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Increasing the requirements to show antitrust harm in modernised effects-based analysis: an assessment of the impact on the efficiency of enforcement of Art 81 EC

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Costs and Benefits of Improving Accuracy

6.1 Introduction

Raising the Commission's burden of proof under Art 81(1) EC could produce a side effect with ambiguous implications. More investigative requirements may translate into less enforcement activity and, consequently, in a lower level of deterrence. In this chapter we adopt a theoretical perspective to examine the potential of improving accuracy in adjudication as a means to increase the efficiency of enforcement. Section 6.2 looks at the costs and benefits of an increase in the Commission's burden. Finding that these are different depending on whether firms are prone to under or over-comply, the section continues to examine whether either of these effects can be expected to occur more frequently in the field of effects-based analysis. Next, Section 6.3 discusses the implications for different types of firms in more detail and advances a number of complementary measures that can be adopted to keep possible drawbacks of improving accuracy in check.

Note that in this chapter the issue of adjusting the legal standard will not primarily be considered from a substantive point of view. The precise evidentiary implications of the changes to the legal standard needed to improve certainty are discussed in the next chapter. It should also be mentioned that we will be working on the assumption that requiring the Commission to show that the agreements it challenges have adverse effects on consumers will make it more difficult to discharge its burden of proof. This assumption will also be addressed in Chapter 7.

6.2 Improving accuracy: incentives under current conditions

Adopting decisions that are more detailed in their analysis of harm (and producing such decisions in greater number) will have two types of benefits. At the litigation stage, it should result in fewer erroneous decisions and it should lead to more focused enforcement that implicates fewer low-value infringements and more high-value infringements.¹ More importantly, it should give firms a better *ex ante* view of the dividing line between permissible and impermissible agreements. This will work to reduce the expected sanction costs of engaging in permissible behaviour *vis-à-vis* those of engaging in impermissible behaviour. As a result, firms will have more incentives to sign desirable contracts.

At the same time, standard theory on improving accuracy in adjudication identifies cost effects as a major constraint.² As suggested, requiring enforcers to present more compelling evidence of consumer harm can be expected to require more effort, leading to an increase of costs. And with rising investigation costs, the level of enforcement – and thus deterrence – is likely to suffer. In as much as firms were over-deterred in the pre-existing situation, this drop in enforcement is desirable. But such a drop could also mean that firms that were previously under-deterred end up being equally or more prone to infringe Art 81 EC. A complementary rise in the level of sanctions will be helpful to reduce such incentives, but it should be realised that this might re-inflate incentives to over-comply for others.

We saw in Chapters 3 that uncertainty about the location of the effects-based standard applied in EC antitrust can result in both types of effect. In general, at the stage where they recognise that the actions they contemplate have antitrust implications, firms will face a range of different options (forms of agreement) that will differ in terms of restrictiveness. In such situations it is the pace at which expected costs and benefits change in moving from one option to the other that determines whether firms cross the line or exercise too much caution.³ On the other hand, the decision to engage in certain forms of exclusionary behaviour, in particular, appears to be of a binary nature. In such cases uncertainty will always tend to inflate

¹ For a discussion of these types of errors, see the discussion in Chapter 3, Section 3.3.2.

² See in particular Kaplow (1994).

³ They will choose the level of restrictiveness that minimizes the combination of expected sanctions and foregone profits. For instance, if it pays for the contracting parties to reduce the level of restrictiveness of their intended agreement because the gains in terms of a reduced exposure to fines exceed the associated loss in revenues, they can be expected to alter the design accordingly.

incentives to under-comply. And as suggested at the end of Chapter 5, there is evidence of both types of inefficiencies. Given the importance of the distinction for making an increase in the burden to show harm work, it is worth considering, first of all, whether any statements can safely be made as to which of these inefficiencies prevails in the current situation. As was done before, we make an analogy with the literature on negligence law.

Incentives in the field of negligence

Both Craswell and Calfee (1986) and Kahan (1989) have attempted to ascertain whether uncertainty about the negligence standard results in under or over-deterrence. They use the same framework of analysis that allows for a range of increasingly negligent (restrictive) behaviour. Still, they reach diametrically opposed conclusions. This is explained by a divergence in their interpretation of the law on negligence, which leads them to make different assumptions about the marginal incentives.

A defendant is liable under the rule of negligence if at the time he acted the costs of preventing the accident were lower than the expected losses.⁴ In order to understand the differences between the theoretical positions of Craswell and Calfee, and Kahan, it is important to recognise that accidents can occur even if the required level of care is undertaken and hence no liability ensues.⁵ Craswell and Calfee assume that if the potential offender failed to take due care, he becomes liable for the harm that his actions have caused, including all damages that would have been inflicted even if he had taken the precautions required. This implies that in the area of behaviour where the potential offender assumes that liability is most likely to attach,⁶ expected damages will rise quite abruptly, presumably more so than precaution costs

⁴ See *Conway v. O'Brien* (111 F.2d 611 (2nd Cir. 1940), at 612) for a more eloquent expression in US case law by judge Learned Hand, and for a general discussion on negligence (and a comparison with strict liability) see Schäfer and Schönenberger (2000).

⁵ It is useful to illustrate this with an example. Assume that liability for driving accidents is governed by the rule of negligence and, also, that the speeding limit is set at the socially optimal level of care. Drivers that exceed the speed limit take insufficient care and when this leads them to cause an accident they are held liable. It is possible, however, that persons respecting the speed limit get involved in accidents. It could, for instance, be that their breaks fail despite regular maintenance checks. In such a case the person in question will not be held liable for the damages inflicted upon others. If however the same person was speeding, Craswell and Calfee assume that he will be held liable, regardless of the fact that the accident would also have occurred if he had respected the speed limit.

⁶ In this regard it is useful to think in terms of the graph that was presented above in Chapter 3, Section 3.4 and which is copied at the end of this section as Figure 6.1 (see footnote 34 and accompanying text). In the area shaded grey where potential offenders reckon with a significant probability of being caught, expected sanctions will rise more sharply if they are calculated in such a way as to reflect more than only the harm caused by breaking the rule.

decline.⁷ Applying the logic of marginal incentives, Craswell and Calfee argue that in most situations potential offenders will end up taking too much precaution.⁸

In contrast, Kahan submits that a defendant can only be liable for the damages caused by his negligence, i.e. the harm that would not have been inflicted if he would have taken due care.⁹ In this context, damages will rise incrementally, rather than abruptly, from the beginning. Given how the negligence standard is defined, we know more about marginal effects in this situation. At the level of behaviour that corresponds to the legal standard, the costs of taking more precaution necessarily exceed the extra costs of liability. Consequently as behaviour becomes less restrictive, precaution costs rise faster, whilst when moving away from the standard in the opposite direction, liability costs increase more strongly. In this situation, it is submitted that no rational actor will feel the urge to take additional precaution. Uncertainty can then only induce potential offenders to take less than optimal care. This is because the less than full probability of being found negligent that the potential offender takes into account when deciding on his behaviour, has the effect of lowering the value of expected liability. Thus, it becomes clear that the behaviour that allows a potential offender to minimize precaution and liability costs corresponds to a lower level of precaution than the standard prescribes.

Summarizing, it can be said that both Craswell and Calfee and Kahan describe a *factual* situation where potential offenders face a range of choices about the actions they can undertake.¹⁰ They make different assumptions, however, about the nature of the damages that courts will take into account in assessing negligence and, thus, about the expected liability costs that potential offenders will attribute to these different

⁷ There is no reason to suspect a sudden kink here, they are assumed to decline gradually.

⁸ This is so particularly for situations in which the amount of harm that can be legitimately inflicted is potentially large, and uncertainty is very concentrated around the legal standard, because in that case expected liability rises very rapidly in the area around the legal standard. If on the other hand such legitimately inflicted harm will be small, and uncertainty is spread out, the results are more like those reached by Kahan.

⁹ Although from a doctrinary point of view Kahan's assumption is the right one, separating these two forms of damage is often unfeasible in practice, and defendants end up paying full damages. Schwartz (2000) argues that the Craswell and Calfee model is probably more accurate in describing reality, therefore.

¹⁰ The main example that Kahan relies on in his article involves a fence. The fence is presented as a means to prevent damages being inflicted on neighbouring properties. A higher fence costs more to build than a lower fence. The proprietor will be liable if by building a sufficiently high fence to prevent the accident he would have spent less than the damages incurred by his neighbour. As suggested, Kahan argues that uncertainty about the location of the legal standard can only result in the erection of a fence of less than the optimal height. This does not mean, of course, that he sees physical obstacles to the construction of a fence that is higher than necessary.

choices. It is these differences in their interpretation of the *law*, which make that these authors reach different conclusions on the effects of uncertainty about the location of the legal standard. Craswell and Calfee hold that, of the two possible outcomes, over-deterrence is likely to occur more frequently, whilst Kahan concludes that under-deterrence is the only possible effect.

Although the underlying *factual* situation in European antitrust is the same, neither the assumption about the *law* made by Craswell and Calfee, nor the one Kahan relies on is valid in European antitrust. This means that we can only say that both under-deterrence and over-deterrence are possible in European antitrust and that it is not possible to determine which effect prevails over the other. Let us start with the theory advanced by Craswell and Calfee.

Craswell and Calfee's theory applied to antitrust

Recall that these authors assume that expected liability costs increase dramatically in the area immediately surrounding the legal standard because the defendant expects liability not only for the damages he has caused by taking inadequate care, but also for the damages that would have occurred if he had exercised due care. To see whether this reasoning can be transposed to the antitrust setting we will first look at the Commission's method of setting fines and, in particular, at the question whether expected fines rise incrementally from zero or whether they be expected to start with a jump. Next, we will turn to the question of follow on litigation, to see whether the prospect of a private damages suit could make expected fines rise sharply.

Pursuant to Art 23 of Regulation 1/2003 the Commission may impose fines on undertakings that infringe Art 81 EC.¹¹ The way it exercises this power is set out in a notice containing guidelines.¹² This provision and these guidelines make clear, first of all, that a fine need not always be imposed if a violation is found. This is evident, also, in Art 9 of Regulation 1/2003, which determines that a commitment decision can only be adopted in cases where it is not necessary to impose a fine. The guidelines are not explicit on how this determination of necessity is made. They provide information on how a fine is calculated once it deemed necessary to impose one. It seems reasonable,

¹¹ [2003] OJ L1/1.

¹² See the Commission's guidelines on the method of setting fines pursuant to Article 23(2)(a) of Regulation 1/2003 ([2006] OJ C210/2).

however, to assume that the factors that determine the height of the fine have a bearing on the evaluation of the need to impose one.

The procedure for calculating fines that is described in the guidelines consists of two phases. First, a basic amount is set, which is a variable proportion (maximum 30%) of the defendant's sales in the relevant product and geographical market. The size of this proportion is dependent on an assessment of the nature of the infringement, the combined market share of the defendants, the geographical scope of the violation and its duration. In the second phase the basic amount can be adjusted to take into account mitigating or additional aggravating circumstances (yet under no condition can the fine imposed exceed 10% of the defendant's total turnover).

The guidelines can be summarised by saying that minor infringements will be punished mildly (if at all) and that serious infringements will be punished more severely. Adjustment mechanisms have been incorporated in both phases of the procedure, apparently to ensure that a fine reflects the harmfulness of the agreement.¹³ There is no particular reason to expect, therefore, that an agreement that causes very little harm will be met with a sizable fine.¹⁴ This appears to be confirmed by the Commission's decision practice. As noted in preceding chapters, four out of the six effects-based decisions taken after the entry into force of Regulation 1/2003 are commitment decisions (that is, no fine is imposed). In only one of the two remaining infringement decisions, *Morgan Stanley / Visa*, a fine of 10.2 million Euros was imposed.¹⁵ This case can be considered to be a serious effects-based violation, since Visa is a large player on an important market and, above all, since the Commission found no evidence at all of possible efficiency justifications for its behaviour. Still, the amount of 10.2 million Euros is not particularly high in comparison to cases where

¹³ See also para. 6 of the Guidelines (supra, footnote 16), where the Commission states the following. 'The combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement [...].'

¹⁴ It stands to reason, also, that practices examined under the effects-based standard will not be met with the biggest of fines. In this regard, see particularly para. 23 of the Guidelines (supra, footnote 16) where certain per se practices are singled out as meriting the setting of a high basic amount.

¹⁵ Decision of 3 October 2007, published on the Commission's website. The second post-2004 infringement decision was adopted in the case of *Master Card* (decision of 19 December 2007, published on the Commission's website). Note that this case was initiated by the notification of the agreement involved and that substantial efficiency arguments were advanced and examined at length. It is not surprising, therefore, that no fine was imposed. The two other effects-based infringement decisions listed in Appendix A were both, also, initiated by the notification of the agreement involved and no fine was imposed.

effects-based arguments are mixed with an object-based analysis or a *per se* analysis stands alone, such as *JCB* (40 million Euros)¹⁶ and *Volks Wagen* (102 million Euros).¹⁷

Whilst fines may thus be assumed to rise incrementally from zero as firms consider increasingly harmful behaviour, it could still be that firms expect effective penalties, even for minor infringements, to be higher. Craswell and Calfee argue that defendants should expect liability not only for the damages they have caused by taking inadequate care, but also for the damages that would have occurred if they had exercised due care. Clearly such legitimately inflicted harm, as opposed to harm to consumers, exists in the antitrust law context. It is, in fact, the essence of the competitive process that firms strive to increase their profits at the expense of their rivals. Such efficient behaviour is to be protected rather than deterred by the antitrust laws. It was precisely this reasoning that justified the adoption of the so-called *antitrust injury* doctrine in the US, which bars plaintiffs from recovering for harm of any other sort than those that the antitrust laws were designed to protect.¹⁸ Under this doctrine a competitor can sue for profits lost due to the restriction, but not for damages that would have occurred absent the restriction. These are seen as the result of healthy competition.

Even though there is not a clearly articulated European antitrust injury doctrine,¹⁹ it is highly unlikely that firms in Europe are much afraid of follow-on litigation by competing firms that would include legitimately inflicted harm in their damages claims. To begin, private enforcement in the field of effects-based analysis is virtually non-existent at present.²⁰ Moreover, given the importance of this issue in achieving the goals of antitrust, it is to be expected that if such cases would come up national civil courts will impose the same limitations on damages claims as their US counterparts. This is particularly so since this approach would nicely fit the practice at least

¹⁶ [2002] OJ L69/1.

¹⁷ [1998] OJ L124/60, later reduced by the CFI to 90 million ([2000] ECR II-2707).

¹⁸ On the antitrust injury doctrine, see e.g. Page (1985) and the discussion below in Section 6.3.

¹⁹ Jones (1999: 191 a.f.) argues against a US antitrust injury doctrine in Europe because of a difference in the substantive criterion: a mere distortion of the process of competition in Europe, rather than consumer harm as in the US. Clearly, this concern will fall away if the change in the legal standard proposed above is adopted. Brkan (2005) argues that such complicated issues as are involved with antitrust injury should be dealt with in the actual proceedings, not in its initial screening. Her opposition stems from a misunderstanding of this doctrine. As is explained in more detail below in Section 6.4, the antitrust injury doctrine is not about the complicated task of establishing causality, as she suggests. Rather, the admissibility of the plaintiff's claim is scrutinized assuming that all underlying facts can be proven. In this way, claims by plaintiffs that cannot have sustained the type of harm that the antitrust laws protect against can be filtered out at an early moment in the proceedings.

²⁰ See the discussion on private enforcement in Chapter 7, Section 7.3.2.

of the considerable number of continental tort systems that have adopted the so-called *Schutznorm* doctrine, which, in clear contrast to the assumption made by Craswell and Calfee on (US) negligence law, holds that a tortfeasor is liable only for such damages as the norm he violated was intended to safeguard against.²¹

These arguments suggest that expected sanction costs rise incrementally over the range of possible behaviour, rather than suddenly or with kinks. As Kahan does in his analysis of negligence law, therefore, we should examine whether we have reasons to believe that they do so at a slower pace than expected profits, particularly at the point where agreements are likely to be held in violation of the Treaty. If so, firms should be expected to respond mainly in the form of under-compliance.

Kahan's theory applied to antitrust

Arguably, reliance on a proportion of the sales volume affected by the restriction (the basic amount) as the criterion for setting fines may work to suppress the rate at which sanctions rise in comparison to profits in European antitrust. This can be appreciated as follows. For firms in most industries, even if there are market failures, turnover may be assumed to consist of a relatively large cost component. Moreover, a considerable part of these costs (such as those incurred in paying for material inputs, wages, production plants, etc.) will be unaffected by the different forms of agreement that a firm can choose from (for example, from different forms of distribution contracts).²² As a consequence, the difference between the various options in terms of their effect on turnover and, thus, expected fines, will tend to be smaller than the differences in terms of profits.²³

The pace at which expected fines increase may also be suppressed because, as was argued in Chapter 4, uncertainty is currently spread out over a rather wide range of

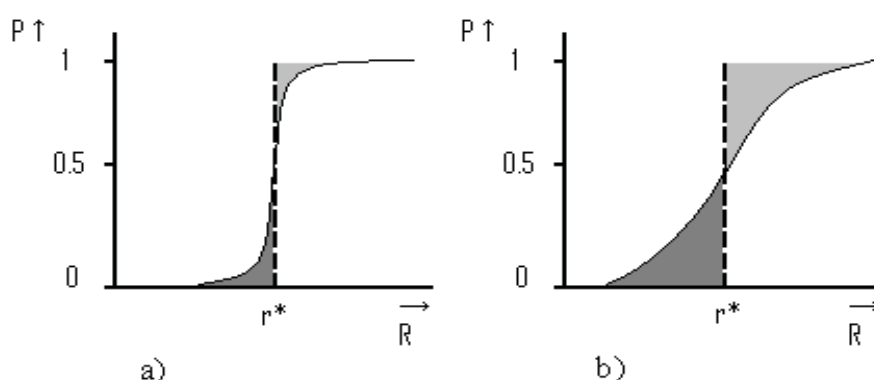
²¹ For a discussion of European tort systems and on the *Schutznorm*, see Van Gerven, 2000).

²² For discussions on industry profitability, see e.g. Scherer and Ross (1990) and Schmalensee (1989).

²³ The Commission's approach of relying on turnover to set the amount of a fine has been criticised in the literature, notably by Wils (2002: 33 and 71). Taking a somewhat different angle than the one presented here, he argues that there is no legal reason to calculate fines as a proportion of turnover, nor an economic justification. To achieve effective deterrence, fines should optimally be equal to the harm caused by the infringement, or alternatively equal to the benefit gained by the violator plus some safety margin, divided by the probability of detection and punishment. Bos and Schinkel (2006) show that the Commission's scope for setting fines is considerably constrained by the 10% of world wide turnover cap provided for in Art 23 of Regulation 1/2003 (supra, footnote 15). This is to say that this cap will relatively frequently and, particularly, in more serious cases prevent the Commission from setting a higher fine following by following the methodology set out in its Guidelines (supra, footnote 16). They conclude that since there generally exists a positive relationship between the illegal gains from competition law infringement and the value of the affected commerce, it will in many circumstances be difficult to meet the guidelines' overall objective to deter breaches of the competition rules.

behaviour.²⁴ This can be appreciated by considering the probability distributions depicted below in Figure 6.1.²⁵ Graph a) depicts a situation where firms are relatively certain about the location of the legal standard, whilst graph b) reflects a situation where firms are relatively uncertain.²⁶ Over the range of behaviour that is shaded grey (in both graphs) firms take into account a significant probability that they will be challenged. Notice that this range is narrower in graph a). In this situation the

Figure 6.1



probability of being held in violation shoots up from 0 to 1 over a rather narrow range of restrictive behaviour surrounding the legal standard. In graph b) the rise is much more gradual. This affects the rate at which expected fines increase. The wider the range of behaviour that is considered risky in the sense that it may become the subject of antitrust proceedings, the lower the rate at which expected fines rise.

Nonetheless, the possibility of upward adjustment provided for in the Commission's fining policy makes that we cannot exclude the possibility that certain

²⁴ See Chapter 4, Sections 4.3 and 4.4. The decision practice that was discussed there shows that in some cases, such as the *Master Card* decision (supra, footnote 19), it focuses almost exclusively on consumer harm issues and thus on firms that may genuinely be in a position to exercise market power. In other cases, however, such as *P&O/Stena Line* ([1999] OJ L163/61) it modifies agreements by firms of which it acknowledges that they have no market power at all. This means that the Commission intervenes in a rather wide range of business behaviour. The argument made here is that the wider the range of behaviour that firms consider may be found to be in violation, the slower the pace at which expected fines rise.

²⁵ As was explained in Chapter 3, Section 3.4, a probability distribution maps the combination of potential offenders' best guesses of the probability of being found to have violated the law that they associate with each of the possible forms of agreements that they can choose from. These options are grouped on the horizontal axis with less restrictive (and innocuous) agreements on the left hand side, and more restrictive (harmful) agreements on the right hand side. The vertical axis measures the associated probability of being found to have violated Art 81 EC.

²⁶ I.e. as suggested in footnote 34 and accompanying text., the wide spread of uncertainty means that firms reckon with the possibility of intervention over a wide range of behaviour.

firms perceive expected sanctions to rise faster than expected profits.²⁷ And in this regard it should also be realised that termination (or alteration by means of commitments) of an agreement that has already been implemented may come with considerable costs that should be added to the costs of the fine. This is because certain forms of agreement may involve substantial investments. It can be expected that these investments would not be fully recoverable in case of *ex post* intervention, such as the freezer-cabinets provided to outlets in the case of *Van den Bergh Foods*.²⁸ These investments work so as to accelerate the pace at which expected sanctions rise. We are forced to conclude, therefore, that no definite statements can be made as to which effect, under or over-deterrence, is likely to occur more often in the current situation. The tendencies appear to go in different directions. This means that the change in the legal standard and its complementary measures must be designed with both effects in mind.

6.3 Impact on different actors and complementary measures

To develop our thoughts about the impact of improving accuracy in adjudication on differently positioned firms, let us start by looking at the Commission's likely reaction to an increase in enforcement costs and, particularly, the nature of the cases that would be affected. Faced with the task to distribute the resources it devotes to the effects-based field over fewer cases, the Commission will select and pursue those cases from amongst the pool of cases about which it has information that appear to pose a more serious threat to consumer welfare (like the cases of *Van den Bergh Foods*,²⁹ *Master Card*³⁰ and *Morgan Stanley/Visa*,³¹ where there were significant indications of market power) and it will discard other that involve less restrictive agreements (like the cases of *TPS*,³² *P&O/Stena Line*³³ and *UEFA*,³⁴ where the claim

²⁷ See para. 28 (on aggravating circumstances) of the Commission's Fining Guidelines (supra, footnote 16).

²⁸ [1998] L246/1. See the discussion of this case in Chapter 4. Other examples are the investments made in pay-tv operations in cases such as *Telenor/Canal+* (decision of 29 December 2003, published on the Commission's website, at para. 65) and *TPS* ([1999] OJ L90/6); and the expenses that code-sharing airlines will make in integrating their computer systems when (see *Austrian Airlines / Lufthansa* ([2002] OJ L242/25, and *Alitalia / Air France* (decision of 7 April 2004, published on the Commission's website).

²⁹ [1998] OJ L246/1.

³⁰ Decision of 19 December 2007, published on the Commission's website.

³¹ Supra, footnote 19.

³² [1999] OJ L90/6.

³³ [1999] OJ L163/61.

that market power was exercised was much less convincing).³⁵ This is because it will be harder to meet the standard for showing harm in the latter group of cases and because the former group poses a larger threat to consumers.

More specifically, after the proposed reform the Commission can be expected to focus more on firms with higher levels of market power.³⁶ This tells us that any drop in deterrence caused by lower levels of enforcement will be experienced primarily by firms with a reduced potential to inflict harm. It should be realised that inefficient contracting by such firms that is caused by uncertainty is most likely to take the form of over-compliance. A drop in deterrence may therefore contribute positively to the objective of improving accuracy by further lowering the likelihood that agreements concluded by firms facing considerable competition will be terminated or altered. In addition, if for certain firms on this side of the market power spectrum incentives to under-comply are produced, the negative consequences for society are probably smaller than if firms with more market power are involved.

The effects of improving accuracy on the ability to assess the legality of intended agreements should be identical for larger firms. The probability that an investigation by the Commission would result in a beneficial or neutral agreement being held illegal should go down and the probability that a harmful agreement will be found illegal should increase. It is the associated effect on the probability that enforcement action will be started that is different for this group. Given that the Commission will be more accurate in case selection, larger firms that aim to implement an agreement with considerable potential for efficiencies should be relatively more secure than before that they will not be targeted, even if they remain likely candidates for enforcement action on account of their size. The question, however, is whether the increase in the Commission's enforcement costs does not weigh down its enforcement capacity to

³⁴ [2003] OJ L291/25. See also the Commission's more recent decisions in the cases of *DFB* (decision of 19 January 2005, published on the Commission's website) and *Premier League* (decision of 22 March 2006, published on the Commission's website).

³⁵ The first group of cases was discussed in Chapter 4, Section 4.3.2. The second group of cases was discussed in Chapter 4, Section 4.3.1.2. There we saw that in this second group of cases the Commission relied substantially on formalistic arguments. It is submitted that if the Commission would be effectively and consistently forced by the Courts to adhere to the standard that is presented in the modernised guidelines (see Chapter 2, Section 2.4, and Chapter 4, Section 4.4) the Commission would be less likely (which, on the other hand, is not to say that it would be impossible) to focus on cases like those in the second group, simply because it would be less probable that the decision would be upheld on appeal.

³⁶ As was already suggested in Chapter 5, Section 5.4, and will be further developed in Chapter 7, Section 7.2, this will have the beneficial side effect of reducing the Commission's scope to adopt commitment decisions, which generally offer little guidance.

such an extent that the effect of increasing the probability that bad agreements will be held illegal is cancelled out. In the overall assessment of the impact of improving accuracy this effect might wholly or partially off-set the benefits of eliminating over-compliance. In this regard, several remarks can be made. The first is that for firms with considerable market power to be less deterred than they are at present, the drop in the level of enforcement must arguably be more than marginal since they will not be the first group to feel the effects of such a change. Secondly, a drop in the level of enforcement should be observable by the Commission itself and could be countered in the ways described below.

Countering a drop in deterrence

We have seen that, thus far, fines have not always been imposed in cases where infringements were found under the new regulation. One way to react to an observed deterioration in the Commission's capacity to bring cases would be to consistently impose a fine – calculated on the basis of the Commission's existing guidelines³⁷ – upon finding that an agreement harms consumers. In the period immediately following a change in the legal standard, when its precise implications will not have been cleared up, it is possible that this might re-inflate incentives to over-comply for other firms.³⁸

Several of the observations on Regulation 1/2003 that were submitted to the Commission indicate that such behaviour is most likely to occur when agreements involve considerable investments.³⁹ One way to prevent this effect would be to take investments that cannot be recovered upon termination into account as a mitigating circumstance in setting fines.⁴⁰ Decision practice shows that a serious adverse financial impact on the undertaking concerned may provide a reason to reduce the amount of the fine.⁴¹ This practice has been subject to criticism in the literature.⁴²

³⁷ *Supra*, footnote 16.

³⁸ Whilst the proposal to alter the Commission's burden of proof in effects-based analysis (under Art 81(1) EC) should reduce uncertainty about the legal standard, even on the longer term such uncertainty is not likely to be eliminated altogether. This is because new developments in economic insights will continue to evolve and will require constant fine tuning and adaptation of the interpretation of the law.

³⁹ See the discussion in Chapter 5, Section 5.4, and in particular the observations submitted by Clifford Chance, CMS Competition Practice Group and Bird & Bird.

⁴⁰ Note that the list of mitigating factors mentioned in para. 29 of the Fining Guidelines (*supra*, footnote 16) is not intended to be exhaustive.

⁴¹ See e.g. the following decisions: *PVC I* ([1989] OJ L74/1); *Roofing Felt* ([1986] OJ L252/15); *Flat Glass Benelux* ([1984] OJ L212/13); *Zinc Producer Group* ([1984] OJ L220/27); *Cast Iron* ([1983] OJ L317/1).

From a deterrence point of view, ability to pay should not be a relevant consideration in setting fines.⁴³ An exception is made for cases where a firm might default, which would constitute an excessive punishment that could give rise to over-deterrence.⁴⁴ The reason for taking irrecoverable investments into account would be very similar. The purpose of imposing a fine is to assure an adequate level of (specific and general) deterrence. If the fine is calculated on the basis of the seriousness and the duration of the infringement without considering additional negative effects of termination, this could result in unduly elevated effective sanctions and over-deterrence.⁴⁵ As is the case with other mitigating circumstances, the burden would have to be on the defendant to show that it has made investments that cannot be recovered in case of termination and that the resulting costs would be significant. Significance could be measured by reference to the height of the fine that would be imposed if no irrecoverable investments were made.

In addition, measures can be taken to mitigate an adverse effect on the Commission's enforcement costs that might result from an increase in its burden of proof. It was mentioned before that in an *ex post* setting complaints are of significant importance for detecting infringements. Naturally, however, not all complaints are justified. Whilst the Commission enjoys considerable discretion in setting its priorities, dealing with complaints that it chooses not to pursue does weigh on its

⁴² See notably Wils (2002: 36). See also Jones and Suffrin (2007: 1226).

⁴³ The ECJ appears to rely on the same or similar reasoning. In *Dansk Rørindustri v. Commission*, Cases C-189/02 etc., [2005] ECR I-5425, at para. 327, it confirmed a ruling by the CFI (Case T/23/99, [2002] ECR II-1705) holding that the Commission could not be obliged to take the poor financial condition of the undertaking concerned into account. Doing so, it remarked, would be tantamount to giving an unjustified competitive advantage to firms least well adapted to market conditions.

⁴⁴ *Supra*, footnote 52 48.

⁴⁵ Alternatively, evidence of significant irrecoverable investments could be relied upon to support an argument that the infringement has been committed as a result of negligence, which is a mitigating factor expressly mentioned in the Fining Guidelines. In order for it to be appropriate to impose a fine, a firm must have at least been negligent in violating Art 81 EC (see Art 23(2) of Regulation 1/2003, *supra*, footnote 15). That is, although it may not have been aware of the illegal consequences of its behaviour, it should reasonably have been aware given the state of case law and decision practice (see e.g. Jones and Suffrin, 2007: 1214; Wils, 2002: 29; and Hofstetter, 2009). In para. 29 of the guidelines the Commission indicates that the fact that the infringement was committed as a result of negligence may present a mitigating circumstances and, thus, a reason to lower the basic amount of the fine. The burden of proof is on the undertaking to show that it has acted negligently, rather than with intent. The fact that considerable irrecoverable investments were made as part of the agreement could play a part in discharging this burden of proof. On its own, however, this should not be considered sufficient proof. Such a policy would be vulnerable to strategic manipulation, since parties might decide to make irrevocable investments precisely in order to avoid being severely fined. Note, however, that it should make no difference whether a firm faces a high fine and low termination-related costs or a low fine and high termination-related costs; the level of deterrence that is achieved would be the same.

resources. Reducing this burden could be used to compensate the Commission for the extra costs that come with an increased burden of proof.

The importance of complaints in enforcement is underscored by the Commission's reports on competition policy, which indicate that between 2002 and 2005 around 45% of the new investigations were prompted by complaints.⁴⁶ No data for later years is available, but it can be expected that the number and importance of complaints will grow with the shift to *ex post* enforcement in the effects-based field.⁴⁷ Of the 32 effects-based decisions listed in Annex A, 12 involved a complaint.⁴⁸ With a view to the discussion below, it is important to note that in five of these cases the complainant was a competitor.⁴⁹ The impact of rejections of complaints on the Commission's resources can be gauged by considering the following indicators. The Commission's reports suggest that in 2004 it adopted 14 decisions rejecting a complaint (plus 28 informal ones), whereas in 2005 8 such decisions were adopted (there is no data in the report on informal decisions).⁵⁰ A number of these rejection decisions have been appealed before the CFI and the ECJ.⁵¹

The right to lodge a complaint is reserved to those natural persons or undertakings that can show a legitimate interest. Undertakings can claim a legitimate interest where they are operating in the relevant market or where the conduct complained of is liable to directly and adversely affect their interests.⁵² This definition includes customers, suppliers, and competing firms. As suggested, complaints need not always be meritorious. Like potential offenders, complainants may be uncertain about the precise location of the legal standard and they will generally not have access to all factual information necessary to assess legality. Firms may also file complaints in an attempt to hinder a rival and limit his capacity to compete. Whatever the cause, those

⁴⁶ Note that the numbers provided in the reports (published on the Commission's website) are not broken down. They include all forms of infringements of Art 81 EC and Art 82 EC.

⁴⁷ Cf. the Commission's annual report on competition policy (2006), at para. 369.

⁴⁸ Given that 26 of these cases were governed by Regulation 17/62, it is not surprising that the majority of cases started on the basis of a notification. See Annex A.

⁴⁹ See Annex A.

⁵⁰ Most of these decisions have not been reported or published on the Commission's website. It cannot be distilled, therefore, how many cases involve competitor complainants.

⁵¹ This includes case C-519/04 ([2006] ECR I-6991) and T-313/02 ([2004] ECR II-3291); case T-204/03 ([2006] OJ C294/43); case T-193/02 ([2005] ECR II-209); case T-186/05 ([2007] OJ C247/34), and case T-319/99 ([2003] ECR II-360).

⁵² See the Commission's Notice on the handling of complaints under Articles 81 and 82 of the Treaty ([2004] OJ C101/65) at para. 36.

who can claim a legitimate interest are entitled to a statement of the Commission's reasons in case the complaint is rejected.⁵³

An analogy with the 'antitrust injury' doctrine developed in US law serves to illustrate how denying competitors a legitimate interest could be used to compensate the Commission for the extra costs of showing consumer harm. As we saw, the antitrust injury doctrine concerns the standing of private enforcers in US antitrust. Only plaintiffs that have sustained "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful" are entitled to claim damages on the basis of the antitrust laws. This rule, first formulated in the 1977 case of *Brunswick Corp. V. Pueblo Bowl-O-Mat, Inc.*,⁵⁴ should be seen in light of the influence of the Chicago School on US antitrust.⁵⁵ As the scope for antitrust intervention narrowed, so did the group of persons with standing to sue. With antitrust harm conceptualised as *consumer* harm, the antitrust injury doctrine mainly serves as an instrument to deny competitors, who might have found protection under more inclusive standards, access to court.⁵⁶

The suggestion made here is not that in Europe competitors should be prevented from filing complaints. It is recognised that they can provide crucial assistance in detecting potential infringements. But if consumer harm rather than a restriction of commercial freedom is to be the touchstone for intervention in European antitrust, then some suspicion of competitors' complaints is justified; after all, it is in the nature of the competitive process that firms will hurt each other in courting consumers. Little will be lost, therefore, by allowing the Commission not to motivate the rejection of unmeritorious complaints filed by competitors. The resources that are untied in this way can then be rerouted towards the investigation of cases that give the Commission cause for genuine concern.

6.4 Conclusion

From an *ex ante* perspective, it is impossible to say with certainty what the precise effect of raising the Commission's burden of proof would be on the efficiency of enforcement under the effects-based standard of Art 81 EC. There are too many

⁵³ *Id.*, at para 72.

⁵⁴ 429 US 477 (1977).

⁵⁵ In this sense, see Page (1989).

⁵⁶ See Snyder and Kauper (1991) for an empirical study on the effect of the antitrust injury on the frequency of competitor suits, and the response by Page and Blair (1992).

variables that are unknown at present. Much depends, for example, on the type of cases about which the Commission is fed information, on how much information other firms can glean from decisions on these cases and on the average effect on the Commission's enforcement costs.

What can be said, however, for the purposes of this impact assessment, is that much can be done to limit or reduce the drawbacks of improving accuracy and there are fairly good proxies for reduced deterrence that can be observed by the Commission. If its enforcement costs rise substantially due to the proposed reform and if this prevents it from pursuing cases involving serious levels of market power, the Commission could make more use in this field of its existing powers to impose fines. An alternative or complementary measure would be to relieve the Commission of the obligation to respond to complaints filed by non-competitors, which would be entirely consistent with the Commission's new substantive approach.

In the next chapter we examine the changes to be made to the Commission's burden of proof from a substantive perspective. It considers what changes are required in terms of the type and nature of the evidence to be proffered in the analysis under Art 81(1) EC (including their possible implications for enforcement costs) and studies to which extend a stronger focus on consumer harm is compatible with the case law of the Court of First Instance.