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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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

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

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[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

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[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]

[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

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[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

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[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

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

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[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,

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[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

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[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

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[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

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[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

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.