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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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Conclusion

8.1 Summary

Before concluding this work by discussing some of its implications for future research, let us briefly summarise the above.

The objective

This thesis set out to evaluate the level of legal certainty in contemporary effects-based analysis under Art 81 EC and to examine whether enforcement under this standard can be made more efficient. Two reasons were advanced for inquiring about legal certainty in this field. Both relate to the recent modernisation of the Commission's substantive policies. By relying more on modern economics in the analysis restraints, these reforms were meant to establish a more permissive regime that implicates fewer agreements than the preceding formalistic approach. The threats to legal certainty stem from the way this programme was implemented. Firstly, it was argued that although this new approach is carefully described in a number of guidelines, day-to-day practice in this field continues to show considerable traits of the old expansionist approach. And secondly, it was pointed out that although these reforms were clearly triggered by the realisation that fewer restraints affect welfare than previously thought, they did not result in material changes to the Commission's burden of proof. This means that the breadth of its scope for intervention was largely unaffected by the reforms and raises questions about legal certainty, that is, about firms' ability to predict whether their agreement might be challenged and found in violation.

On the method

Under uncertainty about the precise location of the legal standard, firms may end up signing socially harmful or unnecessarily cautious agreements (under and over-compliance, resp.). Given that there are inherent difficulties in unearthing direct empirical evidence of such inefficiencies, this thesis has relied on a rigorous analytical framework to study legal certainty in the effects-based field. This framework describes: (1) the variables that influence the calibration of the legal standard and the division of the burden of proof; and (2) the effect of this calibration firms in the market. First, this framework was used to examine the results of a comparison between the way EU and US antitrust organise the investigation of the effects of restrictive agreements. Next, it was relied on to examine the effects of the reform process discussed above on firms' ability to distinguish permissible for impermissible restrictions.

Findings on legal certainty

Particularly firms who seek to position their intended agreement in the area opened up by the process of substantive modernisation, can be expected to encounter difficulties in predicting how their case would be evaluated. There are three reasons that support this view. First, not much exists to guide firms as to the likely appraisal of such contracts. The bulk of the decisions taken after the move away from formalism (32 in total) is made up of clearance decisions that are not nearly as thoroughly reasoned on matters of fact and economic evaluations as infringement decisions are. Such decisions, however, are scarce – the current total stands at four. The Commission's guidelines cannot be expected to fill this gap. They provide an inventory of arguments that may be advanced in antitrust proceedings, but do not give an indication of the probability that one will prevail by relying on them, as case law and decision practice do. Second, and crucial, a large number of clearance decisions show that the Commission continues to rely on expansive notions of restrictiveness. Firms are likely to take notice of this, since many clearances are conditional and are, thus, implicit prohibitions. Firms can therefore be expected to perceive a non-negligible risk of intervention over an extended range of more and less restrictive practices. Thirdly, these difficulties are exacerbated by the introduction of new enforcement procedures, which require firms to assess the legality of their agreement independently in the face

of possible intervention and penalties, rather than in consultation with the Commission. There are indications that these uncertainties do indeed lead firms to adopt inefficient behaviour. These can be found in decisions concerning actually committed infringements (instances of under-deterrence) and, as far as over-compliance is concerned, in the observations by law firms on the behaviour of their clients (submitted to the Commission in the context of its public consultation on the performance of Regulation 1/2003).¹ Still, even if uncertainty as regards important questions of law can be said to be considerable, it must be acknowledged that we cannot ascertain, with the approach adopted in this thesis, how serious the inefficiencies caused by uncertainty are, or whether either of these two effects is more prevalent.

Findings on improving accuracy

Next, on the basis of the argument that either type of inefficiency is in principle best avoided, ways to improve legal certainty were examined. Specifically, the effectiveness of (1) requiring the Commission to articulate clearly what harm to consumers it expects from a restraint and (2) to present empirical evidence in support of this claim was examined. On the plus-side, it was argued that this should make more information available to firms about what constitutes antitrust harm, how it is identified in practice and how harm is weighed against possible efficiencies. This will work to reduce the expected sanction costs of engaging in permissible behaviour *vis-à-vis* those of engaging in impermissible behaviour. As a result, firms will have more incentives to sign desirable contracts. The effect on the bargaining power between parties in litigation should also be taken into account. With less incentive for defendants to offer commitments, the Commission will be forced to adopt more elaborately motivated infringement decisions.

Raising the Commission's burden of proof will, however, also affect its capacity to bring cases. The question is whether the increase in the Commission's enforcement costs does not weigh down its enforcement capacity to such an extent that the effect of increasing the probability that bad agreements will be held illegal is cancelled out. In the overall assessment of the impact of improving accuracy this effect might wholly or partially off-set the benefits of eliminating over-compliance. From an *ex ante*

¹ [2003] OJ L1/1. The observations are published on the Commission's website.

perspective, it is impossible to give a definite answer to this question. What can be said, however, for the purposes of this impact assessment, is that this risk appears to be smaller in the effects-based context than abstract theoretical analysis might imply. A legal standard squarely focused on harm will make investigation costs dependent on the plausibility of the Commission's claim. The Commission will thus be compelled to concentrate resources on more obviously harmful restraints. If the per case investigation costs would rise, therefore, this would primarily affect enforcement on the less restrictive side of the spectrum. In as much as the current approach is characterised by over-inclusiveness, this should rather be seen as an advantage. Moreover, if a serious drop in the capacity to enforce is observed, the Commission may rely on its thusfar under-utilised fining powers (under-utilised in this field) to restore deterrence. An additional way to mitigate the effect on investigation costs, it was suggested, would be to allow the Commission to reject complaints by non-consumers without having to state reasons.

Compatibility with European antitrust

Finally, a number of legal arguments that could be raised against this proposal were examined and dismissed. Most importantly, it was argued that adoption of a consumer harm test does not transplant alien concepts into European antitrust law. It is no more than putting into practice what the Commission itself sets out in its guidelines. There is no risk, that Art 81(3) EC will be emasculated as a consequence – the principle argument advanced in the leading case on the division of the burden of proof in Art 81 EC, *Métropole*.² As the place for assessing arguments to the effect that the agreement produces countervailing benefits in another dimension of output than the Commission's allegations relate to, this provision will continue to play a vital role in the analysis of restraints. It was argued, therefore, that this ruling should not stand in the way of efforts to improve legal certainty.

8.2 Broader implications and directions for future research

This study has implications that reach beyond Art 81 EC. In particular, it holds an important message for the Commission's review of Art 82 EC. In addition, it raises questions for future research.

² *Métropole v. Commission*, [2001] ECR II-2459.

Art 82 EC review

In December 2005 the Commission issued a staff paper on exclusionary abuses of dominance that is meant to stimulate discussion and prepare for a review of the application of Art 82 EC,³ which led to the adoption of a set of guidelines in February 2009.⁴ One of the major developments that these guidelines introduce lies in the fact that the Commission signals that it is more open to consider the pro-competitive effects of exclusionary practices engaged in by dominant firms.⁵ At various instances, also, the discussion paper makes clear that, in the Commission's view, Art 82 EC serves to protect the interests of consumers.⁶ Exclusion must (ultimately) lead to exploitative consequences, therefore, for there to be scope for intervention.

This thesis has examined the way in which the reforms in the field of Art 81 EC were put into practice by the Commission. Given that the reforms in the field of Art 82 EC have only just been introduced at the time of writing, it is too early to make a similar analysis in this context. Our study does, however, raise some concerns about the way in which this reform will be implemented; notably, that elements of the analytical framework in Art 81 EC that were criticised in this thesis may also find their way into Art 82 EC analysis.

Despite the emphasis that is put on consumer harm throughout these guidelines, the discussion of the evidence by which foreclosure must be shown appears to suggest that the effect on the competitive structure of the market (that is, on competition and competitors) will constitute the primary benchmark in the investigation. At the same time, the language used in the part of the guidelines dealing with objective justifications and efficiencies is very similar to the language used in the Commission's Notice on the application of Art 81(3) EC.⁷

³ Published on the Commission's website.

⁴ Commission Notice containing guidance on the Commission's enforcement priorities in applying Art 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, published on the Commission's website.

⁵ *Supra*, footnote 4, at para. 28 a.f.

⁶ See, for example, the introduction to the guidelines and the section describing the purpose of the guidelines.

⁷ [2004] OJ C 101/97.

We saw in our discussion of the case of *Master Card*⁸ and *Morgan Stanley / Visa*⁹ that the standard that is advanced in these guidelines for the assessment of efficiency defences may be very exacting in practice. It is open for question, therefore, how much real room for hearing efficiency defences is created by the new guidelines. Moreover, there is a risk that the Commission may copy its practice under Art 81 EC and frame what were identified to be non-affirmative defences (relating to the same dimension of output that is implicated by the Commission's theory of harm) above as falling under the defendant's burden. At the level of litigation, the result may be that plausible exculpations are insufficiently unexamined. This, at least, was the fate of both Master Card's defence based on network effects and Visa's contention that a recent drop in merchant's fees testified of effective competition.¹⁰ And the effects on firms in the market (potential offenders) should also be considered. The uncertainty resulting from decisions that remain vague about the precise criteria applied in assessing harm and countervailing benefits may lead dominant undertakings to sign inefficient contracts. Those firms facing a strictly binary choice to exclude a competitor or not, like Visa did in the case just discussed, may end up being insufficiently deterred, whereas other undertakings, particularly those who make significant irrecoverable investments, may take unnecessary precautions.

Policy innovation, Remia, and the French model

The appropriateness of the institutional framework supporting European antitrust enforcement has frequently been called into question (e.g. Lyons, 2004; and Wilks and McGowan, 1996). The European system, based on the French model of administrative law, gives the Commission two complementary roles in enforcement. Not only does it act as prosecutor, it also takes binding decisions on the cases it challenges. At the same time, the European Courts leave the Commission considerable freedom in making its assessments. In the foundational years of European antitrust, the ECJ was actively involved in developing policy. Over time, the Court redefined its role and took a step back, creating more room for the Commission to influence policy. In particular, in the case of *Remia*, the Court

⁸ Decision of 19 December 2007, published on the Commission's website. See the discussions of this case in Chapter 4, Section 4.3.2, and Chapter 7, Section 7.2.

⁹ Decision of 3 October 2007, published on the Commission's website. See the discussion of this case in Chapter 7, Section 7.2.

¹⁰ See the discussion in Chapter 7, Section 7.2.

indicated that it would not substitute the Commission's expert assessment of complex economic questions with its own better judgment.¹¹ Since its institution in 1989, the CFI has subjected the Commission's factual claims to more thorough scrutiny than the ECJ did before it. But it has avoided making principled statements that go beyond the lines drawn in ECJ case law, as it could have done in *Métropole*, for instance.¹² In the current perspective, the initiative on developing the economic concepts that underlie European antitrust policy is clearly and increasingly with the Commission.¹³

The current division of labour creates the risk that the Commission's 'private' interests as an – over-burdened – enforcer influence the choices it makes as policymaker. A primary example is provided by the fact that – although the reforms of the Commission's substantive policies were meant to establish a more permissive regime – they did not result in material changes to its burden of proof. This a question concerning the merits of this institutional set up that appears not to have been addressed in the literature and therefore provides ground for future research. It would be particularly interesting, in this regard, to make an international comparison of the link between institutional architecture and receptiveness to advances in economics. US antitrust experience, for instance, shows that courts can play an active and leading role in integrating new insights into law.

8.3 Concluding remarks

The prohibition of agreements that restrict competition in Art 81 EC has implications for the commercial contracts of many thousands of firms active on the Common Market. When looked at from a purely legal perspective, the regulation of potentially beneficial agreements that restrict competition comes across as a well developed and relatively stable field of law. The economic theories used to interpret the welfare effects of such agreements may be subject to change, but the main legal principles that govern this investigation still rest on the solid foundation laid by European Court of Justice in its earliest antitrust case law. Over time these principles have gradually been further developed, but at present the field sees little thorough regulatory innovation and remains at the periphery of the academic debate on antitrust.

¹¹ *Remia v. Commission*, [1987] ECR 2545, at para. 34.

¹² *Supra*, footnote 1. See the discussion of this case in Chapter 7, Section 7.4.

¹³ Consider for example the reform and review programs that the Commission has launched in all major fields of antitrust policy over the past decade. In this regard, see Chapter 1, footnote 1.

This thesis has examined how well existing law on restrictive agreements works to inform firms active on the Common market about which forms of potentially beneficial agreements are prescribed. When looked at through this lens, the field is revealed to be in need of serious repairs, as consistent guidance is missing on a number of important points. In considerable part, this is related to the Commission's scope of intervention in business behaviour, which, for historic reasons, extends beyond what modern economic insights tell us is necessary to protect society from harmful restrictions of competition. The resulting strength of the Commission's bargaining position *vis-à-vis* firms allows it to make savings on the motivation of its decisions, which generates uncertainty. For this reason, this thesis advocates that an adjustment is made to a crucial aspect of Art 81 EC: the division of the burden of proof. In so doing, an important second point was implicitly made: the legal principles that govern the investigation of restrictive agreements cannot be seen in isolation from advances made in economic theory.