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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APPENDIX A

EU Commission Decisions

The investigation of European effects-based analysis under Art 81 EC focused on leading ECJ and CFI rulings, as well as on the Commission's decision practice. The reasons for devoting particular attention to the Commission's practice were discussed extensively in Chapters 2 (Section 2.4) and 4 (Section 4.2).[1] This appendix provides a complete list of the Commission's decisions that were studied and describes by what method they were selected.

The total number of Commission decisions in competition cases is very large and spans many different fields.[2] This thesis is concerned with only one of these fields and, consequently, relies on a small subset of decisions. The section on antitrust cases of the Commission's website provided the basis or the selection of decisions.[3] Three criteria were used to select the relevant cases from amongst this list of public documents. The first relates to the treaty provision involved. Only cases involving an investigation under Art 81 EC were selected (that is, cases dealt with exclusively under Art 82 EC or other fields of competition law were left out).

[1] With a view to the discussion of the selection-criteria it is useful to re-introduce the most important reasons that were advanced in those chapters. First, the Commission continues to rely on more inclusive notions of restrictiveness than prescribed by the Courts. By focusing exclusively on case law we would therefore risk missing important aspects of what firms experience to be the limits of the law. Second, there is a group of decisions – informative about the dividing line between permissible and impermissible restrictions of competition – that are less likely ever to reach the stage of review. Conditional clearances (exemptions with conditions and commitment decisions) are less likely to be appealed, since frequently they are the result of negotiations between the Commission and the defendants. In general, however, they do modify the agreement as originally envisaged by the defendants and, thus, contain important information to guide firms contemplating the conclusion of a similar contract.

[2] Carree et al. (2008), for example, report a total number of 587 decisions for the period 1964-2001. This number excludes decisions in the field of state aid and concentration control, but in addition to Art 81 EC cases, it also includes Art 82 EC cases.

[3] Http://ec.europa.eu/comm/competition/antitrust/cases/index.html

The second criterion relates to the legal standard that is relied upon in the decision. This study is concerned with decisions taken under the effects-based standard only (that is, cases decided by applying the object-based standard were left out). In this regard, it should be noted that on the Commission's website, cases are not distinguished in terms of the legal standard that is applied in the investigation of the restriction at issue. And even in decisions themselves, the choice is not always explicitly made. Clearance decisions – the bulk of the Commission's practice – can, nonetheless, safely be classified as involving effects-based analysis, since the scope for clearing *per se* restrictions can reasonably be assumed to be very limited.[4] With respect to infringement decisions, the issues are more complicated. In particular, there are many examples in the Commission's practice of infringement decisions that employ a combination of object-based and effects-based reasoning.[5] Generally, it is possible to identify the dominant method of analysis. Discussion of a number of border-line cases helps to clarify how this rather qualitative assessment was made.

The cases of *Belgian Architects*,[6] *GlaxoWellcome*,[7] and *JCB*[8] are examples of cases that have been excluded. In *Belgian Architects* – where a clear *per se* violation is at stake (minimum fee fixing) – the investigation of the effects produced by the agreement remains very superficial.[9] The decisions in *GlaxoWellcome* and *JCB* both involve more extensive examination of effects.[10] The charge in these cases, however, was the restriction of parallel imports and the analysis of effects was focused

[4] Commitment decisions are generally motivated in abbreviated fashion, frequently to the extent that it cannot be ascertained that the analysis was focused on effects. As suggested, this may nonetheless be assumed, since the scope for clearing *per se* restrictions can be considered to be very limited. Negative clearance decisions – where it is found that the agreement does not come under the scope of Art 81(1) EC – have been excluded from the study. Most of these cases do apply effects-based analysis. But they are frequently even less elaborately motivated than exemption decisions and do not reach the crucial stage of Art 81(3) EC analysis.

[5] Althoug seemingly in contradiction with the rationale for having two different methods of analysis (see Chapter 2, Section 2.4), in the context of the notification regime this approach is understandable. Serious concerns raised by notified agreements would generally be negotiated away. Potentially efficient agreements that were met by a finding of an infringement were generally those that were not notified, or had been implemented differently than was outlined in the notification. This lack of good faith seems often to have provided a reason for object-based argumentation, which, also, allowed the Commission to scale-back on the depth of its more fact-intensive, and thus costly, effects-based inquiry. For these reasons it is often debatable whether a specific infringement decision displays significant effects-based analysis.

[6] Decision of 24 June 2004, published on the Commission's website.

[7] [2001] OJ 302/1.

[8] [2002] OJ 69/1.

[9] Supra, footnote 7. Other examples of cases that have been excluded for the same reason are *Souris Topps* (decision of 26 May 2004, published on the Commission's website), *Yamaha* (decision of 16 July 2003, published on the Commission's website), and *SunAir / SAS* ([2001] OJ L265/15).

[10] Supra, footnotes 8 and 9.

accordingly. This makes the analysis of the effects produced by these agreements considerably different from the assessment of the impact produced by generic restrictions of competition, which has been the focus of this work. *EATA*[11] and *Morgan Stanley / Visa*[12] are examples of cases involving obvious restrictions that have been included in the list below because the decision clearly rests on the effects-based component of the assessment.

Finally, timing played an important role in the selection. The objective in this work was to study decisions that reflect the Commission's modernised method of assessing the effects produced by restraints (up to the year 2008). As we saw in Chapter 5, substantive modernisation got underway in the second half of the 1990s. Notably, the block exemption regulations for vertical restraints and horizontal co-operation were adopted in 1999 and 2000.[13] To be able to work with a somewhat larger number of cases, decisions involving vertical restraints dating from the year 1998 have also been included (one year after the publication of the green paper on vertical restraints)[14] and with regard to horizontal co-operation agreements, decisions from 1999 onwards have been looked at (when the process of review was underway for two years already[15]).[16]

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[11] [1999] OJ L193/23.

[12] Decision of 3 October 2007, published on the Commission's website.

[13] See Regulation 2790/99 on vertical restraints, (supra, footnote 181); Regulation 2658/2000, on the application of Article 81(3) of the Treaty to categories of specialisation agreements, [2001] OJ L 304/3; and Regulation 2659/2000, on the application of Article 81(3) of the Treaty to categories of research and development agreements, [2001] OJ L 304/7.

[14] [1997] CMLR 519.

[15] See 28th Report on Competition Policy (1998), at points 54 and 55.

[16] With regard to the time period chosen, some might want to argue that the real change in the Commission's substantive approach occurred only in the year 2004, when it issued its Notice on the application of Art 81(3) EC ([2004] OJ C101/97) and when the entry into force of Regulation 1/2003 ([2003] OJ L1/1) finally freed it from the burdens imposed by the notification system. It is certainly recognised that the year 2004 constitutes a milestone in the history of European antitrust (in this regard, see also McGowan, 2005). This is reflected in this thesis by the ample discussion (in Chapters 2, 5, and 7) of the said Notice and by the emphasis placed on the discussion of post-2003 decision practice (notably, of the decisions in the cases of Morgan Stanley / Visa (decision of 3 October 2007, published on the Commission's website) and *Master Card* (decision of 19 December 2007, published on the Commission's website)). It is submitted, however, that the transformation to a true effects-based regime is clearly not an overnight event. Rather, it is a gradual process (that is still on-going). The issuance of the Vertical Guidelines ([2000] OJ C291/1) in the year 2000 and of the Horizontal Guidelines ([2001] OJ C3/2) the year after, were significant earlier steps in this process. Importantly, these guidelines clearly had an effect on practice prior to the year 2004. In this regard, see, for instance, the references made to these guidelines in the cases of Visa MIF (OJ [2002] L318/17, at para. 56); O2/T-Mobile Germany (OJ [2004] L75/32, at para. 116), UEFA ([2003] OJ L291/25, at footnote 59); and throughout the decision of Telenor/Canal+ (decision of 29 December 2003, published on the Commission's website). Note, also, that the Commission had effectively stopped processing notifications before the entry into force of Regulation 1/ 2003; in this regard, see Whish (2003: 164). Finally, focusing exclusively on post 2003 decision practice would have considerably narrowed the

The list presented below classifies the cases selected following this procedure according to (1) the type of decision involved, (2) whether clearance is subject to (substantial behavioural) conditions, (3) whether the decision indicates that at some stage of the proceedings modifications were made to the agreement in order to assuage the Commission's concerns, and (4) how the proceedings were initiated.[17]

No	Name	Citation	Decision type	Conditions	Modified	Initiated by
1	vdBerghFoods	OJ [1998] L246/1	Infringement	X	x	Competitor complaint
2	P&O/StenaLine	OJ [1999] L163/61	Exemption	Yes	No	Competitor complaint
3	Whitbread/Bass/Scottish	OJ [1999] L88/26	Exemption	No	No	x
4	TPS	OJ [1999] L90/6	Exemption	Yes	Yes	Notified
5	IMA (EPI)	OJ [1999] L106/14	Exemption	No	Yes	x
6	P&I Clubs	OJ [1999] L125/12	Exemption	Yes	Yes	Complaint
7	Cegetel	OJ [1999] L218/14	Exemption	No	Yes	Notified
8	GEAE/P&W	OJ [2000] L58/16	Exemption	Substantial	Yes	Competitor complaint
9	Reims II	OJ [1999] L275/17	Exemption	Substantial	Yes	Complaint
10	BSkyB	OJ [1999] L312/1	Exemption	Substantial	Yes	Notified
11	EATA	OJ [1999] L193/23	Infringement	x	x	x
12	Ceced	OJ [2000] L187/47	Exemption	No	No	Notified
13	Eurovision	OJ [2000] L151/18	Exemption	Substantial	No	Notified
14	EcoEmballages	OJ [2001] L233/37	Exemption	No	No	Notified
15	Lufthansa/AustrianAirl	OJ [2002] L242/25	Exemption	Substantial	No	Notified
16	Visa MIF	OJ [2002] L318/17	Exemption	Substantial	Yes	Complaint
17	IFPI Simulcasting	OJ [2003] L107/58	Exemption	Yes	Yes	Notified
18	Lufthansa/SAS/United	OJ [2002] C264/5	Exemption	Substantial	Yes	x
19	RevisedTaca	OJ [2003] L26/53	Exemption	No	Yes	Complaint
20	O2/T-Mobile UK	OJ [2003] L200/59	Exemption	No	Yes	Notified
21	O2/T-Mobile Germany	OJ [2004] L75/32	Exemption	No	Yes	x
22	UEFA	OJ [2003] L291/25	Exemption	Substantial	Yes	Notified
23	Reims II renewal	OJ [2004] L56/76	Exemption	Substantial	Yes	x
24	Telenor/Canal+	COMP38.287 (29-12-2003)	Exemption	No	Yes	Notified
25	Argev / ARA	OJ [2002] C250/3	Exemption	Substantial	Yes	Competitor complaint
26	Alitalia/AirFrance	COMP38.284 (7-4-2004)	Exemption	Substantial	Yes	Notified
27	DFB	COMP37.214 (19-1-2005)	Commitment	Substantial	x	Notified
28	Premier League	COMP38.173 (22-3-2006)	Commitment	Substantial	x	Commission
29	Repsol	COMP38.348 (14-4-2006)	Commitment	Substantial	x	Notified
30	Cannes	COMP38.681 (4-10-2006)	Commitment	Substantial	x	Complaint
31	Morgan Stanley / Visa	COMP37.860 (3-10-2007)	Infringement	X	x	Competitor complaint
32	Master Card	COMP34.579 (19-12-2007)	Infringement	X	x	Complaint

scope of this work by reducing the number of relevant decision to no more than 6, whereas the current set-up allows for the examination of 32 decisions.

[17] As regards the way proceedings were initiated, not that the entry 'complaint' does not necessarily indicate that the complaint was filed by a non-competitor; in a number of cases the decision is not clear on this point.