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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

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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.

Marco Lankhorst (1976, Amsterdam) studied law at Amsterdam University. Before starting his PhD research he worked as a law clerk at the Amsterdam Court of Appeals and, for a brief spell, in the Merger Control section of the Dutch Competition Authority. He currently lives in Rwanda, where he works for a non governmental organisation active in the justice sector.

ISBN: 978 90 3610 157 8

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