that firms reckon with the possibility of intervention over a wide range of behaviour.

firms perceive expected sanctions to rise faster than expected profits.[27] And in this regard it should also be realised that termination (or alteration by means of commitments) of an agreement that has already been implemented may come with considerable costs that should be added to the costs of the fine. This is because certain forms of agreement may involve substantial investments. It can be expected that these investments would not be fully recoverable in case of *ex post* intervention, such as the freezer-cabinets provided to outlets in the case of *Van den Bergh Foods*.[28] These investments work so as to accelerate the pace at which expected sanctions rise. We are forced to conclude, therefore, that no definite statements can be made as to which effect, under or over-deterrence, is likely to occur more often in the current situation. The tendencies appear to go in different directions. This means that the change in the legal standard and its complementary measures must be designed with both effects in mind.

6.3 Impact on different actors and complementary measures

To develop our thoughts about the impact of improving accuracy in adjudication on differently positioned firms, let us start by looking at the Commission's likely reaction to an increase in enforcement costs and, particularly, the nature of the cases that would be affected. Faced with the task to distribute the resources it devotes to the effects-based field over fewer cases, the Commission will select and pursue those cases from amongst the pool of cases about which it has information that appear to pose a more serious threat to consumer welfare (like the cases of *Van den Bergh Foods*,[29] *Master Card*[30] and *Morgan Stanley/Visa*,[31] where there were significant indications of market power) and it will discard other that involve less restrictive agreements (like the cases of *TPS*,[32] *P&O/Stena Line*[33] and *UEFA*,[34] where the claim

[27] See para. 28 (on aggravating circumstances) of the Commission's Fining Guidelines (supra, footnote 16).
[28] [1998] L246/1. See the discussion of this case in Chapter 4. Other examples are the investments made in pay-tv operations in cases such as *Telenor/Canal+* (decision of 29 December 2003, published on the Commission's website, at para. 65) and *TPS* ([1999] OJ L90/6); and the expenses that code-sharing airlines will make in integrating their computer systems when (see *Austrian Airlines / Lufthansa* ([2002] OJ L242/25, and *Alitalia / Air France* (decision of 7 April 2004, published on the Commission's website).
[29] [1998] OJ L246/1.
[30] Decision of 19 December 2007, published on the Commission's website.
[31] Supra, footnote 19.
[32] [1999] OJ L90/6.
[33] [1999] OJ L163/61.

that market power was exercised was much less convincing).[35] This is because it will be harder to meet the standard for showing harm in the latter group of cases and because the former group poses a larger threat to consumers.

More specifically, after the proposed reform the Commission can be expected to focus more on firms with higher levels of market power.[36] This tells us that any drop in deterrence caused by lower levels of enforcement will be experienced primarily by firms with a reduced potential to inflict harm. It should be realised that inefficient contracting by such firms that is caused by uncertainty is most likely to take the form of over-compliance. A drop in deterrence may therefore contribute positively to the objective of improving accuracy by further lowering the likelihood that agreements concluded by firms facing considerable competition will be terminated or altered. In addition, if for certain firms on this side of the market power spectrum incentives to under-comply are produced, the negative consequences for society are probably smaller than if firms with more market power are involved.

The effects of improving accuracy on the ability to assess the legality of intended agreements should be identical for larger firms. The probability that an investigation by the Commission would result in a beneficial or neutral agreement being held illegal should go down and the probability that a harmful agreement will be found illegal should increase. It is the associated effect on the probability that enforcement action will be started that is different for this group. Given that the Commission will be more accurate in case selection, larger firms that aim to implement an agreement with considerable potential for efficiencies should be relatively more secure than before that they will not be targeted, even if they remain likely candidates for enforcement action on account of their size. The question, however, is whether the increase in the Commission's enforcement costs does not weigh down its enforcement capacity to

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[34] [2003] OJ L291/25. See also the Commission's more recent decisions in the cases of *DFB* (decision of 19 January 2005, published on the Commission's website) and *Premier League* (decision of 22 March 2006, published on the Commission's website).

[35] The first group of cases was discussed in Chapter 4, Section 4.3.2. The second group of cases was discussed in Chapter 4, Section 4.3.1.2. There we saw that in this second group of cases the Commission relied substantially on formalistic arguments. It is submitted that if the Commission would be effectively and consistently forced by the Courts to adhere to the standard that is presented in the modernised guidelines (see Chapter 2, Section 2.4, and Chapter 4, Section 4.4) the Commission would be less likely (which, on the other hand, is not to say that it would be impossible) to focus on cases like those in the second group, simply because it would be less probable that the decision would be upheld on appeal.

[36] As was already suggested in Chapter 5, Section 5.4, and will be further developed in Chapter 7, Section 7.2, this will have the beneficial side effect of reducing the Commission's scope to adopt commitment decisions, which generally offer little guidance.

such an extent that the effect of increasing the probability that bad agreements will be held illegal is cancelled out. In the overall assessment of the impact of improving accuracy this effect might wholly or partially off-set the benefits of eliminating over-compliance. In this regard, several remarks can be made. The first is that for firms with considerable market power to be less deterred than they are at present, the drop in the level of enforcement must arguably be more than marginal since they will not be the first group to feel the effects of such a change. Secondly, a drop in the level of enforcement should be observable by the Commission itself and could be countered in the ways described below.

Countering a drop in deterrence

We have seen that, thus far, fines have not always been imposed in cases where infringements were found under the new regulation. One way to react to an observed deterioration in the Commission's capacity to bring cases would be to consistently impose a fine – calculated on the basis of the Commission's existing guidelines[37] – upon finding that an agreement harms consumers. In the period immediately following a change in the legal standard, when its precise implications will not have been cleared up, it is possible that this might re-inflate incentives to over-comply for other firms.[38]

Several of the observations on Regulation 1/2003 that were submitted to the Commission indicate that such behaviour is most likely to occur when agreements involve considerable investments.[39] One way to prevent this effect would be to take investments that cannot be recovered upon termination into account as a mitigating circumstance in setting fines.[40] Decision practice shows that a serious adverse financial impact on the undertaking concerned may provide a reason to reduce the amount of the fine.[41] This practice has been subject to criticism in the literature.[42]

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[37] Supra, footnote 16.

[38] Whilst the proposal to alter the Commission's burden of proof in effects-based analysis (under Art 81(1) EC) should reduce uncertainty about the legal standard, even on the longer term such uncertainty is not likely to be eliminated altogether. This is because new developments in economic insights will continue to evolve and will require constant fine tuning and adaptation of the interpretation of the law.

[39] See the discussion in Chapter 5, Section 5.4, and in particular the observations submitted by Clifford Chance, CMS Competition Practice Group and Bird & Bird.

[40] Note that the list of mitigating factors mentioned in para. 29 of the Fining Guidelines (supra, footnote 16) is not intended to be exhaustive.

[41] See e.g. the following decisions: *PVC I* ([1989] OJ L74/1); *Roofing Felt* ([1986] OJ L252/15; *Flat Glass Benelux* ([1984] OJ L212/13); *Zinc Producer Group* ([1984] OJ L220/27; *Cast Iron* ([1983] OJ L317/1).

From a deterrence point of view, ability to pay should not be a relevant consideration in setting fines.[43] An exception is made for cases where a firm might default, which would constitute an excessive punishment that could give rise to over-deterrence.[44] The reason for taking irrecoverable investments into account would be very similar. The purpose of imposing a fine is to assure an adequate level of (specific and general) deterrence. If the fine is calculated on the basis of the seriousness and the duration of the infringement without considering additional negative effects of termination, this could result in unduly elevated effective sanctions and over-deterrence.[45] As is the case with other mitigating circumstances, the burden would have to be on the defendant to show that it has made investments that cannot be recovered in case of termination and that the resulting costs would be significant. Significance could be measured by reference to the height of the fine that would be imposed if no irrecoverable investments were made.

In addition, measures can be taken to mitigate an adverse effect on the Commission's enforcement costs that might result from an increase in its burden of proof. It was mentioned before that in an *ex post* setting complaints are of significant importance for detecting infringements. Naturally, however, not all complaints are justified. Whilst the Commission enjoys considerable discretion in setting its priorities, dealing with complaints that it chooses not to pursue does weigh on its

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[42] See notably Wils (2002: 36). See also Jones and Suffrin (2007: 1226).

[43] The ECJ appears to rely on the same or similar reasoning. In *Dansk Rørindustry v. Commission*, Cases C-189/02 etc., [2005] ECR I-5425, at para. 327, it confirmed a ruling by the CFI (Case T/23/99, [2002] ECR II-1705) holding that the Commission could not be obliged to take the poor financial condition of the undertaking concerned into account. Doing so, it remarked, would be tantamount to giving an unjustified competitive advantage to firms least well adapted to market conditions.

[44] Supra, footnote 52 48.

[45] Alternatively, evidence of significant irrecoverable investments could be relied upon to support an argument that the infringement has been committed as a result of negligence, which is a mitigating factor expressly mentioned in the Fining Guidelines. In order for it to be appropriate to impose a fine, a firm must have at least been negligent in violating Art 81 EC (see Art 23(2) of Regulation 1/2003, supra, footnote 15). That is, although it may not have been aware of the illegal consequences of its behaviour, it should reasonably have been aware given the state of case law and decision practice (see e.g. Jones and Sufrin, 2007: 1214; Wils, 2002: 29; and Hofstetter, 2009). In para. 29 of the guidelines the Commission indicates that the fact that the infringement was committed as a result of negligence may present a mitigating circumstances and, thus, a reason to lower the basic amount of the fine. The burden of proof is on the undertaking to show that it has acted negligently, rather than with intent. The fact that considerable irrecoverable investments were made as part of the agreement could play a part in discharging this burden of proof. On its own, however, this should not be considered sufficient proof. Such a policy would be vulnerable to strategic manipulation, since parties might decide to make irrevocable investments precisely in order to avoid being severely fined. Note, however, that it should make no difference whether a firm faces a high fine and low termination-related costs or a low fine and high termination-related costs; the level of deterrence that is achieved would be the same.

resources. Reducing this burden could be used to compensate the Commission for the extra costs that come with an increased burden of proof.

The importance of complaints in enforcement is underscored by the Commission's reports on competition policy, which indicate that between 2002 and 2005 around 45% of the new investigations were prompted by complaints.[46] No data for later years is available, but it can be expected that the number and importance of complaints will grow with the shift to *ex post* enforcement in the effects-based field.[47] Of the 32 effects-based decisions listed in Annex A, 12 involved a complaint.[48] With a view to the discussion below, it is important to note that in five of these cases the complainant was a competitor.[49] The impact of rejections of complaints on the Commission's resources can be gauged by considering the following indicators. The Commission's reports suggest that in 2004 it adopted 14 decisions rejecting a complaint (plus 28 informal ones), whereas in 2005 8 such decisions were adopted (there is no data in the report on informal decisions).[50] A number of these rejection decisions have been appealed before the CFI and the ECJ.[51]

The right to lodge a complaint is reserved to those natural persons or undertakings that can show a legitimate interest. Undertakings can claim a legitimate interest where they are operating in the relevant market or where the conduct complained of is liable to directly and adversely affect their interests.[52] This definition includes customers, suppliers, and competing firms. As suggested, complaints need not always be meritorious. Like potential offenders, complainants may be uncertain about the precise location of the legal standard and they will generally not have access to all factual information necessary to assess legality. Firms may also file complaints in an attempt to hinder a rival and limit his capacity to compete. Whatever the cause, those

[46] Note that the numbers provided in the reports (published on the Commission's website) are not broken down. They include all forms of infringements of Art 81 EC and Art 82 EC.
[47] Cf. the Commission's annual report on competition policy (2006), at para. 369.
[48] Given that 26 of these cases were governed by Regulation 17/62, it is not surprising that the majority of cases started on the basis of a notification. See Annex A.
[49] See Annex A.
[50] Most of these decisions have not been reported or published on the Commission's website. It cannot be distilled, therefore, how many cases involve competitor complainants.
[51] This includes case C-519/04 ([2006] ECR I-6991) and T-313/02 ([2004] ECR II-3291); case T-204/03 ([2006] OJ C294/43); case T-193/02 ([2005] ECR II-209); case T-186/05 ([2007] OJ C247/34), and case T-319/99 ([2003] ECR II-360).
[52] See the Commission's Notice on the handling of complaints under Articles 81 and 82 of the Treaty ([2004] OJ C101/65) at para. 36.

who can claim a legitimate interest are entitled to a statement of the Commission's reasons in case the complaint is rejected.[53]

An analogy with the 'antitrust injury' doctrine developed in US law serves to illustrate how denying competitors a legitimate interest could be used to compensate the Commission for the extra costs of showing consumer harm. As we saw, the antitrust injury doctrine concerns the standing of private enforcers in US antitrust. Only plaintiffs that have sustained "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful" are entitled to claim damages on the basis of the antitrust laws. This rule, first formulated in the 1977 case of *Brunswick Corp. V. Pueblo Bowl-O-Mat, Inc*.,[54] should be seen in light of the influence of the Chicago School on US antitrust.[55] As the scope for antitrust intervention narrowed, so did the group of persons with standing to sue. With antitrust harm conceptualised as *consumer* harm, the antitrust injury doctrine mainly serves as an instrument to deny competitors, who might have found protection under more inclusive standards, access to court.[56]

The suggestion made here is not that in Europe competitors should be prevented from filing complaints. It is recognised that they can provide crucial assistance in detecting potential infringements. But if consumer harm rather than a restriction of commercial freedom is to be the touchstone for intervention in European antitrust, then some suspicion of competitors' complaints is justified; after all, it is in the nature of the competitive process that firms will hurt each other in courting consumers. Little will be lost, therefore, by allowing the Commission not to motivate the rejection of unmeritorious complaints filed by competitors. The resources that are untied in this way can then be rerouted towards the investigation of cases that give the Commission cause for genuine concern.

6.4 Conclusion

From an *ex ante* perspective, it is impossible to say with certainty what the precise effect of raising the Commission's burden of proof would be on the efficiency of enforcement under the effects-based standard of Art 81 EC. There are too many

[53] Id., at para 72.
[54] 429 US 477 (1977).
[55] In this sense, see Page (1989).
[56] See Snyder and Kauper (1991) for an empirical study on the effect of the antitrust injury on the frequency of competitor suits, and the response by Page and Blair (1992).

variables that are unknown at present. Much depends, for example, on the type of cases about which the Commission is fed information, on how much information other firms can glean from decisions on these cases and on the average effect on the Commission's enforcement costs.

What can be said, however, for the purposes of this impact assessment, is that much can be done to limit or reduce the drawbacks of improving accuracy and there are fairly good proxies for reduced deterrence that can be observed by the Commission. If its enforcement costs rise substantially due to the proposed reform and if this prevents it from pursuing cases involving serious levels of market power, the Commission could make more use in this field of its existing powers to impose fines. An alternative or complementary measure would be to relieve the Commission of the obligation to respond to complaints filed by non-competitors, which would be entirely consistent with the Commission's new substantive approach.

In the next chapter we examine the changes to be made to the Commission's burden of proof from a substantive perspective. It considers what changes are required in terms of the type and nature of the evidence to be proffered in the analysis under Art 81(1) EC (including their possible implications for enforcement costs) and studies to which extend a stronger focus on consumer harm is compatible with the case law of the Court of First Instance.

CHAPTER 7

A new Agenda for European *Rule of reason* analysis

7.1 Introduction

European antitrust case law, decision practice, and guidelines do not work in unison to inform firms active on the Common Market about the legal standard applied in effects-based analysis, that is, about the precise location of the dividing line between permissible and impermissible restraints of competition. There appear to be discrepancies between the new approach set out in the Commission's guidelines[1] and what it does in practice.[2] Closely related is the fact that the potential of Commission decisions to clarify the new approach (by signalling to firms what weight will be accorded to the different considerations listed in the guidelines) is not fully used.[3]

This chapter describes in detail what substantive adjustments must be made to the legal standard in order to make the Commission's effects-based practice more focused and its decisions more insightful on issues that are crucial in self-assessment by potential offenders. It is argued, in Section 7.2, that the way forward is to emphasise empiricism in assessing the impact of restraints. In particular, the Commission should be required to produce more conclusive evidence of consumer harm – a tangible or at least plausible reduction of output, quality, choice, or innovation – before the burden is allowed to shift to the defendant. Section 7.3

[1] See the Guidelines on Vertical Restraints, [2000] OJ C291/1; the Guidelines on the applicability of Article 81 to horizontal co-operation agreements, [2001] OJ C3/2; and particularly the Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/97. For a discussion of these and related documents, see Chapter 2, Section 2.4.

[2] See Chapter 4, Section 4.3.1. There we saw that contemporary decision practice includes more than a few examples of interventions in situations where the risk of consumer harm is far from obvious and where the structural concerns have not been systematically addressed.

[3] See Chapters 4 and 5. Many Commission decisions are motivated in abbreviated form only. And even in its more elaborate decisions the issue of harm is often not fully brought into focus.

offers some considerations concerning the effects of this proposal on the enforcement costs of the Commission and private enforcers. Since asking for more evidence of harm is very similar to the call for the application of a *rule of reason* that was rejected by the CFI in the case of *Métropole*,[4] Section 7.4 examines the compatibility of this proposal with the broader framework of European antitrust. A final section concludes.

7.2 Empiricism in the analysis of restraints

Serious scrutiny of evidence regarding consumer harm is made necessary by on-going developments in Industrial Organization. As economists have improved their understanding of the way markets function, the number of factors that are recognised to potentially influence the welfare effect of a specific type of restraint have increased.[5] Thus, the scope for classifying restrictions on the basis of their outward appearance (the features of an agreement) has been reduced, and the value of analysing market structure, as an indicator for the negative impact of a restraint, has been eroded. Given that in all but the most egregious or evidently innocuous cases evidence related to the terms of an agreement or to market structure will be insufficient to determine whether an agreement poses a genuine threat to consumers, it is necessary to expand the analysis of restraints and to widen the evidence that will be relied upon. The guidelines issued as part of the modernisation process show that this message has come across in Brussels.[6] Still, as we have seen, this is not fully reflected in the Commission's post-modernisation practice. There are problems, in particular, with over-inclusiveness and the motivation of decisions. To obtain an view on the substantive changes needed to solve these problems, it is useful that we discuss these issues in some more detail.

When the Commission – in the analysis under Art 81(1) EC – shows that an agreement restricts competition and that it must be seen against the background of a market in which the defendant is a significant player, this does not prove that consumers will be harmed. The agreement might generate efficiencies, but even

[4] *Métropole v. Commission*, [2001] ECR II-2459. This is illustrated by the recent decision in *Master Card* (decision of 19 December 2007, published on the Commission's website) where the Commission refused to make room in the assessment under Art 81(1) EC for the defendant's argument that the restriction at issue served to expand rather than restrict output.
[5] For a discussion on developments in Industrial Organization, see Chapter 5, Section 5.2.1.
[6] Supra, footnote 1.

without them, it isn't necessarily the case that harm will ensue. Whether the *potential* for harm that is thus established materialises is, in practice, examined under Art 81(3) EC. Recall, for example, the case of *Bass*, where the Commission, in the analysis under Art 81(1) EC, formulated a price discrimination claim on the basis of a considerable differential in the price of beer supplies charged to different types of outlets.[7] In the investigation pursuant to Art 81(3) EC this price difference was found to be caused by the extra costs Bass incurred in servicing one of these groups, rather than by discrimination. In reality, therefore, there was no adverse effect on consumers and, as a consequence, genuine pro-competitive efficiencies did not have to be examined.

In the vast majority of the Commission's decisions, however, this crucial phase of the investigation is jumped over and the investigation under Art 81(3) EC starts immediately with the identification of pro-competitive efficiencies.[8] Note, first of all, that this may tend to produce type 2 errors in Commission decisions. Failure to verify whether the potential adverse effect of the original agreement materialises creates the risk that the antitrust laws are used to condemn competitive behaviour.[9] What is more important is that, even if the Commission's decisions are free of errors, the failure to address the issue of harm explicitly, combined with a continued reliance in exemption and commitment decisions on criteria that are more inclusive than those advanced in the Commission's guidelines, creates confusion that complicates self-assessment by firms and may lead them to under or over-comply.

From a substantive perspective, therefore, the necessary adjustment to the legal standard in effects-based analysis consists of two components. To discharge its burden of proof under Art 81(1) EC, the Commission should be required to articulate a plausible theory of harm and to present evidence in support of the crucial elements of that claim. To begin with the first of these components, the theory of harm must explain how the defendant's conduct (the agreement and the way it is implemented)

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[7] [1999] L186/1; discussed in Chapter 4, Section 4.3.2.

[8] See Chapter 4, Section 4.3.2. In addition to the case of *Bass* (supra, footnote 7) the question whether the Commission's theory of harm actually comes true is addressed in only two of the 32 effects-based decisions studied. These are the case of *Van den Bergh Foods* ([1998] L246/1) and *Master Card* (supra, footnote 4). For a discussion of both cases, see Chapter 4, Section 4.3.2.

[9] This risk is particularly great for conditional clearance decisions. Naturally, the conditions imposed (commitments under the current framework) are such as to make the agreement less restrictive. We saw in Chapter 4, Section 4.3.1, that contemporary decision practice includes more than a few examples of such decisions involving situations where the risk of consumer harm is far from obvious and where the implications of market structure have not been systematically addressed. It is submitted that, given these circumstances, it may be doubted whether actual consumer harm was prevented by so doing.

lead to harm given the characteristics of the market at issue. And the alleged harm should be of the right type; that is, harm to consumers (in the form of higher prices, lower quality, less choice, or a reduced level of innovation). Next, this theory should be plausible, meaning that it fits with modern economic insights and the facts of the case. Most important, the Commission should present evidence to support this theories (and rebut arguments that tend to undermine it) before the burden is allowed to shift to the defendant.

Implications for the way restraints are analysed

US case law can be looked at to form a more detailed image of the role that some of these requirements play in antitrust litigation. The case of *Matsushita*[10] provides a prime example of the effect of presenting an improbable theory of harm. Zenith, an American manufacturer of television sets, filed suit against 21 Japanese competitors on the US market. Zenith claimed that the defendants cartelised the Japanese market so as to be able to sell at artificially low prices in the US, in an attempt to drive Zenith and others off the market. The Supreme Court found this claim to be hard to sustain on theoretical grounds. Using Japanese supra-competitive profits to sustain losses on the other side of the Pacific would be sensible only if there was a reasonable expectation that there would be returns on this investment. The Court observed that where predatory pricing is hard to pull off for a single firm, coordinating loss-making pricing over an extended period of time by a group of more than 20 firms is more daunting still. Crucially, also, to recoup the losses the cartel would have to be kept in place, now to charge monopoly prices, which would attract new entrants and the attention of the antitrust authorities. Setting out the principles that governed the assessment of this case, the Court stated that:

> [If] the factual context renders respondents' claim implausible – if the claim is one that simply makes no economic sense – respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.[11]

[10] *Matsushita Electric Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986).
[11] Id. At 577.

Claims that are not based on an identifiable and acceptable theory of harm and claims based on an implausible theory of harm that is not supported by substantial evidence can thus be eliminated.[12] Arguably, the Commission's reasoning in a case like *TPS* would not meet the requirement that a plausible theory of harm is articulated.[13] TPS was a joint-venture providing pay-television in France. This market was, at the time, heavily dominated by one player, Canal+, with over 4 million customers. There were several much smaller competitors in the market, including the joint venture, which had some 460.000 customers. TPS foresaw considerable growth in coming years. The joint venture agreement granted TPS the right of first refusal to programmes in the portfolios of its parents. In its decision the Commission underscored the importance of this clause to TPS in acquiring a solid position on this quickly developing market. Given TPS' growth forecasts, the Commission limited the permissible duration of this restriction to three years. Nowhere in its decision, however, did it articulate how this clause might be used to exploit consumers.

The case of *California Dental Association*[14] can be used to illustrate the implications of insisting on empirical evidence of consumer harm. As we saw before, this case involved restrictions on certain forms of advertising by members of an association of dentists.[15] The Association argued that these restrictions benefited consumers, because they aimed to ensure the accuracy of the information contained in advertising in a market characterised by large disparities between the information available to the professional and the patient. The Supreme Court determined that the Court of Appeals had mistakenly required the Association to substantiate its affirmative defence. Given that restricting advertising has the potential to reduce

[12] The requirement to state a plausible claim is of significant important in US antitrust litigation. In a considerable proportion of the US cases examined in Chapter 4 (see Appendix B) district courts grant defendants' motions for summary judgment or motions to dismiss because no cognisable claim is stated , because the plaintiff fails to allege sufficient facts, or because the theory of harm in implausible and insufficiently supported by factual allegations. Examples are *American Telephone & Telegraph Co. v. IMR Capital Corp.* (888 F.Supp. 221) where plaintiffs fail to allege facts that support the claim that market power was exercised; *Floors-N-More, Inc. v. Liquidators* (142 F.Supp.2d 496) idem; *Reddy v. Good Samaritan Hospital* (137 F.Supp.2d 948) where it was found that the exclusion from practice in one hospital cannot have an adverse effect on consumers in a national market; *Todd v. Exxon Corp.* (126 F.Supp.2d 321) where the plaintiff failed to allege a plausible relevant market; and *Suzuki of Western Mass, Inc. v. Outdoor Sports Expo, Inc.* (126 F.Supp.2d 40) where a claim alleging a reduction on intra-brand competition was thrown out since nothing in the purported scheme indicated that customers were prevented from buying other manufacturers' products.
[13] [1999] OJ L90/6.
[14] *California Dental Association v. FTC*, 526 U.S. 765 (1999).
[15] See the discussion of this case in Chapter 4, Section 4.3.1.

demand for dental services, it was not entirely obvious that it would also result in a restriction of supply – the focus of antitrust concern. Whether it did was judged to be a question for empirical analysis that should have been addressed by the FTC before the burden was allowed to shift to the defendant.

Applied to European antitrust this reasoning would imply a significant shift in the burden of proof, since the question whether the harmful potential of a restraint materialises is currently addressed in the analysis under Art 81(3) EC. Take, for instance, the Commission's recent decision in the case of *Master Card*.[16] The Master Card system involves four parties. These are merchants that accept card payments, their banks, card holders, and the banks that issue cards. The Commission took issue with a rule in Master Card's bylaws setting a fee charged by the issuing bank to the merchant's bank in the absence of specific bilateral agreements between such banks on transaction fees.[17] Relying on several forms of direct evidence (two quantitative studies of the price effect produced by the default fee and a survey of merchants) the Commission showed that Master Card's arrangement had the actual effect of inflating the charges set to merchants.[18]

Master Card argued that the default fee included in its bylaws – even if it set a floor under the fees charged by issuing banks to merchants' banks – worked so as to promote the total output of the scheme. The benefits that either group of customers derives from a credit card system depend on the number of customers in the other group that subscribe. The more Master Cards are in circulation, the more attractive it becomes for merchants to take part, and the more outlets accept Master Cards, the more use they will be to consumers. Master Card argued that in the absence of a default fee issuing banks would not consider the effects in the market for attracting merchants when determining the charges set to merchants' banks.[19] The function of the default fee, in its view, was to correct for such imbalances and optimise the utility of the system for both groups.

The question raised by Master Card's defence is very similar to the one faced by the Supreme Court in *California Dental Association*. Master Card gave an alternative and not necessarily implausible pro-competitive explanation for the facts alleged by the Commission. If required to show consumer harm, the Commission could

[16] Supra, footnote 4.
[17] Id, at para. 400 and following.
[18] Id. at para. 425 and following.
[19] Id. at para. 534 and following.

therefore not have deferred this empirical question to the analysis under Art 81(3) EC.[20]

This shift in the burden of proof has important implications for the scope of the indispensability requirement of Art 81(3) EC. Currently, the phase of the investigation where it is verified that consumer harm indeed occurs falls within the reach of the indispensability requirement. Suppose that Master Card would have managed – in the analysis under Art 81(3) EC – to show that the default rule did not harm card holders and merchants. Technically, it would then still be vulnerable to the Commission's argument that other networks managed to thrive without imposing a default rule, or that less restrictive means were available to achieve the same objective. If, however, the consumer harm check is run as part of the analysis under Art 81(1) EC, indispensability would come into play only if the Commission were able to show that the default rule restricted output.

It is important to note, also, that consumer harm can be shown in the form of direct evidence, by showing market power and the likelihood of its exercise, or by a combination of these. In cases such as *National Collegiate Athletic Association* (NCAA)[21] – where the number of matches broadcast on television was limited – the restriction of output is self-evident so that market structure need not be examined. Where harm is less obvious, the effects of a restraint may be made visible by carrying out an experiment.[22] The case of *Indiana Federation of Dentists*[23] can serve as an example. This case involved a federation of dentists who collectively refused to provide insurers with x-rays necessary to evaluate the diagnosis and treatment. Whether the federation's policy suppressed competition among dentists with respect to co-operation with the requests by insurance companies, was easily answered in the affirmative by the Supreme Court. There was evidence in the record both of Indiana dentists' perceptions that unrestrained competition tended to lead their colleagues to comply with insurers' requests, and of the fact that outside of Indiana, where no ban existed, insurers generally found little difficulty in obtaining compliance by

[20] Similarly, the argument in *Bass* (supra, footnote 7 and accompanying text) that the observed price differential was caused by a higher level of service rendered to tied-outlets, would then have to be treated as a non affirmative defence.
[21] *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 435 U.S. 679 (1978).
[22] In this sense, see Cooper et al. (2005a and 2005b).
[23] *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

dentists.[24] Likewise, in the case of *California Dental Association*,[25] it is well possible to imagine an exercise in comparative statics that would have answered the question of empirical analysis pressed by the Court. This could be done, for example, by comparing prices in California with otherwise similar markets for dental services in which the advertisement rule did not apply, or comparing fees in counties with more than average association members, to those with a less than average number of members.[26]

In other cases the situation absent the restraint may be difficult to show by means of direct evidence (alone), making analysis of market power – the capacity to hurt consumers and the likelihood that it was used – unavoidable. The difference between an assessment of market power that is focused on consumer harm and an analysis that centres on market structure can be illustrated by comparing the factually very similar cases of *Visa and Master Card* (US)[27] and *Morgan Stanley / Visa* (EU).[28] In the US case, the Department of Justice challenged exclusionary elements of Visa's and MasterCard's bylaws that threatened member banks with expulsion if they issued cards on the competing American Express or Discover networks. The district court relied on a mix of direct and indirect evidence to examine whether allowing member banks to issue American Express and Discover cards would allow these companies to expand output and to offer card holders a wider range of choice and lower prices. Although the rigour with which these effects on consumer welfare were examined has met with criticism from US commentators,[29] what is important here is the key in which this decision is set. The European decision – which related to the acquiring market and involved the exclusion of Morgan Stanley from the Visa network – has a different outlook. The Commission examined the structure of the relevant market in detail and, in addition, showed that Morgan Stanley had significant experience as an acquiring bank and was large enough to achieve

[24] Id. at 456.
[25] Supra, footnote 14.
[26] The Commission's argument in its *Master Card* decision (supra, footnote 4) that that there was no objective need to establish a default fee to be charged by the issuing bank to the acquiring bank since there was evidence that other networks managed to operate without such a restraint is very similar in nature. In this regard, see, infra, footnote 48.
[27] *US v. Visa USA, Inc.* (163 F.Supp.2d 322). See the discussion of this case in Chapter 4, Section 4.3.1.
[28] Decision of 3 October 2007, published on the Commission's website.
[29] see e.g. Evans (2001) and Arquit and Koob (2004).

economies of scale.[30] Visa claimed that even without Morgan Stanley the market was highly competitive, by pointing to a dramatic fall in merchant service charges. Apparently, however, for the Commission the relevant criterion was not the extent to which merchants were affected, but whether the market was deprived of an able competitor.[31] It is unlikely that a US court would have allowed the burden to shift to the defendant without further scrutiny of this matter.

Implications for the guidance available to firms

Requiring an acceptable theory of harm supported by sufficient empirical evidence in the investigation under Art 81(1) EC should lead to better motivated decisions and will, thus, contribute to increased legal certainty. More information should become available to firms about what constitutes antitrust harm and how the Commission goes about verifying its existence. At the same time, the process of balancing positive and negative effects under Art 81(3) EC should also become more insightful, as both effects would be stated in terms of their implications for consumer welfare. Finally, we saw in Chapter 6 that the Commission may react to an increase in its burden of proof by concentrating its enforcement efforts on more serious violations. Since commitment decisions may not be adopted in cases where it is appropriate to impose a fine,[32] this will go hand in hand with a relative increase in the number of infringement decisions.[33] This is important, since they offer potential offenders – that is, firms in the stage of designing and agreement with possible antitrust implications – considerably more guidance. These effects of the proposed adjustment to the effects-based standard on enforcement costs are examined in the following Section.

[30] Apart from the fact that it focuses on the acquiring market instead of the issuing market, this decision is different in that the exclusion took the form of not allowing Morgan Stanley (the parent of Discover) to become a member of the Visa network. Given, however, that apart from Master Card there was no meaningful inter-brand competition, this difference is negligible.

[31] Supra, footnote 28, at para. 199 and 200.

[32] See the last sentence of recital 13 of Regulation 1/2003 ([2003] OJ L1/1).

[33] Note that this is a different result than one might initially expect. In general, one would expect enhanced legal certainty to lead less litigation and more settlements. This is because both sides will have better information with which to assess the merits of their case and will less often disagree on substantive issues. As a consequence, a negotiated outcome will more often be preferred way out for both parties. With respect to the guidance offered by infringement and commitment decisions, see the discussion in Chapter 5, Section 5.2.3.

7.3 Effects on enforcement costs

On the basis of the detailed proposals regarding the adjustments to be made to the effects-based standard that were presented above, it is possible to examine a question that was left unaddressed in Chapter 6. This is the question to what extent it is reasonable to expect that requiring the enforcer to show harm to consumers will lead to an increase in per-case enforcement costs. A distinction is made between the effect on the Commission's burden of proof (Section 7.3.1) and the effect on the costs incurred by private enforcers (7.3.2).

7.3.1 Transforming the Commission's burden of proof

It is not inevitably the case that imposing a consumer harm requirement translates into higher enforcement costs, at least not in every case. Surely, if adopting the consumer harm test is conceptualised as simply adding an element to the analysis of a restraint, the proposition that the enforcer's burden will rise is intuitively appealing. The Commission will have to discover, analyse and organise extra empirical data regarding consumer harm. However, framing the matter in this way would clearly be an over-simplification. It is more accurate to think in terms of a shift in the focus of the analysis. The precise effects on enforcement costs – an increase or a decrease – will depend on the circumstances of the case.

The European Courts put emphasis on market structure in the assessment under Art 81(1) EC.[34] Although direct evidence may play a limited part,[35] on the whole the Commission's approach in infringement decisions is largely similar. Shifting the focus of the analysis away from the effects of the restraint on competition (market structure) to the effect on consumers will pave the way for the use of direct evidence of a market-wide reduction of volumes, quality, choice, or innovation in the assessment under Art 81(1) EC. Since analysis of market structure is meant to capture the capacity to harm consumers, and direct evidence relates to some form of

[34] See Chapter 4, Section 4.3.1.
[35] E.g. in cases such as *Van den Bergh Foods* (supra, footnote 8), *Bass* (supra, footnote 7), and *Master Card* (supra, footnote 4).

manifestation of the harm itself, the two may be used as substitutes or as complements.[36]

Because of their complexity, market definition and analysis of market structure are generally regarded to be particularly cumbersome and costly exercises. Arguably, they are the most challenging hurdles the Commission faces in presenting an effects-based claim.[37] A case like *NCAA*, where the challenged restraint was such that the effect of restricting output was evident, illustrates that analysis of market structure will not always be necessary, if consumer harm can easily be inferred by other means.[38] In US antitrust, such cases are by no means exceptional.[39] In cases involving comparable near-*per se* restraints,[40] the Commission already adopts similar reasoning.[41]

In other cases direct evidence may be sufficiently vocal to considerably reduce the effort that has to be put into the assessment of market structure. The case of *Indiana Federation of Dentists* provides a good example.[42] This case involved a collective refusal to provide insurers with x-rays used to evaluate the diagnosis and treatment. As noted earlier, a restriction of output was easily inferred from evidence in the record indicating that outside Indiana, where no ban existed, insurers generally found little difficulty in obtaining compliance by dentists.[43] It is hard to see how amassing such evidence could lead to investigation costs in excess of those incurred in ordinary structural analysis.

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[36] In fact, the majority of the plaintiffs in the cases listed in Appendix B based their claims on a combination of direct and indirect evidence.
[37] See e.g. Bishop and Walker (2002:82) and Whish (2003:24).
[38] Supra, footnote 21.
[39] Three of the 13 cases listed in Appendix B that reached the stage of trial succeed on the basis of similar reasoning (these are *Chicago v. NBA* (754 F.Supp. 1336), *Sessions v. Joor* (786 F.Supp. 1518), and *US v. Brown University* (805 F.Supp. 288)) and three of the five plaintiff's motions for summary judgment that are granted involve this type of quick-look analysis (these are: *Law v. NCAA* (902 F.Supp. 1394), *Southtrust v. Plus* (913 F.Supp. 1517), and *Continental v. United* (126 F.Supp.2d 962)).
[40] Such as *Visa International – MIF* ([2002] OJ L318/17), *IFPI Simulcasting* ([2003] OJ L107/58), and *Belgian Architects* (decision of 24 June 2004, published on the Commission's website).
[41] See Chapter 4, Section 4.3.1; and specifically the text accompanying footnotes 87-92.
[42] Supra, footnote 23.
[43] Id. at 456. In essence, the Commission's argument in its *Master Card* decision (supra, footnote 4) that there was no objective need to establish a default fee to be charged by the issuing bank to the acquiring bank since other networks managed to operate without such a restraint is very similar in nature. The argument remained under-developed, however. As we saw above, Master Card argued that in the absence of a default fee issuing banks would not consider the effects in the market for attracting merchants when determining the charges set to merchants' banks. The function of the default fee, in its view, was to prevent the setting of unreasonable fees and, thus, to make the system grow and let output expand. The other networks to which the Commission pointed were all much smaller than Master Card. The Commission's evidence, therefore, does not go so far as to refute Master Card's interpretation.

It can be expected, however, that in the majority of cases evidence of effects will not stand alone, and at times it may not even be available. An investigation of the capacity to produce negative effects – the approach that currently dominates in European antitrust – will then be inevitable. The discussion of the *Master Card* decision illustrates that in such cases the weight of the Commission's burden may indeed increase if a showing of consumer harm is required in the analysis under Art 81(1) EC.[44] Showing the tendency inherent in the restriction and the relative size of the defendant will then be insufficient to make the burden shift to the defendant. Some indication that this tendency materialises must be added. Moreover, this indication should be of such a nature that it rebuts any alternative explanation of the effect in the same dimension of output that is offered by the defendant. In other words, Master Card's argument that the default interchange fee served to expand output and benefited card holders and merchants would have to be addressed by the Commission within the scope of the analysis under Art 81(1) EC.

Where a showing of market power is inevitable, adopting a requirement to show harm does not always have to lead to an increase in the Commission's burden, however. This can be appreciated as follows. Traditional investigation of market power consists of two stages. In a first phase the relevant market is studied to form a view of the context in which the restraint must be seen. Generally, a very broad perspective is adopted in this part of the investigation. Next, an investigation is made of the effect of the restraint on competition in this market, principally by reference to the defendant's market share.[45] Imposing a consumer harm requirement and adopting an investigatory strategy that focuses, from the start, on verification of the alleged theory of harm makes it possible to integrate these two stages of analysis. Doing so may allow for economies to be made in the investigation (Salop, 2001: 189).[46]

Consider the claim formulated by the plaintiffs in the (US) *Kodak* case.[47] This case involved the servicing of photocopying machines produced by this manufacturer. Originally, Kodak competed on servicing with independent service providers (ISOs). Later Kodak changed its policy and refused to supply parts to ISOs. This forced many ISOs out of business, and left users of Kodak equipment

[44] Supra, footnote 4.
[45] In cases involving exclusive dealing, the extent to which the challenged agreements contribute to the level of foreclosure in the market will also be taken into consideration. See the discussion of the case of *Stergios Delimitis v. Henninger Bräu* ([1991] ECR I-935) in Chapter 4, Section 4.3.1.
[46] In a similar sense, see Patterson (2000).
[47] *Image Technical Services, Inc. v. Eastman Kodak Co.* 504 U.S. 451 (1992).

with no alternative but to rely on Kodak's more expensive servicing. Proving this claim requires examination of ISOs' options to obtain parts elsewhere and the options open to owners of Kodak equipment to buy servicing elsewhere or to self-service. What information is available about servicing to purchasers of original equipment (OE) is also relevant. If they would be fully informed, any attempt by Kodak to over-charge for servicing would undermine its inter-brand competitiveness.

Structuring the investigation in such a way as to focus on these questions from the start – which implies working with the tentative market defined in the theory of harm – will lead to the production of much of the evidence that would result from traditional market analysis. It may, however, also help to avoid the sometimes intense litigation on the precise scope of the relevant market. More generally, it can serve to make market analysis more focused and, thus, to streamline effects-based analysis. For example, if approached in the ordinary way, it is not at all unlikely that the *Kodak* case would have generated considerable preliminary debate about whether for antitrust purposes servicing of Kodak equipment constituted a separate market, a dependent market, or no separate market at all. By focusing on the extent to which servicing is part of OE buyers' considerations, and the extent to which they have access to information about servicing, these types of either-or questions that come with market definition could be left aside.[48]

In sum, it can be argued that the effects of adjusting the legal standard applied in the analysis under Art 81(1) EC are unlikely to be uniform. Overall, the burden can be expected to increase, but there will also be cases where the effect for enforcers is neutral or beneficial.[49] The weight of the burden of proof under Art 81(1) EC will be

[48] The case of *Van den Bergh Foods* (supra, footnote 8) can be used to illustrate that this approach could work for the Commission as well. This case involved the provision of free freezer cabinets to sellers of ice cream, on the condition that they could only be stocked with Van den Bergh's products. Given the limited amount of floor-space in the average outlet, this effectively came down to an exclusive purchasing agreement. Due to Van den Bergh's pre-eminent position on the market, the freezer cabinet policy closed off a considerable portion of the market for competing manufacturers of ice cream. To prove harm in this case, the Commission would have to show that this policy resulted in higher distribution costs for competitors than for Van den Bergh, which forced them to reduce their output and allowed Van den Bergh to raise its prices profitably. The case presented by the Commission did not address all aspects of this scenario. Adoption of a consumer harm requirement would result in additional investigations, therefore. At the same time, however, focusing from the beginning on verification of this theory would arguably have allowed the Commission to make do with a less expansive examination of the relative market than is displayed in its decision.

[49] Arguably, the effect of the gradual introduction of the consumer harm requirement in US *rule of reason* analysis has been the same. It is true that amongst US antitrust commentators it has become commonplace to note that bringing a successful claim has become more difficult since the 1980s. This is often illustrated by means of data on the number of private cases in relation to the number of government cases. According to Gavil et al. (2002: 999), from 1941 to the mid '60s, the ratio of private

a function of the plausibility of the theory of harm. This has the beneficial effect of concentrating enforcement efforts on those cases of which we are more certain that harm has actually occurred. At the same time, it may serve to ensure potential offenders that that the less obvious it is to them that the contract they intend to sign will harm consumers, the less likely it is that it will be challenged.

The present section dealt with the effects of alterning the legal standard to show a restriction on the Commission, the principal enforcer in European antitrust. Over the past decade, there has been a growing interest in stimulating private enforcement of Art 81 EC. In light of these developments, it is appropriate to briefly consider the effects on private enforcers. The next section argues that the implications are not the same as for the Commission.

7.3.2 Effects on private enforcers' costs

Private enforcement of antitrust is in its infancy in Europe. Although formal impediments have been removed, the obstacles to launching a successful damages claim involving an allegation that must be assessed under the effects-based standard remain formidable. If at all such claims are to succeed under current conditions, this is most likely to happen in the form of follow-on litigation, where private plaintiffs may benefit from evidence unearthed in anterior administrative proceedings. In principle, this form of private enforcement would not be seriously affected by a raise

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to government cases tended to be 6 to 1 or less. From the mid '60s to the late '70s private cases exceeded government filings by 20 to 1. During the 1980s private filings fell substantially and the ratio of private to public cases stabilized at roughly 10 to 1.

Developments of both a procedural and substantive nature are pointed at to explain these events. The strict requirements for standing set out in the twin cases of *Hannover Shoe, Inc. v. United Shoe Machinery Corp.* (392 U.S. 481 (1968)) and *Illinois Brick Co. v. Illinois* (431 U.S. 720 (1977) – which restricted standing to direct purchasers – as well as in the case of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (429 U.S. 477 (1977)) – setting out the antitrust injury doctrine – effectively deny access to court to substantial classes of potential private plaintiffs. On the substantive side, several practices that were previously held *per se* illegal are now subjected to *rule of reason* analysis (e.g. *Continental T.V., Inc. V. GTE Sylvania, Inc.* (433 U.S. 36 (1977)), which is generally considered to be more exacting (cf. Waller, 2003:230). Another important development was the tightening of summary judgment standards to see whether the plaintiff's claim is based on an acceptable theory of harm to consumers (see e.g. Page, 1989 and Calkins, 1986). And in *California Dental Association* (supra, footnote 14) the Court demanded actual evidence of such harm to be proffered, before the burden could shift to the defendant.

It is important to consider the form that these modifications of the law took (cf. Blecher and Noblin, 1998). For the most part, these changes were designed to filter out substantively weak cases. The requirements for showing harm in cases that escape these hurdles have not necessarily increased, however. On several occasions, notably in *Indiana Federation of Dentists* (supra, footnote 23) and *California Dental Association* (supra, footnote 14), the Supreme Court has gone out of its way to underscore that showing harm does not necessarily require the type of extensive market analysis that was traditionally engaged in.

in the burden of proof, since the infringement will be established by the Commission. Given that evidence of consumer harm will bear a strong relation with the damages sustained by consumers that file suit, the adjustment may even be to their advantage. To understand these points, consider the following.

When the EC Treaty was adopted in 1957, antitrust was in many ways a novelty in the European context.[50] Not in the least to protect uniformity in this crucial early stage of its development, Regulation 17/62 concentrated the powers to shape the content of European antitrust in the hands of the Commission and the Court of Justice.[51] By making the application of Art 81(3) EC dependent on authorisation by the Commission, national courts were effectively disqualified as a forum for antitrust litigation. At the dawning of the new century it was increasingly felt that, with the core legal principles well developed, damages claims filed before national courts by persons injured by anticompetitive behaviour could help to boost the deterrent effect of European antitrust. To this end, Regulation 1/2003 abolished the Commission's monopoly on the application of Art 81(3) EC.[52]

Inspired, in part, by the various incentive mechanisms in place in US antitrust, a serious debate has been waged over the past years about whether and how European private enforcement should be stimulated. In the US, the treble damages provision of the Clayton Act[53] is considered to be crucial in motivating private enforcers to incur the elevated investigation costs that come with a *rule of reason* claim (see e.g. Salop and White, 1986: 1022).[54] The recent debate has clearly shown that punitive or multiple damages are regarded with much suspicion in Europe.[55] In certain member states, they are considered contrary to foundational principles of the legal order,[56]

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[50] See the discussion on the formative years of European antitrust in Chapter 5, Section 5.2.
[51] [1962] OJ 13/204.
[52] Supra, footnote 33.
[53] 15 U.S.C.A. §14.
[54] See also Cavanagh (1987: 825) on the pros and cons of detrebling in *rule of reason* cases and Waller (2003: 230) on the fact that *rule of reason* cases are considered more difficult to bring than *per se* cases.
[55] To a lesser extent, the same applies to other instruments available to private plaintiffs in US antitrust, such as contingency fees and opt-out class actions.
[56] See the 2004 comparative study on the conditions of claims for damages in case of infringement of EC competition rules (published on the Commission's website) at p. 130. Damages are generally seen to be compensatory in nature (p. 77). Only a handful of states allow damages that are punitive in nature (UK, Ireland, and Cyprus), and even there they are seldom awarded (p. 83). Note that in the UK national report it is expressly stated that it is unclear as of yet whether exemplary damages can be awarded for competition law infringements. The UK Law Commission has however recommended expanded use of exemplary damages awards. See the Law Commission's report no 247 entitled 'Aggravated, exemplary and restitutionary damages law,' of 16 December 1997 (published on the Law Commission's website). In any case, it is not contrary to EC itself for those countries to grant such

and it has been suggested that they may inspire frivolous claims (e.g. Wils, 2003). In any event, most discussions appear to be premised on the idea that the scope for their application must be limited to the most serious types of (*per se*) infringements.[57]

Indeed, the advantages of stimulating private enforcement under the effects-based standard are not obvious under current conditions. Whilst it may be a useful instrument to increase deterrence for firms prone to under-compliance, it risks aggravating the tendencies of other firms to over-comply. Only with improved accuracy could private enforcement play a useful role in the context of effects-based analysis. With or without financial stimuli, however, it can be expected that this role will be modest. This is because damages are likely to be even more difficult to show than the infringement.

This will particularly be the case where, in the absence of good direct evidence, substantial analysis of market power is needed to establish an infringement. Recall that analysis of market power serves to examine the probability that consumers were harmed.[58] In essence, this exercise consists of showing the capacity to inflict harm and the likelihood that it was put to use. This type of analysis may produce sufficiently concrete results to conclude with reasonable certainty that Art 81 EC was infringed and, if the infringement is serious, to impose a fine. It is likely to fall considerably short, however, of identifying the amount of harm in euros sustained by individual consumers. Showing damages will therefore require a significant additional investigatory effort by the plaintiff.

This has several important implications. Firstly, if private enforcement should arise under the effects-based standard, it is more likely to take the form of follow-on suits, because they involve considerably less risk.[59] Adjusting the legal standard against which evidence of a restriction is examined will not adversely affect the burden of proof of follow-on plaintiffs. Naturally, such parties will rely on the results of the administrative proceedings to show that their opponent's conduct was illegal.

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damages in competition cases. In *Factortame III* ([1996] ECR I-1029, at para. 90) the ECJ held that 'it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law'.

[57] See the Commission's 2005 green paper on actions for damages, at p. 34-44; the comments to this document that were received by the Commission, the Commission's 2008 white paper on compensating consumer and business victims of breaches of competition rules, at p. 55-61; and the comments to this document that were received by the Commission (all published on the Commission's website).

[58] See the text accompanying footnotes 27 and 28.

[59] This corresponds to the US situation as described in Waller (2003).

The more evidence of harm to consumers the Commission unearths, the easier it will be for follow-on plaintiffs to show that they have sustained damages. Finally, the link between consumer harm and damages tells us that the effect of adjusting the legal standard on the effective burden of plaintiffs that file and independent suit is likely to be less pronounced than would appear at first sight. The extra effort needed to show an infringement would – at least to some extent – be compensated for by a reduction in the effective burden to show damages.

This can be appreciated by considering the case of *Morgan Stanley / Visa*.[60] Visa tried to keep Morgan Stanley out of its network. For the Commission, the benchmark in this case was whether an able competitor was barred from accessing the market. If the Commission would have been required to show consumer harm under Art 81(1) EC, it would have been forced to address the effect of Morgan Stanley's exclusion on merchant service charges. Clearly, the evidence adduced by the Commission to meet this part of its burden would be directly relevant to merchants seeking to recover the anti-competitive premium that they paid over the years of Morgan Stanley's exclusion. Under current circumstances, these merchant-plaintiffs would have to start from scratch in developing their damages claim.

In discussing the Commission's other recent decision involving credit card networks, *Master Card*,[61] we saw that such a change in the legal standard runs against the Commission's interpretation of Art 81 EC.[62] Referring to the CFI's ruling in *Métropole* regarding the division of the burden of proof in Art 81 EC proceedings, the Commission refused to make room in the assessment under Art 81(1) EC for the defendant's argument that the restriction at issue served to expand rather than restrict output.[63] What remains, therefore, is to examine to what extent the proposed adjustment of the legal standard is compatible with the case law.

7.4 Compatibility with European antitrust

The ruling in *Métropole*[64] resulted from an appeal filed against the Commission's decision in the case of *TPS*.[65] Throughout this thesis, this decision was often used as

[60] Supra, footnote 28.
[61] Supra, footnote 4, and see the discussion in Chapter 4, Section 4.3.2.
[62] See the discussion in Chapter 4, Section 4.3.1.
[63] Supra, footnote 4.
[64] Id.
[65] Supra, footnote 13.

an illustration of the Commission's ability to intervene in market behaviour in the absence of clearly articulated and evidenced adverse effects on consumers and, thus, of the need to adjust the legal standard applied in the investigation under Art 81(1) EC. The CFI's review, however, revealed no error in the Commission's assessment under this provision. The present section (1) compares the call for a *rule of reason* as made by Métropole with the proposal for a more empirical approach formulated above; (2) it examines certain developments that have taken place since the adoption of this ruling to see how this proposal might currently be received by the Courts; and (3) it returns to the Art 82 EC case law on consumer harm that was discussed above in Chapter 4. As a preliminary issue, it must be pointed out that the various arguments for and against the proposed reform that will be advanced are of an essentially legal nature. It is not inquired, as we did above, what the implications are for the behaviour of different types of firms, enforcers and, ultimately, the efficiency of enforcement. Rather, it is asked what scope there is for the law on effects-based analysis under Art 81 EC, as it stands today, to evolve in such a way as to incorporate our proposal. In this regard, it should be noted that even if there would be unsurmountable legal obstacles to the adoption of this approach, this does not invalidate the incentive analysis made above.

Métropole seen in its context

As we have seen, the Commission took issue with a clause granting TPS exclusive rights to content produced by its parents and consequently limited the duration of the exemption to three years.[66] Métropole and the other parents argued before the Court that the Commission's investigation under Art 81(1) EC should have included an economic analysis of the restraint and its context. Application of such a *rule of reason* would have shown, so they claimed, that the clause served to facilitate the penetration of a market that was heavily dominated by an incumbent. According to Métropole, the Commission should have concluded that the agreement promoted competition, instead of lessening it, which would have obliged it to grant negative clearance. In its findings, the Court considered that there is no room in the analysis under that provision to weigh the pro and anti-competitive effects of a restriction, as this would make Art 81(3) EC lose much of its effectiveness.

[66] Id.

One way to understand why the Court decided the case in this way is to consider the broader context in which it operates and, in particular, its relation *vis-à-vis* the ECJ and the Commission. The CFI was created to take pressure of the ECJ and has competence, in particular, to hear cases that involve analysis of complex issues of fact.[67] It is generally recognised that the CFI subjects the Commission's analysis of facts to tougher scrutiny than the ECJ did before it, leaving the Commission less room for the exercise of discretion.[68] Tough scrutiny of the Commission's factual analysis, however, is not necessarily the same as taking the lead in the further development of European antitrust by setting out new substantive directions in the way the ECJ did in the foundational period.[69] In more recent times, the initiative on incorporating advances in economics into European antitrust law has generally been with the Commission and the Courts tend to limit their review of Commission decisions to verifying that no manifest errors of assessment have been made.[70] Add to that the presence of a body of ECJ precedents that allowed some but certainly not full out balancing under Art 81(1) EC[71] and it becomes clear that the CFI had little room to boldly change course.[72]

This is so, particularly, if we consider the nature of the plea made by Métropole and its fellow applicants. They argued that the agreement served to intensify competition on the relevant market. In other words, the benchmark for the *rule of reason* they proposed was the effect of the agreement on the *process* of competition. If the effect of the restraint on the competitive process (whether evidenced by restrictions of commercial freedom or market structure) is the point of reference, there is indeed no obvious way to distinguish between pro-competitive effects that should be heard in the analysis under Art 81(1) EC and those that would have to be dealt with in the examination pursuant to Art 81(3) EC.[73]

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[67] See Chapter 2, Section 2.4.
[68] See e.g. Lehmkuhl (2008), Nehl (1999), and Van der Woude (1993). This is evident, also, in cases like *European Night Services v. Commission* ([1998] ECR II-3141).
[69] In this regard, see Gerber (1998: 352 a.f.).
[70] Id. See also the discussion in Chapter 2, Section 2.4.
[71] See the discussion in Chapter 2, Section 2.3.
[72] Another concern may have been that accepting Métropole's argument would have restricted the Commission's enforcement capacity which was still limited in 2001 due to the burdens imposed by the notification system.
[73] Note that *Métropole* does not completely close the door to hearing exculpation within the framework of Art 81(1) EC. Referring to several ECJ precedents, the Court indicated that if a restriction is ancillary to the agreement as a whole, it does not fall foul of this provision. To qualify, a restriction must be objectively necessary for the implementation of the main operation and proportionate to it. It

The implications of the proposal and changed circumstances

The proposal made above to increase the requirements to show harm in the assessment under Art 81(1) EC differs substantially, however, from the *rule of reason* that was advocated by Métropole and rejected by the CFI. When consumer harm is taken as the relevant benchmark in evaluating direct or indirect evidence, it becomes possible to distinguish between justifications according to the dimension of output to which they relate. If a defendant refutes the alleged theory of harm, by offering evidence that shows that this harm will not materialise or is produced by exogenous factors, his defence centres on the same dimension of output as the Commission's claim is concerned with. In such cases, there is no need for balancing opposing welfare effects. It must first be established whether there is a genuine risk of negative effects.[74] Such a defence is therefore not affirmative in nature and should be addressed by the Commission in the analysis under Art 81(1) EC. Art 81(3) EC comes into play if the defendant points to a beneficial effect produced in another dimension of output. Where, for example, exclusivity clauses are included in distribution agreements to enable improvements in quality or joint ventures are formed to speed up innovation, a restraint may simultaneously produce effects in different dimensions of output. Exclusivity or co-operation could both reduce the

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expressly stated, however, that this ancillary restraints test may not be used to evaluate pro-competitive effects in the investigation under Art 81(1) EC (supra, footnote 4, at paras. 107-108).

[74] The case of *Bass* (supra, footnote 7) can be used as an example. As we have seen, this case involved exclusive purchasing and non-compete obligations imposed on tenants of outlets owned by Bass. The Commission feared that the hold that Bass thus acquired over its pub operators allowed it to charge them elevated prices for supplies. The Commission interpreted a differential in the prices paid by tied house operators on the one hand and unbound operators on the other, as an indication of the exercise of such power. Bass countered that this price differential had nothing to do with the restrictive clauses in its distribution contracts. It argued that the surcharge was caused by extra services provided to tied house operators. By denying the causality behind the price differential, Bass focused its defence on the same dimension of output as the Commission's allegations were concerned with. The essential question in this case was therefore not which of two opposing forces was stronger, but rather which of two mutually exclusive effects actually occurred. This has nothing to do with balancing.

It should be noted, also, that it is by no means the case that the Commission's theory of harm as developed under Art 81(1) EC will necessarily centre on price effects. Take, for example, the (Art 82 EC) case of *Microsoft* (decision of 21 April 2004, published on the Commission's website). The Commission took action against (1) a refusal by Microsoft to supply information to a competitor in the server market about how to make its server software compatible with the Windows operating system for personal computers (see the discussion in Chapter 4, Section 4.3.1), and (2) the tying of the Windows Media Player to the Windows operating system (see the discussion below in the text accompanying footnotes 93-99). In both cases the Commission's objection ultimately was that Microsoft's behaviour reduced the variety of choice available to consumers. Had this case been argued under Art 81 EC, the empirical approach advocated here would require that any defence formulated by Microsoft relating to a different dimension of output than consumer choice – for example that the bundle allowed for cost savings – would have had to be dealt with under the scope of Art 81(3) EC.

volume of output and improve quality, choice, or innovation.[75] The role of Art 81(3) EC will be to allow defendants to show the existence of such efficiencies and to prove that they outweigh the restrictive effect found in the analysis under Art 81(1) EC. Therefore, imposing a consumer harm requirement does narrow the scope of application of Art 81(3) EC. But, it cannot reasonably be argued that there is a risk of turning this provision into a dead letter, particularly since this narrowing will be accompanied by a commensurate reduction in the scope of Art 81(1) EC. And in this regard it should be remembered that in *Métropole* the CFI said more on the investigation under Art 81(1) EC than the fact that it offers no scope for weighing of pro-competitive effects. It also pointed to a developing trend in the case law to require more than a mere restriction of competition to be shown in order to let the burden shift to the defendant. Arguably, the proposal formulated here fits in well with this trend.

There are several other reasons to expect that, in the current time-frame, the CFI might be receptive of an argument that the Commission should make more effort to show at least a genuine potential for harm. First of all, the Commission's decision in the case of *TPS*[76] (that led up to the judgment in *Métropole*)[77] was adopted at a moment when the modernisation was only just underway. The burdensome notification system was still in place and, crucially, the Commission's notice on the application of Art 81(3) EC and its guidelines on horizontal cooperation had not yet been published. The notice, in particular, contains explicit statements on the objective of Art 81 EC.[78] In the Commission's view, this provision serves to

[75] Suppose that in the case of *Bass* (supra, footnote 7) the non-affirmative defence discussed in footnote 73 would have failed (for example because market analysis would have revealed inter brand competition to be weakened in the UK beer market and quantitative analysis would have shown the price differential to be larger than could be explained by pointing at the extra services provided to tied house operators). In that case, Bass' options would not necessarily have been exhausted. It could have tried to argue that by securing a stable demand for the whole range of its products it was able to offer more choice to consumers (for example by developing and launching or reviving specialty beers that would otherwise be too risky to introduce). In the case of *Van den Bergh Foods* (supra, footnote 8), a very similar argument could have been developed. Whether or not in these specific cases such an argument would have been meritorious, is not important. The point is to illustrate that when a more conclusive showing of harm is required – and certain arguments are shifted to the investigation under Art 81(1) EC – there still remains a distinct and well defined category of defences that would have to be addressed in the analysis under Art 81(3) EC.

[76] Supra, footnote 13.

[77] Supra, footnote 4.

[78] Supra, footnote 1.

> 'protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.'[79]

Somewhat further it states that:

> '[for] an agreement to be restrictive by effect, it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable measure of probability.'[80]

Arguably, this provides a legal basis to force the Commission to articulate a plausible theory of harm to consumers in its assessment of restraints under Art 81(1) EC, since there is considerable ECJ and CFI case law establishing that the Commission must respect reasonable expectations based on notices and guidelines.[81] Moreover, developments in the field of merger control indicate that the CFI has become more critical of unsubstantiated economic analysis.[82] In the summer of 2002 it annulled three high-profile Commission decisions. Whilst it emphasised the limited scope of judicial review in each of these judgments, in reality, the CFI went well beyond checking for 'manifest' errors of assessment.

Developments in the field of concentration control

The judgment in the case of *Airtours/First Choice* involved a decision by the Commission to block a hostile-takeover, which would have reduced the number of major holiday tour operators in the UK from four to three.[83] The Commission had based its decision on the finding that the merger would strengthen existing tendencies

[79] Id. at para. 13.
[80] Id. at para. 24. In a footnote the Commission adds the following: '[it] is not sufficient in itself that the agreement restricts the freedom of action of one or more of the parties,' for which it refers to paras. 76 and 77 of the CFI's ruling in Métropole (supra, footnote 4). It then continues to state that: [this] is in line with the fact that the object of Article 81 is to protect competition on the market for the benefit of consumers.
[81] In the case of *Suiker Unie v. Commission* (Cases 40/48 etc., [1975] ECR 1663) the ECJ blocked the imposition of a fine because the notice on commercial agents had created the impression that the conduct in question was not prohibited. See also *Daesang and Sewon v. Commission* (Case T-230/00, [2003] ECR II-2733, at para. 38), *CMA CGM v. Commission* (Case T-213/00, [2003] ECR II-913, at para. 252), *Hercules v. Commission* (Case T-7/89, [1991] ECR II-1711). See also Petit and Rato (2008) and Lehmkuhl (2008).
[82] See Collins (2004), Bailey (2003), and the long list of references provided in Vesterdorf (2005: 4).
[83] *Airtours v. Commission*, Case T-342/99, [2002] ECR II-2585.

in the market to collective dominance. Collective dominance is one of the most complex and problematic areas of European competition policy.[84] In oligopolistic markets, a situation may arise where the market is so transparent that firms are able to effectively coordinate their behaviour without entering into agreements or other forms of communication that could be qualified as a concerted practice under Art 81 EC. This is frequently referred to, also, as tacit collusion.

Whilst the possibility of the adoption of a common policy was one of the focal points in earlier case law on collective dominance,[85] the Commission, in this case, went further by arguing that it was not necessary to show that firms could tacitly collude in order to find that the merger might strengthen tendencies to collective dominance. According to the Commission, it would be sufficient to show that the merger makes it rational for the oligopolists to act, individually, in ways which will substantially reduce competition between them.[86] The CFI rejected this argument and clearly indicated that collective dominance presupposes a common policy and incentives not to depart from it.[87] And, more importantly, for our purposes, the Commission also got it wrong on the facts. The Commission had not succeeded in demonstrating that in the post-merger setting the remaining firms would no longer have sufficient incentives to compete; it had wrongly concluded that the market would be so transparent as to allow these firms to monitor each other's behaviour, it had failed to identify the existence of adequate retaliatory measures with which to punish cheating, and it had underestimated the response of smaller competitors, potential competitors and customers to collusive practices that might undermine their effectiveness. Crucially, the CFI stated that the Commission would have to produce 'convincing evidence' in order to prohibit a merger on the grounds of collective dominance[88] and ultimately came to the following conclusion:

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[84] For discussions on this topic, see e.g. Whish (2003: 518) and O'Donoghue and Padilla (2006: 137).
[85] See *France v. Commission* (also known as *Kali und Salz*), Case C-68/94 and 30/95, [1998] ECR I-1375.
[86] *Airtours/First Choice*, [2000] OJ L93/1, at paras. 54-55, and 151-153.
[87] Supra, footnote 83, at para. 61, where it describes collective dominance as a situation where a merger 'would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive process, without having to enter into an agreement or resort to a concerted practice within the meaning of Art 81 EC […].'
[88] Id., at para. 63.

> '[F]ar from basing its prospective analysis on cogent evidence, [the Commission's decision] is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created. It follows that the Commission prohibited the transaction without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position of the three major tour operators, of such a kind as significantly to impede effective competition in the relevant market.'

The judgments in the cases of *Schneider/Legrand*[89] and *Tetra-Laval/Sidel*[90] suggest that this exacting standard is also applied outside the highly complex context of collective dominance. The former case involved the merger between two producers of electrical equipment with very strong positions on the French market. The CFI determined that the Commission had made errors of assessment of 'undoubted gravity' by failing to consider the different degrees of competition in each of the national markets it identified and, in particular, by wrongly assuming that the parties' dominance in certain product markets in France would translate into dominance on other markets.[91]

The second case involved the merger between the world leader in carton packaging materials (Tetra-Laval) and a French producer of plastic bottles (Sidel), which the Commission had blocked on the ground that it would enable Tetra-Laval to leverage its dominance in the carton packaging market into the plastic packaging market. Given that, according to the Commission, some time would elapse before dominance was thus acquired in the adjacent market, the CFI indicated that the Commission's analysis of the merged-entity's future market position, whilst allowing for a margin of discretion, had to be 'particularly plausible'.[92] Applying this standard, it once again came to the conclusion that the Commission's analysis was based on insufficient evidence and on erroneous economic assessment.

[89] *Schneider/Legrand v. Commission*, Cases T-310/01 and 77/02, [2002] ECR II-4071.
[90] *Tetra Laval vs Commission*, Cases T-5/02 and 80/02, [2002] ECR II-4381.
[91] Supra, footnote 89, at paras. 404-420.
[92] Supra, footnote 90, at para. 162.

Developments in the field of abuse of dominance

By contrast, recent developments in the law on Art 82 EC might be pointed at to argue against the proposal for a more empirical approach focused on harm. We saw, in Chapter 4, that in the cases of *British Airways*[93] and *Microsoft*[94] the ECJ and the CFI expressly rejected the argument that the Commission should have shown that the conduct in question caused harm to consumers. Both Courts indicated that Art 82 EC covers not only practices which may prejudice consumers directly, but also those which which cause prejudice to consumers indirectly by imparing an effective competitive structure.

It should, first of all, be noted that these judgments leave little doubt that the ultimate purpose of Art 82 EC is to protect consumers.[95] What we are dealing with here is a question of the operational objectives of this provision: what constitutes sufficient evidence to show that Art 82 EC has been violated?[96] These rulings should be interpreted to indicate that showing evidence of a significant impairment of market structure may be sufficient to assume that consumers are or will be harmed. It is not altogether straight forward, however, that the same can be said outside the context of Art 82 EC. To appreciate why, let us start by looking at the Commission's tying claim in the *Microsoft* case.[97]

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[93] Judgment of the ECJ in Case C-95/04 P of 15 March 2007.

[94] Judgment of the CFI in Case T-201/04 of 17 September 2006.

[95] This appears to contradict the view expressed by certain authors, such as Fox (2001: 373), Hildebrand (2002), Amato (1997) and Gifford and Kudrle (2003), that in Europe antitrust law – and especially Art 82 EC – is understood to protect market structure and market dynamism – particularly access and freedom to trade of smaller participants – from conduct by (jointly) powerful undertakings and that, consequently, the behaviour that is guarded against includes both exploitation of consumers, and exclusion of competitors and distributors. Another possibility is that the EC is more concerned with dynamic efficiency than the US. However this may be, it should be realised that even if EC antitrust law could be relied on to intervene in business behaviour so as to protect the exclusive interests of competitors, as these authors argue, or if considerations regarding dynamic efficiency make European policymakers more concerned about protecting market structure, this would not affect the validity of the analysis made in the previous chapters of this book, nor the effectiveness of the remedy proposed. It should be well understood that the core of the proposal formulated above is essentially neutral as to the goals pursued in the enforcement of Art 81 EC. The analysis made in the preceding chapters shows that a significant share of the Commission's decisions are not motivated in great detail, particularly on the point of the criterion used to assess the harmfulness of the effects produced by a restraint. And it was argued that legal certainty – and the efficiency of enforcement – can be increased by adjusting the legal standard so as to require more precision from the side of the Commission. Based on the clear wording in the Commission's Notice on the application of Art 81(3) EC (supra, footnote @), it was assumed that consumers are the interest group protected by European antitrust policy. Should this group be larger, this would simply mean that, for example when dealing with exclusionary practices, the Commission would be required to be more specific about the harm sustained by either consumers or competitors.

[96] See the discussion in Chapter 2, Section 2.4 on the distinction between ultimate, intermediate and operational objectives.

[97] Supra, footnote 94.

This part of the Commission's decision centered on Microsoft's Windows Media Player (WMP). Media players are software programmes with which audio and video content can be played back on computers. The Commission objected to the integration of the WMP into the Windows operating system. It argued that, given that Windows is pre-installed on more than 90% of the computers sold all over the world, the bundle of these two products guaranteed WMP ubiquity in the market. Rival producers of media player software were shown not to dispose of an equally efficient alternative means of distribution. The result is that content providers are induced to encode their products primarily in a Microsoft-compatible format and that software developers have incentives to write applications mainly for WMP; the Commission found significant indications for both claims.

Given Microsoft's enormous size on the operating systems market, its record of trying to carry this power over to adjacent markets and the fact that it offered no convincing justification for the bundle in question,[98] it is understandable that the Court thought the Commission's evidence sufficiently probative to support a finding that Art 82 EC had been infringed (and to reject the argument that more conclusive evidence of harm was required).[99] In the context of Art 81 EC, however, there will generally be less room to assume harm solely on the basis of structural analysis. As defendant's market shares decline – and often the firms targeted under Art 81 EC are relatively smaller than those targeted in Art 82 EC proceedings – it will be increasingly doubtful whether a restriction leads to 'negative effects on prices, output, innovation or the variety or quality of goods and services'.

Finally, it could be argued that the CFI's recent ruling in the case of *Glaxo v. Commission* gives some credence to the assertion that the CFI may be convinced to force the Commission to show actual effects on consumers in cases where it intervenes on the basis of a not so obvious claim.[100] As we saw before, this case involved an agreement between Glaxo and wholesalers in Spain that required them to pay higher prices for medicines which they exported than for products resold on the

[98] Microsoft argued that consumers prefer to have a media player pre-installed on their computer. The Commission agreed on this principle, but countered that there was no need for Microsoft to determine that this should be the WMP. Sellers should be left a real choice to install another type of media player.
[99] Moreover, there was evidence in the record that technologically-superior media players could not manage to compete with the WMP and it is not easily seen how the Commission might have proceeded to gather more evidence to substantiate the specific counterfactual at issue in this part of the case.
[100] *Glaxo v. Commission*, judgment of 27 September 2006 in Case T-168/1. See the discussion of this case in Chapter 2, Section 2.4.

Spanish market. The aim was to prevent these resellers from taking advantage of differences in the prices for these same products set by health insurance schemes in other Member States, notably the UK. Glaxo argued that such parallel trading undermined its capacity to innovate. Despite the fact that such an agreement would ordinarily be subjected to the object standard, the Court determined that a more broadly construed investigation was called for. In particular, it required that the effect of the agreement on consumers be taken into account. The reason the court adopted this stance is that, in the context of the heavily regulated market for pharmaceuticals, it was not obvious that restrictions on parallel imports would have the effects that could otherwise be presumed.[101]

7.5 Conclusion

In this final chapter we have studied how firms can be sent a clearer and more consistent signal concerning the dividing line between permissible and impermissible restrictions of competition. The way to achieve this, it was argued, is for the Courts – and in their wake, defendants – to insist that the Commission presents an intelligible theory of the harm that it expects from a restraint and as much empirical evidence as needed to render this claim sufficiently plausible before the burden can shift. This will improve the available guidance on the crucial issues of antitrust harm and balancing of positive and negative effects. In addition, it will force the Commission to concentrate enforcement efforts on those cases of which we are more certain that harm has actually occurred and, thus, serves to ensure potential offenders that the less obvious it is to them that the contract they intend to sign will harm consumers, the less likely it is that it will be challenged. There is no risk that Art 81(3) EC will be emasculated as a consequence – the principle argument advanced in the leading case on the division of the burden of proof in Art 81 EC, *Métropole*.[102] As the place for assessing arguments to the effect that the agreement produces countervailing benefits in another dimension of output than the Commission's allegations relate to, this provision will continue to play a vital role in the analysis of restraints.

[101] Id., at paras. 110-134. For commentary on this ruling, see Korah (2007) and Junod (2007).
[102] Supra, footnote 4.

CHAPTER 8

Conclusion

8.1 Summary

Before concluding this work by discussing some of its implications for future research, let us briefly summarise the above.

The objective

This thesis set out to evaluate the level of legal certainty in contemporary effects-based analysis under Art 81 EC and to examine whether enforcement under this standard can be made more efficient. Two reasons were advanced for inquiring about legal certainty in this field. Both relate to the recent modernisation of the Commission's substantive policies. By relying more on modern economics in the analysis restraints, these reforms were meant to establish a more permissive regime that implicates fewer agreements than the preceding formalistic approach. The threats to legal certainty stem from the way this programme was implemented. Firstly, it was argued that although this new approach is carefully described in a number of guidelines, day-to-day practice in this field continues to show considerable traits of the old expansionist approach. And secondly, it was pointed out that although these reforms were clearly triggered by the realisation that fewer restraints affect welfare than previously thought, they did not result in material changes to the Commission's burden of proof. This means that the breadth of its scope for intervention was largely unaffected by the reforms and raises questions about legal certainty, that is, about firms' ability to predict whether their agreement might be challenged and found in violation.

On the method

Under uncertainty about the precise location of the legal standard, firms may end up signing socially harmful or unnecessarily cautious agreements (under and over-compliance, resp.). Given that there are inherent difficulties in unearthing direct empirical evidence of such inefficiencies, this thesis has relied on a rigorous analytical framework to study legal certainty in the effects-based field. This framework describes: (1) the variables that influence the calibration of the legal standard and the division of the burden of proof; and (2) the effect of this calibration firms in the market. First, this framework was used to examine the results of a comparison between the way EU and US antitrust organise the investigation of the effects of restrictive agreements. Next, it was relied on to examine the effects of the reform process discussed above on firms' ability to distinguish permissible for impermissible restrictions.

Findings on legal certainty

Particularly firms who seek to position their intended agreement in the area opened up by the process of substantive modernisation, can be expected to encounter difficulties in predicting how their case would be evaluated. There are three reasons that support this view. First, not much exists to guide firms as to the likely appraisal of such contracts. The bulk of the decisions taken after the move away from formalism (32 in total) is made up of clearance decisions that are not nearly as thoroughly reasoned on matters of fact and economic evaluations as infringement decisions are. Such decisions, however, are scarce – the current total stands at four. The Commission's guidelines cannot be expected to fill this gap. They provide an inventory of arguments that may be advanced in antitrust proceedings, but do not give an indication of the probability that one will prevail by relying on them, as case law and decision practice do. Second, and crucial, a large number of clearance decisions show that the Commission continues to rely on expansive notions of restrictiveness. Firms are likely to take notice of this, since many clearances are conditional and are, thus, implicit prohibitions. Firms can therefore be expected to perceive a non-negligible risk of intervention over an extended range of more and less restrictive practices. Thirdly, these difficulties are exacerbated by the introduction of new enforcement procedures, which require firms to assess the legality of their agreement independently in the face

of possible intervention and penalties, rather than in consultation with the Commission. There are indications that these uncertainties do indeed lead firms to adopt inefficient behaviour. These can be found in decisions concerning actually committed infringements (instances of under-deterrence) and, as far as over-compliance is concerned, in the observations by law firms on the behaviour of their clients (submitted to the Commission in the context of its public consultation on the performance of Regulation 1/2003).[1] Still, even if uncertainty as regards important questions of law can be said to be considerable, it must be acknowledged that we cannot ascertain, with the approach adopted in this thesis, how serious the inefficiencies caused by uncertainty are, or whether either of these two effects is more prevalent.

Findings on improving accuracy

Next, on the basis of the argument that either type of inefficiency is in principle best avoided, ways to improve legal certainty were examined. Specifically, the effectiveness of (1) requiring the Commission to articulate clearly what harm to consumers it expects from a restraint and (2) to present empirical evidence in support of this claim was examined. On the plus-side, it was argued that this should make more information available to firms about what constitutes antitrust harm, how it is identified in practice and how harm is weighed against possible efficiencies. This will work to reduce the expected sanction costs of engaging in permissible behaviour *vis-à-vis* those of engaging in impermissible behaviour. As a result, firms will have more incentives to sign desirable contracts. The effect on the bargaining power between parties in litigation should also be taken into account. With less incentive for defendants to offer commitments, the Commission will be forced to adopt more elaborately motivated infringement decisions.

Raising the Commission's burden of proof will, however, also affect its capacity to bring cases. The question is whether the increase in the Commission's enforcement costs does not weigh down its enforcement capacity to such an extent that the effect of increasing the probability that bad agreements will be held illegal is cancelled out. In the overall assessment of the impact of improving accuracy this effect might wholly or partially off-set the benefits of eliminating over-compliance. From an *ex ante*

[1] [2003] OJ L1/1. The observations are published on the Commission's website.

perspective, it is impossible to give a definite answer to this question. What can be said, however, for the purposes of this impact assessment, is that this risk appears to be smaller in the effects-based context than abstract theoretical analysis might imply. A legal standard squarely focused on harm will make investigation costs dependent on the plausibility of the Commission's claim. The Commission will thus be compelled to concentrate resources on more obviously harmful restraints. If the per case investigation costs would rise, therefore, this would primarily affect enforcement on the less restrictive side of the spectrum. In as much as the current approach is characterised by over-inclusiveness, this should rather be seen as an advantage. Moreover, if a serious drop in the capacity to enforce is observed, the Commission may rely on its thusfar under-utilised fining powers (under-utilised in this field) to restore deterrence. An additional way to mitigate the effect on investigation costs, it was suggested, would be to allow the Commission to reject complaints by non-consumers without having to state reasons.

Compatibility with European antitrust

Finally, a number of legal arguments that could be raised against this proposal were examined and dismissed. Most importantly, it was argued that adoption of a consumer harm test does not transplant alien concepts into European antitrust law. It is no more than putting into practice what the Commission itself sets out in its guidelines. There is no risk, that Art 81(3) EC will be emasculated as a consequence – the principle argument advanced in the leading case on the division of the burden of proof in Art 81 EC, *Métropole*.[2] As the place for assessing arguments to the effect that the agreement produces countervailing benefits in another dimension of output than the Commission's allegations relate to, this provision will continue to play a vital role in the analysis of restraints. It was argued, therefore, that this ruling should not stand in the way of efforts to improve legal certainty.

8.2 Broader implications and directions for future research

This study has implications that reach beyond Art 81 EC. In particular, it holds an important message for the Commission's review of Art 82 EC. In addition, it raises questions for future research.

[2] *Métropole v. Commission*, [2001] ECR II-2459.

Art 82 EC review

In December 2005 the Commission issued a staff paper on exclusionary abuses of dominance that is meant to stimulate discussion and prepare for a review of the application of Art 82 EC,[3] which led to the adoption of a set of guidelines in February 2009.[4] One of the major developments that these guidelines introduce lies in the fact that the Commission signals that it is more open to consider the pro-competitive effects of exclusionary practices engaged in by dominant firms.[5] At various instances, also, the discussion paper makes clear that, in the Commission's view, Art 82 EC serves to protect the interests of consumers.[6] Exclusion must (ultimately) lead to exploitative consequences, therefore, for there to be scope for intervention.

This thesis has examined the way in which the reforms in the field of Art 81 EC were put into practice by the Commission. Given that the reforms in the field of Art 82 EC have only just been introduced at the time of writing, it is too early to make a similar analysis in this context. Our study does, however, raise some concerns about the way in which this reform will be implemented; notably, that elements of the analytical framework in Art 81 EC that were criticised in this thesis may also find their way into Art 82 EC analysis.

Despite the emphasis that is put on consumer harm throughout these guidelines, the discussion of the evidence by which foreclosure must be shown appears to suggest that the effect on the competitive structure of the market (that is, on competition and competitors) will constitute the primary benchmark in the investigation. At the same time, the language used in the part of the guidelines dealing with objective justifications and efficiencies is very similar to the language used in the Commission's Notice on the application of Art 81(3) EC.[7]

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[3] Published on the Commission's website.
[4] Commission Notice containing guidance on the Commission's enforcement priorities in applying Art 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, published on the Commission's website.
[5] Supra, footnote 4, at para. 28 a.f.
[6] See, for example, the introduction to the guidelines and the section describing the purpose of the guidelines.
[7] [2004] OJ C 101/97.

We saw in our discussion of the case of *Master Card*[8] and *Morgan Stanley / Visa*[9] that the standard that is advanced in these guidelines for the assessment of efficiency defences may be very exacting in practice. It is open for question, therefore, how much real room for hearing efficiency defences is created by the new guidelines. Moreover, there is a risk that the Commission may copy its practice under Art 81 EC and frame what were identified to be non-affirmative defences (relating to the same dimension of output that is implicated by the Commission's theory of harm) above as falling under the defendant's burden. At the level of litigation, the result may be that plausible exculpations are insufficiently unexamined. This, at least, was the fate of both Master Card's defence based on network effects and Visa's contention that a recent drop in merchant's fees testified of effective competition.[10] And the effects on firms in the market (potential offenders) should also be considered. The uncertainty resulting from decisions that remain vague about the precise criteria applied in assessing harm and countervailing benefits may lead dominant undertakings to sign inefficient contracts. Those firms facing a strictly binary choice to exclude a competitor or not, like Visa did in the case just discussed, may end up being insufficiently deterred, whereas other undertakings, particularly those who make significant irrecoverable investments, may take unnecessary precautions.

Policy innovation, Remia, and the French model

The appropriateness of the institutional framework supporting European antitrust enforcement has frequently been called into question (e.g. Lyons, 2004; and Wilks and McGowan, 1996). The European system, based on the French model of administrative law, gives the Commission two complementary roles in enforcement. Not only does it act as prosecutor, it also takes binding decisions on the cases it challenges. At the same time, the European Courts leave the Commission considerable freedom in making its assessments. In the foundational years of European antitrust, the ECJ was actively involved in developing policy. Over time, the Court redefined its role and took a step back, creating more room for the Commission to influence policy. In particular, in the case of *Remia*, the Court

[8] Decision of 19 December 2007, published on the Commission's website. See the discussions of this case in Chapter 4, Section 4.3.2, and Chapter 7, Section 7.2.
[9] Decision of 3 October 2007, published on the Commission's website. See the discussion of this case in Chapter 7, Section 7.2.
[10] See the discussion in Chapter 7, Section 7.2.

indicated that it would not substitute the Commission's expert assessment of complex economic questions with its own better judgment.[11] Since its institution in 1989, the CFI has subjected the Commission's factual claims to more thorough scrutiny than the ECJ did before it. But it has avoided making principled statements that go beyond the lines drawn in ECJ case law, as it could have done in *Métropole*, for instance.[12] In the current perspective, the initiative on developing the economic concepts that underlie European antitrust policy is clearly and increasingly with the Commission.[13]

The current division of labour creates the risk that the Commission's 'private' interests as an – over-burdened – enforcer influence the choices it makes as policymaker. A primary example is provided by the fact that – although the reforms of the Commission's substantive policies were meant to establish a more permissive regime – they did not result in material changes to its burden of proof. This a question concerning the merits of this institutional set up that appears not to have been addressed in the literature and therefore provides ground for future research. It would be particularly interesting, in this regard, to make an international comparison of the link between institutional architecture and receptiveness to advances in economics. US antitrust experience, for instance, shows that courts can play an active and leading role in integrating new insights into law.

8.3 Concluding remarks

The prohibition of agreements that restrict competition in Art 81 EC has implications for the commercial contracts of many thousands of firms active on the Common Market. When looked at from a purely legal perspective, the regulation of potentially beneficial agreements that restrict competition comes across as a well developed and relatively stable field of law. The economic theories used to interpret the welfare effects of such agreements may be subject to change, but the main legal principles that govern this investigation still rest on the solid foundation laid by European Court of Justice in its earliest antitrust case law. Over time these principles have gradually been further developed, but at present the field sees little thorough regulatory innovation and remains at the periphery of the academic debate on antitrust.

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[11] *Remia v. Commission*, [1987] ECR 2545, at para. 34.
[12] Supra, footnote 1. See the discussion of this case in Chapter 7, Section 7.4.
[13] Consider for example the reform and review programs that the Commission has launched in all major fields of antitrust policy over the past decade. In this regard, see Chapter 1, footnote 1.

This thesis has examined how well existing law on restrictive agreements works to inform firms active on the Common market about which forms of potentially beneficial agreements are prescribed. When looked at through this lens, the field is revealed to be in need of serious repairs, as consistent guidance is missing on a number of important points. In considerable part, this is related to the Commission's scope of intervention in business behaviour, which, for historic reasons, extends beyond what modern economic insights tell us is necessary to protect society from harmful restrictions of competition. The resulting strength of the Commission's bargaining position *vis-à-vis* firms allows it to make savings on the motivation of its decisions, which generates uncertainty. For this reason, this thesis advocates that an adjustment is made to a crucial aspect of Art 81 EC: the division of the burden of proof. In so doing, an important second point was implicitly made: the legal principles that govern the investigation of restrictive agreements cannot be seen in isolation from advances made in economic theory.

APPENDIX A

EU Commission Decisions

The investigation of European effects-based analysis under Art 81 EC focused on leading ECJ and CFI rulings, as well as on the Commission's decision practice. The reasons for devoting particular attention to the Commission's practice were discussed extensively in Chapters 2 (Section 2.4) and 4 (Section 4.2).[1] This appendix provides a complete list of the Commission's decisions that were studied and describes by what method they were selected.

The total number of Commission decisions in competition cases is very large and spans many different fields.[2] This thesis is concerned with only one of these fields and, consequently, relies on a small subset of decisions. The section on antitrust cases of the Commission's website provided the basis or the selection of decisions.[3] Three criteria were used to select the relevant cases from amongst this list of public documents. The first relates to the treaty provision involved. Only cases involving an investigation under Art 81 EC were selected (that is, cases dealt with exclusively under Art 82 EC or other fields of competition law were left out).

[1] With a view to the discussion of the selection-criteria it is useful to re-introduce the most important reasons that were advanced in those chapters. First, the Commission continues to rely on more inclusive notions of restrictiveness than prescribed by the Courts. By focusing exclusively on case law we would therefore risk missing important aspects of what firms experience to be the limits of the law. Second, there is a group of decisions – informative about the dividing line between permissible and impermissible restrictions of competition – that are less likely ever to reach the stage of review. Conditional clearances (exemptions with conditions and commitment decisions) are less likely to be appealed, since frequently they are the result of negotiations between the Commission and the defendants. In general, however, they do modify the agreement as originally envisaged by the defendants and, thus, contain important information to guide firms contemplating the conclusion of a similar contract.

[2] Carree et al. (2008), for example, report a total number of 587 decisions for the period 1964-2001. This number excludes decisions in the field of state aid and concentration control, but in addition to Art 81 EC cases, it also includes Art 82 EC cases.

[3] Http://ec.europa.eu/comm/competition/antitrust/cases/index.html

The second criterion relates to the legal standard that is relied upon in the decision. This study is concerned with decisions taken under the effects-based standard only (that is, cases decided by applying the object-based standard were left out). In this regard, it should be noted that on the Commission's website, cases are not distinguished in terms of the legal standard that is applied in the investigation of the restriction at issue. And even in decisions themselves, the choice is not always explicitly made. Clearance decisions – the bulk of the Commission's practice – can, nonetheless, safely be classified as involving effects-based analysis, since the scope for clearing *per se* restrictions can reasonably be assumed to be very limited.[4] With respect to infringement decisions, the issues are more complicated. In particular, there are many examples in the Commission's practice of infringement decisions that employ a combination of object-based and effects-based reasoning.[5] Generally, it is possible to identify the dominant method of analysis. Discussion of a number of border-line cases helps to clarify how this rather qualitative assessment was made.

The cases of *Belgian Architects*,[6] *GlaxoWellcome*,[7] and *JCB*[8] are examples of cases that have been excluded. In *Belgian Architects* – where a clear *per se* violation is at stake (minimum fee fixing) – the investigation of the effects produced by the agreement remains very superficial.[9] The decisions in *GlaxoWellcome* and *JCB* both involve more extensive examination of effects.[10] The charge in these cases, however, was the restriction of parallel imports and the analysis of effects was focused

[4] Commitment decisions are generally motivated in abbreviated fashion, frequently to the extent that it cannot be ascertained that the analysis was focused on effects. As suggested, this may nonetheless be assumed, since the scope for clearing *per se* restrictions can be considered to be very limited. Negative clearance decisions – where it is found that the agreement does not come under the scope of Art 81(1) EC – have been excluded from the study. Most of these cases do apply effects-based analysis. But they are frequently even less elaborately motivated than exemption decisions and do not reach the crucial stage of Art 81(3) EC analysis.

[5] Althoug seemingly in contradiction with the rationale for having two different methods of analysis (see Chapter 2, Section 2.4), in the context of the notification regime this approach is understandable. Serious concerns raised by notified agreements would generally be negotiated away. Potentially efficient agreements that were met by a finding of an infringement were generally those that were not notified, or had been implemented differently than was outlined in the notification. This lack of good faith seems often to have provided a reason for object-based argumentation, which, also, allowed the Commission to scale-back on the depth of its more fact-intensive, and thus costly, effects-based inquiry. For these reasons it is often debatable whether a specific infringement decision displays significant effects-based analysis.

[6] Decision of 24 June 2004, published on the Commission's website.

[7] [2001] OJ 302/1.

[8] [2002] OJ 69/1.

[9] Supra, footnote 7. Other examples of cases that have been excluded for the same reason are *Souris Topps* (decision of 26 May 2004, published on the Commission's website), *Yamaha* (decision of 16 July 2003, published on the Commission's website), and *SunAir / SAS* ([2001] OJ L265/15).

[10] Supra, footnotes 8 and 9.

accordingly. This makes the analysis of the effects produced by these agreements considerably different from the assessment of the impact produced by generic restrictions of competition, which has been the focus of this work. *EATA*[11] and *Morgan Stanley / Visa*[12] are examples of cases involving obvious restrictions that have been included in the list below because the decision clearly rests on the effects-based component of the assessment.

Finally, timing played an important role in the selection. The objective in this work was to study decisions that reflect the Commission's modernised method of assessing the effects produced by restraints (up to the year 2008). As we saw in Chapter 5, substantive modernisation got underway in the second half of the 1990s. Notably, the block exemption regulations for vertical restraints and horizontal co-operation were adopted in 1999 and 2000.[13] To be able to work with a somewhat larger number of cases, decisions involving vertical restraints dating from the year 1998 have also been included (one year after the publication of the green paper on vertical restraints)[14] and with regard to horizontal co-operation agreements, decisions from 1999 onwards have been looked at (when the process of review was underway for two years already[15]).[16]

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[11] [1999] OJ L193/23.
[12] Decision of 3 October 2007, published on the Commission's website.
[13] See Regulation 2790/99 on vertical restraints, (supra, footnote 181); Regulation 2658/2000, on the application of Article 81(3) of the Treaty to categories of specialisation agreements, [2001] OJ L 304/3; and Regulation 2659/2000, on the application of Article 81(3) of the Treaty to categories of research and development agreements, [2001] OJ L 304/7.
[14] [1997] CMLR 519.
[15] See 28th Report on Competition Policy (1998), at points 54 and 55.
[16] With regard to the time period chosen, some might want to argue that the real change in the Commission's substantive approach occurred only in the year 2004, when it issued its Notice on the application of Art 81(3) EC ([2004] OJ C101/97) and when the entry into force of Regulation 1/2003 ([2003] OJ L1/1) finally freed it from the burdens imposed by the notification system. It is certainly recognised that the year 2004 constitutes a milestone in the history of European antitrust (in this regard, see also McGowan, 2005). This is reflected in this thesis by the ample discussion (in Chapters 2, 5, and 7) of the said Notice and by the emphasis placed on the discussion of post-2003 decision practice (notably, of the decisions in the cases of Morgan Stanley / Visa (decision of 3 October 2007, published on the Commission's website) and *Master Card* (decision of 19 December 2007, published on the Commission's website)). It is submitted, however, that the transformation to a true effects-based regime is clearly not an overnight event. Rather, it is a gradual process (that is still on-going). The issuance of the Vertical Guidelines ([2000] OJ C291/1) in the year 2000 and of the Horizontal Guidelines ([2001] OJ C3/2) the year after, were significant earlier steps in this process. Importantly, these guidelines clearly had an effect on practice prior to the year 2004. In this regard, see, for instance, the references made to these guidelines in the cases of Visa MIF (OJ [2002] L318/17, at para. 56); O2/T-Mobile Germany (OJ [2004] L75/32, at para. 116), UEFA ([2003] OJ L291/25, at footnote 59); and throughout the decision of Telenor/Canal+ (decision of 29 December 2003, published on the Commission's website). Note, also, that the Commission had effectively stopped processing notifications before the entry into force of Regulation 1/ 2003; in this regard, see Whish (2003: 164). Finally, focusing exclusively on post 2003 decision practice would have considerably narrowed the

The list presented below classifies the cases selected following this procedure according to (1) the type of decision involved, (2) whether clearance is subject to (substantial behavioural) conditions, (3) whether the decision indicates that at some stage of the proceedings modifications were made to the agreement in order to assuage the Commission's concerns, and (4) how the proceedings were initiated.[17]

No	Name	Citation	Decision type	Conditions	Modified	Initiated by
1	vdBerghFoods	OJ [1998] L246/1	Infringement	X	x	Competitor complaint
2	P&O/StenaLine	OJ [1999] L163/61	Exemption	Yes	No	Competitor complaint
3	Whitbread/Bass/Scottish	OJ [1999] L88/26	Exemption	No	No	x
4	TPS	OJ [1999] L90/6	Exemption	Yes	Yes	Notified
5	IMA (EPI)	OJ [1999] L106/14	Exemption	No	Yes	x
6	P&I Clubs	OJ [1999] L125/12	Exemption	Yes	Yes	Complaint
7	Cegetel	OJ [1999] L218/14	Exemption	No	Yes	Notified
8	GEAE/P&W	OJ [2000] L58/16	Exemption	Substantial	Yes	Competitor complaint
9	Reims II	OJ [1999] L275/17	Exemption	Substantial	Yes	Complaint
10	BSkyB	OJ [1999] L312/1	Exemption	Substantial	Yes	Notified
11	EATA	OJ [1999] L193/23	Infringement	x	x	x
12	Ceced	OJ [2000] L187/47	Exemption	No	No	Notified
13	Eurovision	OJ [2000] L151/18	Exemption	Substantial	No	Notified
14	EcoEmballages	OJ [2001] L233/37	Exemption	No	No	Notified
15	Lufthansa/AustrianAirl	OJ [2002] L242/25	Exemption	Substantial	No	Notified
16	Visa MIF	OJ [2002] L318/17	Exemption	Substantial	Yes	Complaint
17	IFPI Simulcasting	OJ [2003] L107/58	Exemption	Yes	Yes	Notified
18	Lufthansa/SAS/United	OJ [2002] C264/5	Exemption	Substantial	Yes	x
19	RevisedTaca	OJ [2003] L26/53	Exemption	No	Yes	Complaint
20	O2/T-Mobile UK	OJ [2003] L200/59	Exemption	No	Yes	Notified
21	O2/T-Mobile Germany	OJ [2004] L75/32	Exemption	No	Yes	x
22	UEFA	OJ [2003] L291/25	Exemption	Substantial	Yes	Notified
23	Reims II renewal	OJ [2004] L56/76	Exemption	Substantial	Yes	x
24	Telenor/Canal+	COMP38.287 (29-12-2003)	Exemption	No	Yes	Notified
25	Argev / ARA	OJ [2002] C250/3	Exemption	Substantial	Yes	Competitor complaint
26	Alitalia/AirFrance	COMP38.284 (7-4-2004)	Exemption	Substantial	Yes	Notified
27	DFB	COMP37.214 (19-1-2005)	Commitment	Substantial	x	Notified
28	Premier League	COMP38.173 (22-3-2006)	Commitment	Substantial	x	Commission
29	Repsol	COMP38.348 (14-4-2006)	Commitment	Substantial	x	Notified
30	Cannes	COMP38.681 (4-10-2006)	Commitment	Substantial	x	Complaint
31	Morgan Stanley / Visa	COMP37.860 (3-10-2007)	Infringement	X	x	Competitor complaint
32	Master Card	COMP34.579 (19-12-2007)	Infringement	X	x	Complaint

scope of this work by reducing the number of relevant decision to no more than 6, whereas the current set-up allows for the examination of 32 decisions.

[17] As regards the way proceedings were initiated, not that the entry 'complaint' does not necessarily indicate that the complaint was filed by a non-competitor; in a number of cases the decision is not clear on this point.

APPENDIX B

US District Court Cases

The study of US antitrust law made in preparation for the analysis in Chapters 4 and 7 focused on leading US Supreme Court and Federal Circuit Court of Appeals cases regarding *rule of reason* analysis under Sherman Act §1 and on the literature referred to in those chapters.[1] For reasons discussed in Chapters 2 (Section 2.4) and 4 (Section 4.2), it was considered appropriate also to examine a broader sample of recent District Court cases involving the same subject matter.[2]

The District Court cases used in this study were selected by means of a *West Law* search, using "antitrust" and "rule of reason" as terms for searching the database of federal cases. This produced many hundreds of results. Although all of these cases included the terms 'antitrust' and 'rule of reason', only a fraction involved Sherman Act §1 cases assessed under the *rule of reason*. Case-by-case examination led to the selection of the 114 cases listed below. Cases where the court does not clearly determine that the antitrust claims must be assessed under the *rule of reason* have been excluded. Multi-claim and multi-count cases where the §1 allegations to be assessed under the *rule of reason* are of minor importance to the case as a whole and are unsuccessful, have been left out as well. The cases span the period from 1990 to

[1] 15 U.S.C.A. §1.

[2] Just as with European antitrust, to the extent that higher court decisions set out general principles, their application to individual cases may leave considerable room for appreciation. This means that in a firm's assessment of the legality of an intended agreement lower ranking decisions applying these principles may be of considerable importance. More importantly, by including the District Court level – where the bulk of litigation may be assumed to occur – we can form an impression of the impact of higher court precedents on practice. Thus, it becomes possible, for example, to appreciate the importance in day-to-day practice of the Supreme Court's suggestion in the case of *Indiana Dentist Federation* (476 US 447 (1986), at 460) that the existence of compelling direct evidence may remove the need to engage in market definition.

2001.[3] The table below lists all 114 cases and provides information on the following details.

Under the heading of 'Phase', it is indicated whether the decision was adopted in the pre-trial phase of proceedings (in response to a motion to dismiss or a motion for summary judgment) or after trial. In cases where the defendant's pre-trial motion is denied (because the plaintiff has stated a valid claim and there are genuine issues of material fact) the outcome of the case as a whole remains undecided. With respect to other cases, it is indicated whether the court finds for the plaintiff or the defendant. Note that the entries in this column only relate to the §1 claims assessed under the *rule of reason* and not to the case as a whole. The column 'Stage of analysis' relates to the three stages in *rule of reason* analysis: (1) the plaintiff's burden to show *prima facie* evidence of a restriction, (2) the defendant's burden to show efficiencies, and (3) the plaintiff's burden to show that the restrictions outweigh the benefits. This column indicates the final stage that was reached in the investigation of a case. Where, for instance, in case no. 25 (*US v. Brown University*) it is indicated 'efficiencies', this means that the plaintiff prevails because the defendant has failed to develop a plausible efficiency defence. In a minority of cases district courts discuss evident beneficial effects produced by the alleged restriction to show that the plaintiff has not succeeded in showing sufficient *prima facie* evidence; these are marked 'PF efficiencies'.

Nr	Name	Citation	Phase	Finding for	Standard	Stage of analysis
1	Illinois v Panhandle	730 F.Sup.. 826 (1990)	Trial	Plaintiff	Rule of reason	Balancing
2	TownSound v Chrysler	743 F.Supp. 353 (1990)	Pre-trial	Defendant	Rule of reason	Prima facie case
3	Eureka v PBA	746 F.Supp. 915 (1990)	Pre-trial	Plaintiff	Rule of reason	Balancing
4	Chicago v NBA	754 F.Supp. 1336 (1991)	Trial	Plaintiff	Quick Look	Balancing
5	Camellia v Tribune	762 F.Supp. 290 (1991)	Pre-trial	Defendant	Rule of reason	Prima facie case
6	Weight-Rite v USGolf	759 F.Supp. 638 (1991)	Pre-trial	Defendant	Rule of reason	Prima facie case
7	Anesthesia v Metz	766 F.Supp. 1104 (1991)	Pre-trial	Defendant	Rule of reason	Prima facie case
8	Cranfill v ScottFetzer	773 F.Supp. 943 (1991)	Pre-trial	Defendant	Rule of reason	Prima facie case
9	MylanLab v Akzo	770 F.Supp. 1053 (1991)	Pre-trial	Defendant	Rule of reason	Prima facie case
10	NCTA v BMI	772 F.Supp. 614 (1991)	Trial	Defendant	Rule of reason	Balancing
11	Keystone v Westrock	792 F.Supp. 1552 (1991)	Pre-trial	Defendant	Rule of reason	Prima facie case
12	Carleton v VermontDairy	782 F.Supp. 926 (1991)	Pre-trial	Undecided	Rule of reason	Prima facie case

[3] The original set up was to include decisions taken between 1990 and 2005. Because each case has to be analysed in detail to determine whether it involves a §1 *rule of reason* claim it could not easily be foreseen how many results the search would produce. Given that (1) the 1990-2001 sample includes 3 times more cases than the European sample, (2) the decisions thus selected clearly reflect the major precedents discussed in Chapters 4 and 7, and (3) that the sifting process proved very time-consuming, the current selection was judged sufficiently large for the purposes of this study.

Nr	Name	Citation	Phase	Finding for	Standard	Stage of analysis
13	Sessions v Joor	786 F.Supp. 1518 (1991)	Trial	Plaintiff	Quick Look	Efficiencies
14	Miller v IndianaHospital	814 F.Supp. 1254 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
15	Futurevision v Multivision	789 F.Supp. 760 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
16	FiveSmiths v NFLPA	788 F.Supp. 1042 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
17	Jackson v Radcliffe	795 F.Supp. 197 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
18	GreaterRockford v Shell	790 F.Supp. 804 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
19	CapitalImaging v Mohaw	791 F.Supp. 956 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
20	BreauxBros v Teche	792 F.Supp. 1436 (1992)	Trial	Plaintiff	Rule of reason	Efficiencies
21	Joplin v Allen	795 F.Supp. 349 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
22	GreeneCounty v Behm	797 F.Supp. 1276 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
23	Southern v Matsushita	806 F.Supp. 950 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
24	Sullivan v Tagliabue	795 F.Supp. 56 (1992)	Pre-trial	Undecided	Rule of reason	Prima facie case
25	US v BrownUniversity	805 F.Supp. 288 (1992)	Trial	Plaintiff	Quick Look	Efficiencies
26	Smalley v Emerson	808 F.Supp. 1503 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
27	Flegel v ChristianHospita	804 F.Supp. 1165 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
28	NewYork v Anheuser	811 F.Supp. 848 (1993)	Trial	Plaintiff	Rule of reason	Balancing
29	Lifeline v ConnecticutIns	821 F.Supp. 1201 (1993)	Pre-trial	Defendant	Rule of reason	Prima facie case
30	SCFCVisa	819 F.Supp. 956 (1993)	Trial	Plaintiff	Rule of reason	Balancing
31	Balaklaw v Lovell	822 F.Supp. 892 (1993)	Pre-trial	Defendant	Rule of reason	Prima facie case
32	Storer v Montgomery	826 F.Supp. 1338 (1993)	Pre-trial	Undecided	Rule of reason	Prima facie case
33	Lee v LifeInsurance	829 F.Supp. 529 (1993)	Pre-trial	Defendant	Rule of reason	Prima facie case
34	Rosen v Hyundai	829 F.Supp. 41 (1993)	Pre-trial	Defendant	Rule of reason	Prima facie case
35	Clorox v Winthorp	836 F.Supp. 983 (1993)	Pre-trial	Undecided	Rule of reason	Prima facie case
36	Cogan v Harford	843 F.Supp. 1013 (1994)	Pre-trial	Defendant	Rule of reason	Prima facie case
37	Servicetrends v Siemens	870 F.Supp. 1042 (1994)	Pre-trial	Defendant	Rule of reason	PF efficiencies
38	Blackburn v Sweeney	850 F.Supp. 758 (1994)	Pre-trial	Undecided	Rule of reason	Prima facie case
39	Thompson v NCA	850 F.Supp. 470 (1994)	Pre-trial	Defendant	Rule of reason	Prima facie case
40	AppraiserFoundation	867 F.Supp. 1407 (1994)	Pre-trial	Defendant	Rule of reason	Prima facie case
41	Northlake v Glaverbel	861 F.Supp. 653 (1994)	Pre-trial	Defendant	Rule of reason	Prima facie case
42	Princess v Lindsey	918 F.Supp. 1356 (1994)	Pre-trial	Defendant	Rule of reason	Prima facie case
43	Leyba v Renger	874 F.Supp. 1229 (1994)	Pre-trial	Defendant	Rule of reason	Prima facie case
44	Picker v Leavitt	865 F.Supp. 951 (1994)	Pre-trial	Defendant	Rule of reason	PF efficiencies
45	Levine v CentralFlorida	864 F.Supp. 1175 (1994)	Pre-trial	Defendant	Rule of reason	Prima facie case
46	Orson v Miramax	862 F.Supp. 1378 (1994)	Pre-trial	Defendant	Rule of reason	PF efficiencies
47	TCA v Northwestern	873 F.Supp. 29 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
48	TotalBenefit v Group	875 F.Supp. 1228 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
49	Acme v Wharton	890 F.Supp. 1230 (1995)	Pre-trial	Undecided	Rule of reason	Prima facie case
50	Doctors v SoutheastMed	889 F.Supp. 879 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
51	Mathews v Lancaster	883 F.Supp. 1016 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
52	Re/Max v RealtyOne	900 F.Supp. 132 (1995)	Pre-trial	Undecided	Rule of reason	Prima facie case
53	AT&T v IMRCapital	888 F.Supp. 221 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
54	Addamax v Open	888 F.Supp. 274 (1995)	Pre-trial	Undecided	Rule of reason	Prima facie case
55	Law v NCAA	902 F.Supp. 1394 (1995)	Pre-trial	Plaintiff	Quick Look	Efficiencies
56	Volpp v Caterpillar	917 F.Supp. 1208 (1995)	Pre-trial	Defendant	Rule of reason	PF efficiencies
57	Southtrust v Plus	913 F.Supp. 1517 (1995)	Pre-trial	Plaintiff	Quick Look	Balancing
58	Nichols v Dunlop	913 F.Supp. 1088 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
59	Audell v Suburban	903 F.Supp. 364 (1995)	Pre-trial	Undecided	Rule of reason	Prima facie case
60	Khan v StateOil	907 F.Supp. 1202 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
61	Ransomes v Spartan	914 F.Supp. 183 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
62	Martin v KFC	935 F.Supp. 898 (1996)	Pre-trial	Defendant	Rule of reason	Prima facie case

Nr	Name	Citation	Phase	Finding for	Standard	Stage of analysis
63	Barrett v Fields	924 F.Supp. 1063 (1996)	Trial	Undecided	Rule of reason	Prima facie case
64	Queen v Dominos	922 F.Supp. 1055 (1996)	Pre-trial	Defendant	Rule of reason	Prima facie case
65	Sage v ISS	936 F.Supp. 130 (1996)	Pre-trial	Defendant	Rule of reason	Prima facie case
66	Baglio v Baska	940 F.Supp. 819 (1996)	Pre-trial	Defendant	Rule of reason	Prima facie case
67	Alpha v Comsat	968 F.Supp. 876 (1996)	Pre-trial	Defendant	Rule of reason	Prima facie case
68	Tower v Fedex	956 F.Supp. 270 (1996)	Pre-trial	Defendant	Rule of reason	Prima facie case
69	Godix v Caterpillar	948 F.Supp. 1570 (1996)	Trial	Defendant	Rule of reason	Prima facie case
70	Yeager v PennPower	953 F.Supp. 617 (1997)	Pre-trial	Plaintiff	Rule of reason	Balancing
71	Bogan v NorthWestern	953 F.Supp. 532 (1997)	Pre-trial	Defendant	Rule of reason	Prima facie case
72	CircuitBreaker	984 F.Supp. 1267 (1997)	Pre-trial	Defendant	Rule of reason	Prima facie case
73	Bushnell v ITT	973 F.Supp. 1276 (1997)	Pre-trial	Defendant	Rule of reason	Prima facie case
74	Rozema v Marshfield	977 F.Supp. 1362 (1997)	Pre-trial	Undecided	Rule of reason	Prima facie case
75	Wilson v Mobil	984 F.Supp. 450 (1997)	Pre-trial	Defendant	Rule of reason	Prima facie case
76	Daniel v ABEM	988 F.Supp. 112 (1997)	Pre-trial	Undecided	Rule of reason	Prima facie case
77	Brooks v GST	992 F.Supp. 1124 (1997)	Pre-trial	Undecided	Rule of reason	Prima facie case
78	Ginzburg v Memorial	993 F.Supp. 998 (1997)	Pre-trial	Defendant	Rule of reason	Prima facie case
79	Fraser v MLSoccer	7 F.Supp.2d 73 (1998)	Pre-trial	Undecided	Quick Look	Prima facie case
80	Davies v Genesis	994 F.Supp. 1078 (1998)	Pre-trial	Defendant	Rule of reason	Prima facie case
81	CDC v Idexx	7 F.Supp.2d 119 (1998)	Pre-trial	Defendant	Rule of reason	Prima facie case
82	Nurses v Unity	5 F.Supp.2d 694 (1998)	Pre-trial	Defendant	Rule of reason	Prima facie case
83	UnionCarbide v Montell	27 F.Supp.2d 414 (1998)	Pre-trial	Defendant	Rule of reason	Prima facie case
84	Oregon v PhilipMorris	17 F.Supp.2d 1170 (1998)	Pre-trial	Defendant	Rule of reason	Prima facie case
85	Norte v FirstBank	25 F.Supp.2d 9 (1998)	Pre-trial	Defendant	Rule of reason	Prima facie case
86	GreaterProvidence v MI	32 F.Supp.2d 491 (1998)	Pre-trial	Undecided	Rule of reason	Prima facie case
87	ContOrth v HealthIns	40 F.Supp.2d 109 (1999)	Pre-trial	Undecided	Rule of reason	Prima facie case
88	Caldera v Microsoft	87 F.Supp.2d 1244 (1999)	Pre-trial	Undecided	Rule of reason	Prima facie case
89	Granite v Bear	58 F.Supp.2d 228 (1999)	Pre-trial	Defendant	Rule of reason	Prima facie case
90	RedLion v Ohmeda	63 F.Supp.2d 1218 (1999)	Pre-trial	Undecided	Rule of reason	Prima facie case
91	Adidas v NCAA	64 F.Supp.2d 1097 (1999)	Pre-trial	Defendant	Rule of reason	Prima facie case
92	Interior v Design	73 F.Supp.2d 829 (1999)	Pre-trial	Defendant	Rule of reason	Prima facie case
93	Toscano v PGA	70 F.Supp.2d 1109 (1999)	Pre-trial	Defendant	Rule of reason	Prima facie case
94	Virgin v BA	69 F.Supp.2d 571 (1999)	Pre-trial	Defendant	Rule of reason	Prima facie case
95	Chawla v Shell	75 F.Supp.2d 626 (1999)	Pre-trial	Defendant	Rule of reason	Prima facie case
96	Randall v BuenaVista	75 F.Supp.2d 946 (1999)	Pre-trial	Undecided	Rule of reason	Prima facie case
97	Carter v Variflex	101 F.Supp.2d 1261 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
98	Bepco v AlliedSignal	106 F.Supp.2d 814 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
99	Microbix v Biowhittaker	172 F.Supp.2d 680 (2000)	Pre-trial	Defendant	Quick Look	Balancing
100	US v Microsoft	87 F.Supp.2d 30 (2000)	Trial	Defendant	Rule of reason	Prima facie case
101	Paladin v Montana	97 F.Supp.2d 1013 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
102	VirgVermiculite v Grace	108 F.Supp.2d 549 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
103	Reddy v GoodSamaritan	137 F.Supp.2d 948 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
104	Urdinaran v Aarons	115 F.Supp.2d 484 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
105	O'Dell v GMC	122 F.Supp.2d 721 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
106	Todd v Exxon	126 F.Supp.2d 321 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
107	Continental v United	126 F.Supp.2d 962 (2001)	Pre-trial	Plaintiff	Quick Look	Balancing
108	Suzuki v Outdoor	126 F.Supp.2d 40 (2001)	Pre-trial	Defendant	Rule of reason	Prima facie case
109	Morales v Garcia	137 F.Supp.2d 44 (2001)	Pre-trial	Defendant	Rule of reason	Prima facie case
110	Moecker v Honeywell	144 F.Supp.2d 1291 (2001)	Pre-trial	Undecided	Rule of reason	Prima facie case
111	Beyer v Elmhurst	142 F.Supp.2d 296 (2001)	Pre-trial	Defendant	Rule of reason	Prima facie case
112	FloorsNMore v Liquidator	142 F.Supp.2d 496 (2001)	Pre-trial	Defendant	Rule of reason	Prima facie case

Nr	Name	Citation	Phase	Finding for	Standard	Stage of analysis
113	Viazis v AAOrthodontists	182 F.Supp.2d 552 (2001)	Trial	Defendant	Rule of reason	Prima facie case
114	US v Visa	163 F.Supp.2d 322 (2001)	Trial	Plaintiff	Rule of reason	Balancing

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NEDERLANDSE SAMENVATTING (*summary in Dutch*)

In dit proefschrift wordt de vraag aan de orde gesteld hoeveel rechtszekerheid bedrijven kunnen ontlenen aan de wijze waarop Art 81 EC thans wordt geïnterpreteerd en gehandhaafd ten aanzien van overeenkomsten die – in potentie – zowel positieve als negatieve welvaartseffecten kunnen veroorzaken. Onzekerheid over de bewijsstandaard kan ertoe leiden dat bedrijven maatschappelijk schadelijke of juist onnodig voorzichtige contracten sluiten. Omdat grote obstakels in de weg staan aan het vergaren van empirisch bewijs van zulk ongewenst gedrag, is in dit onderzoek gewerkt met een conceptueel model dat de wijze waarop bewijsstandaarden inwerken op het gedrag van bedrijven nauwkeurig beschrijft. Dit conceptuele model is gebruikt zowel om de resultaten van een uitgebreide rechtsvergelijkende studie te interpreteren, als om de gevolgen voor bedrijven van recente hervormingen van het Europese mededingingsbeleid te onderzoeken. Dit wijst uit dat er, in de eerste plaats, slechts weinig richtinggevende beslissingspraktijk is waarop bedrijven zich kunnen oriënteren om te bepalen of zij de grenzen van het EC verdrag overschrijden. Voorts blijkt uit deze beslissingen dat de Commissie in staat is om in te grijpen zonder dat schade aan het maatschappelijk belang aannemelijk wordt gemaakt. Beide factoren geven aanleiding tot het onderzoeken van mogelijkheden om de rechtszekerheid te vergroten. Meer in het bijzonder wordt gekeken naar het verhogen van de bewijslast van de Commissie door het verlangen van (1) een duidelijk gearticuleerde stellingname aangaande de te verwachte negatieve gevolgen van een restrictieve overeenkomst en (2) voldoende empirisch bewijs om deze stelling te kunnen staven. De Commissie wordt hiermee aangemoedigd om zich te concentreren op meer schadelijke vormen van overeenkomsten, terwijl bedrijven grotere zekerheid hebben dat als de overeenkomst hen geen marktmacht oplevert, interventies uit zullen blijven. Mogelijk negatieve gevolgen van het verzwaren van de bewijslast in termen van een verminderde afschrikwekkende werking van het mededingingsrecht kunnen bestreden worden door middel van een aanpassing van het boetebeleid zodanig dat onderscheid wordt gemaakt tussen bedrijven die meer of minder gevoelig zijn voor prikkels om de grenzen van de wet te overschrijden.