



UvA-DARE (Digital Academic Repository)

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

Lankhorst, M.

[Link to publication](#)

Citation for published version (APA):

Lankhorst, M. (2010). *Increasing the requirements to show antitrust harm in modernised effects-based analysis: an assessment of the impact on the efficiency of enforcement of Art 81 EC*. Amsterdam Center for Law & Economics.

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

US District Court Cases

The study of US antitrust law made in preparation for the analysis in Chapters 4 and 7 focused on leading US Supreme Court and Federal Circuit Court of Appeals cases regarding *rule of reason* analysis under Sherman Act §1 and on the literature referred to in those chapters.¹ For reasons discussed in Chapters 2 (Section 2.4) and 4 (Section 4.2), it was considered appropriate also to examine a broader sample of recent District Court cases involving the same subject matter.²

The District Court cases used in this study were selected by means of a *West Law* search, using “antitrust” and “rule of reason” as terms for searching the database of federal cases. This produced many hundreds of results. Although all of these cases included the terms ‘antitrust’ and ‘rule of reason’, only a fraction involved Sherman Act §1 cases assessed under the *rule of reason*. Case-by-case examination led to the selection of the 114 cases listed below. Cases where the court does not clearly determine that the antitrust claims must be assessed under the *rule of reason* have been excluded. Multi-claim and multi-count cases where the §1 allegations to be assessed under the *rule of reason* are of minor importance to the case as a whole and are unsuccessful, have been left out as well. The cases span the period from 1990 to

¹ 15 U.S.C.A. §1.

² Just as with European antitrust, to the extent that higher court decisions set out general principles, their application to individual cases may leave 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 may be of considerable importance. More importantly, by including the District Court level – where the bulk of litigation may be assumed to occur – we can form an impression of the impact of higher court precedents on practice. Thus, it becomes possible, for example, to appreciate the importance in day-to-day practice of the Supreme Court’s suggestion in the case of *Indiana Dentist Federation* (476 US 447 (1986), at 460) that the existence of compelling direct evidence may remove the need to engage in market definition.

2001.³ The table below lists all 114 cases and provides information on the following details.

Under the heading of ‘Phase’, it is indicated whether the decision was adopted in the pre-trial phase of proceedings (in response to a motion to dismiss or a motion for summary judgment) or after trial. In cases where the defendant’s pre-trial motion is denied (because the plaintiff has stated a valid claim and there are genuine issues of material fact) the outcome of the case as a whole remains undecided. With respect to other cases, it is indicated whether the court finds for the plaintiff or the defendant. Note that the entries in this column only relate to the §1 claims assessed under the *rule of reason* and not to the case as a whole. The column ‘Stage of analysis’ relates to the three stages in *rule of reason* analysis: (1) the plaintiff’s burden to show *prima facie* evidence of a restriction, (2) the defendant’s burden to show efficiencies, and (3) the plaintiff’s burden to show that the restrictions outweigh the benefits. This column indicates the final stage that was reached in the investigation of a case. Where, for instance, in case no. 25 (*US v. Brown University*) it is indicated ‘efficiencies’, this means that the plaintiff prevails because the defendant has failed to develop a plausible efficiency defence. In a minority of cases district courts discuss evident beneficial effects produced by the alleged restriction to show that the plaintiff has not succeeded in showing sufficient *prima facie* evidence; these are marked ‘PF efficiencies’.

Nr	Name	Citation	Phase	Finding for	Standard	Stage of analysis
1	Illinois v Panhandle	730 F.Supp. 826 (1990)	Trial	Plaintiff	Rule of reason	Balancing
2	TownSound v Chrysler	743 F.Supp. 353 (1990)	Pre-trial	Defendant	Rule of reason	Prima facie case
3	Eureka v PBA	746 F.Supp. 915 (1990)	Pre-trial	Plaintiff	Rule of reason	Balancing
4	Chicago v NBA	754 F.Supp. 1336 (1991)	Trial	Plaintiff	Quick Look	Balancing
5	Camellia v Tribune	762 F.Supp. 290 (1991)	Pre-trial	Defendant	Rule of reason	Prima facie case
6	Weight-Rite v USGolf	759 F.Supp. 638 (1991)	Pre-trial	Defendant	Rule of reason	Prima facie case
7	Anesthesia v Metz	766 F.Supp. 1104 (1991)	Pre-trial	Defendant	Rule of reason	Prima facie case
8	Cranfill v ScottFetzer	773 F.Supp. 943 (1991)	Pre-trial	Defendant	Rule of reason	Prima facie case
9	MylanLab v Akzo	770 F.Supp. 1053 (1991)	Pre-trial	Defendant	Rule of reason	Prima facie case
10	NCTA v BMI	772 F.Supp. 614 (1991)	Trial	Defendant	Rule of reason	Balancing
11	Keystone v Westrock	792 F.Supp. 1552 (1991)	Pre-trial	Defendant	Rule of reason	Prima facie case
12	Carleton v VermontDairy	782 F.Supp. 926 (1991)	Pre-trial	Undecided	Rule of reason	Prima facie case

³ The original set up was to include decisions taken between 1990 and 2005. Because each case has to be analysed in detail to determine whether it involves a §1 *rule of reason* claim it could not easily be foreseen how many results the search would produce. Given that (1) the 1990-2001 sample includes 3 times more cases than the European sample, (2) the decisions thus selected clearly reflect the major precedents discussed in Chapters 4 and 7, and (3) that the sifting process proved very time-consuming, the current selection was judged sufficiently large for the purposes of this study.

Nr	Name	Citation	Phase	Finding for	Standard	Stage of analysis
13	Sessions v Joor	786 F.Supp. 1518 (1991)	Trial	Plaintiff	Quick Look	Efficiencies
14	Miller v IndianaHospital	814 F.Supp. 1254 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
15	Futurevision v Multivision	789 F.Supp. 760 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
16	FiveSmiths v NFLPA	788 F.Supp. 1042 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
17	Jackson v Radcliffe	795 F.Supp. 197 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
18	GreaterRockford v Shell	790 F.Supp. 804 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
19	Capitallmaging v Mohaw	791 F.Supp. 956 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
20	BreauxBros v Teche	792 F.Supp. 1436 (1992)	Trial	Plaintiff	Rule of reason	Efficiencies
21	Joplin v Allen	795 F.Supp. 349 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
22	GreeneCounty v Behm	797 F.Supp. 1276 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
23	Southern v Matsushita	806 F.Supp. 950 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
24	Sullivan v Tagliabue	795 F.Supp. 56 (1992)	Pre-trial	Undecided	Rule of reason	Prima facie case
25	US v BrownUniversity	805 F.Supp. 288 (1992)	Trial	Plaintiff	Quick Look	Efficiencies
26	Smalley v Emerson	808 F.Supp. 1503 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
27	Flegel v ChristianHospita	804 F.Supp. 1165 (1992)	Pre-trial	Defendant	Rule of reason	Prima facie case
28	NewYork v Anheuser	811 F.Supp. 848 (1993)	Trial	Plaintiff	Rule of reason	Balancing
29	Lifeline v ConnecticutIns	821 F.Supp. 1201 (1993)	Pre-trial	Defendant	Rule of reason	Prima facie case
30	SCFCVisa	819 F.Supp. 956 (1993)	Trial	Plaintiff	Rule of reason	Balancing
31	Balaklaw v Lovell	822 F.Supp. 892 (1993)	Pre-trial	Defendant	Rule of reason	Prima facie case
32	Storer v Montgomery	826 F.Supp. 1338 (1993)	Pre-trial	Undecided	Rule of reason	Prima facie case
33	Lee v LifeInsurance	829 F.Supp. 529 (1993)	Pre-trial	Defendant	Rule of reason	Prima facie case
34	Rosen v Hyundai	829 F.Supp. 41 (1993)	Pre-trial	Defendant	Rule of reason	Prima facie case
35	Clorox v Winthorp	836 F.Supp. 983 (1993)	Pre-trial	Undecided	Rule of reason	Prima facie case
36	Cogan v Harford	843 F.Supp. 1013 (1994)	Pre-trial	Defendant	Rule of reason	Prima facie case
37	Servicetrends v Siemens	870 F.Supp. 1042 (1994)	Pre-trial	Defendant	Rule of reason	PF efficiencies
38	Blackburn v Sweeney	850 F.Supp. 758 (1994)	Pre-trial	Undecided	Rule of reason	Prima facie case
39	Thompson v NCA	850 F.Supp. 470 (1994)	Pre-trial	Defendant	Rule of reason	Prima facie case
40	AppraiserFoundation	867 F.Supp. 1407 (1994)	Pre-trial	Defendant	Rule of reason	Prima facie case
41	Northlake v Glaverbel	861 F.Supp. 653 (1994)	Pre-trial	Defendant	Rule of reason	Prima facie case
42	Princess v Lindsey	918 F.Supp. 1356 (1994)	Pre-trial	Defendant	Rule of reason	Prima facie case
43	Leyba v Renger	874 F.Supp. 1229 (1994)	Pre-trial	Defendant	Rule of reason	Prima facie case
44	Picker v Leavitt	865 F.Supp. 951 (1994)	Pre-trial	Defendant	Rule of reason	PF efficiencies
45	Levine v CentralFlorida	864 F.Supp. 1175 (1994)	Pre-trial	Defendant	Rule of reason	Prima facie case
46	Orson v Miramax	862 F.Supp. 1378 (1994)	Pre-trial	Defendant	Rule of reason	PF efficiencies
47	TCA v Northwestern	873 F.Supp. 29 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
48	TotalBenefit v Group	875 F.Supp. 1228 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
49	Acme v Wharton	890 F.Supp. 1230 (1995)	Pre-trial	Undecided	Rule of reason	Prima facie case
50	Doctors v SoutheastMed	889 F.Supp. 879 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
51	Mathews v Lancaster	883 F.Supp. 1016 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
52	Re/Max v RealtyOne	900 F.Supp. 132 (1995)	Pre-trial	Undecided	Rule of reason	Prima facie case
53	AT&T v IMRCapital	888 F.Supp. 221 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
54	Addamax v Open	888 F.Supp. 274 (1995)	Pre-trial	Undecided	Rule of reason	Prima facie case
55	Law v NCAA	902 F.Supp. 1394 (1995)	Pre-trial	Plaintiff	Quick Look	Efficiencies
56	Volpp v Caterpillar	917 F.Supp. 1208 (1995)	Pre-trial	Defendant	Rule of reason	PF efficiencies
57	Southtrust v Plus	913 F.Supp. 1517 (1995)	Pre-trial	Plaintiff	Quick Look	Balancing
58	Nichols v Dunlop	913 F.Supp. 1088 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
59	Audell v Suburban	903 F.Supp. 364 (1995)	Pre-trial	Undecided	Rule of reason	Prima facie case
60	Khan v StateOil	907 F.Supp. 1202 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
61	Ransomes v Spartan	914 F.Supp. 183 (1995)	Pre-trial	Defendant	Rule of reason	Prima facie case
62	Martin v KFC	935 F.Supp. 898 (1996)	Pre-trial	Defendant	Rule of reason	Prima facie case

Nr	Name	Citation	Phase	Finding for	Standard	Stage of analysis
63	Barrett v Fields	924 F.Supp. 1063 (1996)	Trial	Undecided	Rule of reason	Prima facie case
64	Queen v Dominos	922 F.Supp. 1055 (1996)	Pre-trial	Defendant	Rule of reason	Prima facie case
65	Sage v ISS	936 F.Supp. 130 (1996)	Pre-trial	Defendant	Rule of reason	Prima facie case
66	Baglio v Baska	940 F.Supp. 819 (1996)	Pre-trial	Defendant	Rule of reason	Prima facie case
67	Alpha v Comsat	968 F.Supp. 876 (1996)	Pre-trial	Defendant	Rule of reason	Prima facie case
68	Tower v Fedex	956 F.Supp. 270 (1996)	Pre-trial	Defendant	Rule of reason	Prima facie case
69	Godix v Caterpillar	948 F.Supp. 1570 (1996)	Trial	Defendant	Rule of reason	Prima facie case
70	Yeager v PennPower	953 F.Supp. 617 (1997)	Pre-trial	Plaintiff	Rule of reason	Balancing
71	Bogan v NorthWestern	953 F.Supp. 532 (1997)	Pre-trial	Defendant	Rule of reason	Prima facie case
72	CircuitBreaker	984 F.Supp. 1267 (1997)	Pre-trial	Defendant	Rule of reason	Prima facie case
73	Bushnell v ITT	973 F.Supp. 1276 (1997)	Pre-trial	Defendant	Rule of reason	Prima facie case
74	Rozema v Marshfield	977 F.Supp. 1362 (1997)	Pre-trial	Undecided	Rule of reason	Prima facie case
75	Wilson v Mobil	984 F.Supp. 450 (1997)	Pre-trial	Defendant	Rule of reason	Prima facie case
76	Daniel v ABEM	988 F.Supp. 112 (1997)	Pre-trial	Undecided	Rule of reason	Prima facie case
77	Brooks v GST	992 F.Supp. 1124 (1997)	Pre-trial	Undecided	Rule of reason	Prima facie case
78	Ginzburg v Memorial	993 F.Supp. 998 (1997)	Pre-trial	Defendant	Rule of reason	Prima facie case
79	Fraser v MLSoccer	7 F.Supp.2d 73 (1998)	Pre-trial	Undecided	Quick Look	Prima facie case
80	Davies v Genesis	994 F.Supp. 1078 (1998)	Pre-trial	Defendant	Rule of reason	Prima facie case
81	CDC v Idexx	7 F.Supp.2d 119 (1998)	Pre-trial	Defendant	Rule of reason	Prima facie case
82	Nurses v Unity	5 F.Supp.2d 694 (1998)	Pre-trial	Defendant	Rule of reason	Prima facie case
83	UnionCarbide v Montell	27 F.Supp.2d 414 (1998)	Pre-trial	Defendant	Rule of reason	Prima facie case
84	Oregon v PhilipMorris	17 F.Supp.2d 1170 (1998)	Pre-trial	Defendant	Rule of reason	Prima facie case
85	Norte v FirstBank	25 F.Supp.2d 9 (1998)	Pre-trial	Defendant	Rule of reason	Prima facie case
86	GreaterProvidence v MI	32 F.Supp.2d 491 (1998)	Pre-trial	Undecided	Rule of reason	Prima facie case
87	ContOrth v HealthIns	40 F.Supp.2d 109 (1999)	Pre-trial	Undecided	Rule of reason	Prima facie case
88	Caldera v Microsoft	87 F.Supp.2d 1244 (1999)	Pre-trial	Undecided	Rule of reason	Prima facie case
89	Granite v Bear	58 F.Supp.2d 228 (1999)	Pre-trial	Defendant	Rule of reason	Prima facie case
90	RedLion v Ohmeda	63 F.Supp.2d 1218 (1999)	Pre-trial	Undecided	Rule of reason	Prima facie case
91	Adidas v NCAA	64 F.Supp.2d 1097 (1999)	Pre-trial	Defendant	Rule of reason	Prima facie case
92	Interior v Design	73 F.Supp.2d 829 (1999)	Pre-trial	Defendant	Rule of reason	Prima facie case
93	Toscana v PGA	70 F.Supp.2d 1109 (1999)	Pre-trial	Defendant	Rule of reason	Prima facie case
94	Virgin v BA	69 F.Supp.2d 571 (1999)	Pre-trial	Defendant	Rule of reason	Prima facie case
95	Chawla v Shell	75 F.Supp.2d 626 (1999)	Pre-trial	Defendant	Rule of reason	Prima facie case
96	Randall v BuenaVista	75 F.Supp.2d 946 (1999)	Pre-trial	Undecided	Rule of reason	Prima facie case
97	Carter v Variflex	101 F.Supp.2d 1261 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
98	Bepco v AlliedSignal	106 F.Supp.2d 814 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
99	Microbix v Biowhittaker	172 F.Supp.2d 680 (2000)	Pre-trial	Defendant	Quick Look	Balancing
100	US v Microsoft	87 F.Supp.2d 30 (2000)	Trial	Defendant	Rule of reason	Prima facie case
101	Paladin v Montana	97 F.Supp.2d 1013 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
102	VirgVermiculite v Grace	108 F.Supp.2d 549 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
103	Reddy v GoodSamaritan	137 F.Supp.2d 948 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
104	Urdinaran v Aarons	115 F.Supp.2d 484 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
105	O'Dell v GMC	122 F.Supp.2d 721 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
106	Todd v Exxon	126 F.Supp.2d 321 (2000)	Pre-trial	Defendant	Rule of reason	Prima facie case
107	Continental v United	126 F.Supp.2d 962 (2001)	Pre-trial	Plaintiff	Quick Look	Balancing
108	Suzuki v Outdoor	126 F.Supp.2d 40 (2001)	Pre-trial	Defendant	Rule of reason	Prima facie case
109	Morales v Garcia	137 F.Supp.2d 44 (2001)	Pre-trial	Defendant	Rule of reason	Prima facie case
110	Moecker v Honeywell	144 F.Supp.2d 1291 (2001)	Pre-trial	Undecided	Rule of reason	Prima facie case
111	Beyer v Elmhurst	142 F.Supp.2d 296 (2001)	Pre-trial	Defendant	Rule of reason	Prima facie case
112	FloorsNMore v Liquidator	142 F.Supp.2d 496 (2001)	Pre-trial	Defendant	Rule of reason	Prima facie case

Nr	Name	Citation	Phase	Finding for	Standard	Stage of analysis
113	Viazis v AAOrthodontists	182 F.Supp.2d 552 (2001)	Trial	Defendant	Rule of reason	Prima facie case
114	US v Visa	163 F.Supp.2d 322 (2001)	Trial	Plaintiff	Rule of reason	Balancing