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 B

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

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\(^2\) 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.
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’.

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<tr>
<th>Nr</th>
<th>Name</th>
<th>Citation</th>
<th>Phase</th>
<th>Finding for</th>
<th>Standard</th>
<th>Stage of analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Illinois v Panhandle</td>
<td>730 F.Supp., 826 (1990)</td>
<td>Trial</td>
<td>Plaintiff</td>
<td>Rule of reason</td>
<td>Balancing</td>
</tr>
<tr>
<td>2</td>
<td>TownSound v Chrysler</td>
<td>743 F.Supp. 353 (1990)</td>
<td>Pre-trial</td>
<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
</tr>
<tr>
<td>3</td>
<td>Eureka v PBA</td>
<td>746 F.Supp. 915 (1990)</td>
<td>Pre-trial</td>
<td>Plaintiff</td>
<td>Rule of reason</td>
<td>Balancing</td>
</tr>
<tr>
<td>4</td>
<td>Chicago v NBA</td>
<td>754 F.Supp. 1336 (1991)</td>
<td>Trial</td>
<td>Plaintiff</td>
<td>Quick Look</td>
<td>Balancing</td>
</tr>
<tr>
<td>6</td>
<td>Weight-Rite v USGolf</td>
<td>759 F.Supp. 638 (1991)</td>
<td>Pre-trial</td>
<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
</tr>
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</table>

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.
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<th>Standard</th>
<th>Stage of analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>20</td>
<td>Breaux Bros v Teche</td>
<td>792 F.Supp. 1436 (1992)</td>
<td>Trial Plaintiff</td>
<td>Quick Look</td>
<td>Efficiencies</td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>Greene County v Behm</td>
<td>797 F.Supp. 1276 (1992)</td>
<td>Pre-trial</td>
<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
</tr>
<tr>
<td>23</td>
<td>Southern v Matsushita</td>
<td>806 F.Supp. 950 (1992)</td>
<td>Pre-trial</td>
<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
</tr>
<tr>
<td>35</td>
<td>Clorox v Winthrop</td>
<td>836 F.Supp. 983 (1993)</td>
<td>Pre-trial</td>
<td>Undecided</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
</tr>
<tr>
<td>36</td>
<td>Cogan v Harford</td>
<td>843 F.Supp. 1013 (1994)</td>
<td>Pre-trial</td>
<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
</tr>
<tr>
<td>37</td>
<td>Servicetrends v Siemens</td>
<td>870 F.Supp. 1042 (1994)</td>
<td>Pre-trial</td>
<td>Defendant</td>
<td>Rule of reason</td>
<td>PF efficiencies</td>
</tr>
<tr>
<td>38</td>
<td>Blackburn v Sweeney</td>
<td>850 F.Supp. 758 (1994)</td>
<td>Pre-trial</td>
<td>Undecided</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
</tr>
<tr>
<td>42</td>
<td>Princess v Lindsey</td>
<td>918 F.Supp. 1356 (1994)</td>
<td>Pre-trial</td>
<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
</tr>
<tr>
<td>46</td>
<td>Orson v Miramax</td>
<td>862 F.Supp. 1378 (1994)</td>
<td>Pre-trial</td>
<td>Defendant</td>
<td>Rule of reason</td>
<td>PF efficiencies</td>
</tr>
<tr>
<td>52</td>
<td>Re/Max v RealtyOne</td>
<td>900 F.Supp. 132 (1995)</td>
<td>Pre-trial</td>
<td>Undecided</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
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</tr>
<tr>
<td>64</td>
<td>Queen v Dominos</td>
<td>922 F.Supp. 1055 (1996)</td>
<td>Pre-trial</td>
<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
</tr>
<tr>
<td>71</td>
<td>Bogan v NorthWestern</td>
<td>953 F.Supp. 532 (1997)</td>
<td>Pre-trial</td>
<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
</tr>
<tr>
<td>73</td>
<td>Fraser v ML Soccer</td>
<td>973 F.Supp. 1276 (1997)</td>
<td>Pre-trial</td>
<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
</tr>
<tr>
<td>74</td>
<td>Rozema v Marshfield</td>
<td>977 F.Supp. 1362 (1997)</td>
<td>Pre-trial</td>
<td>Undecided</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
</tr>
<tr>
<td>75</td>
<td>Wilson v Mobil</td>
<td>984 F.Supp. 1357 (1997)</td>
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<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
</tr>
<tr>
<td>76</td>
<td>Daniel v ABEM</td>
<td>988 F.Supp. 112 (1997)</td>
<td>Pre-trial</td>
<td>Undecided</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
</tr>
<tr>
<td>77</td>
<td>Brooks v GST</td>
<td>992 F.Supp. 1124 (1997)</td>
<td>Pre-trial</td>
<td>Undecided</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
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<tr>
<td>78</td>
<td>Ginzburg v Memorial</td>
<td>993 F.Supp. 998 (1997)</td>
<td>Pre-trial</td>
<td>Defendant</td>
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<td>Prima facie case</td>
</tr>
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<td>80</td>
<td>CDC v Indexx</td>
<td>7 F.Supp. 2d 119 (1998)</td>
<td>Pre-trial</td>
<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
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<tr>
<td>81</td>
<td>Nurses v Unity</td>
<td>5 F.Supp. 2d 694 (1998)</td>
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<td>Defendant</td>
<td>Rule of reason</td>
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<tr>
<td>82</td>
<td>Calera v Microsoft</td>
<td>87 F.Supp. 2d 1244 (1999)</td>
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<td>Undecided</td>
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<tr>
<td>83</td>
<td>Granite v Bear</td>
<td>58 F.Supp. 2d 228 (1999)</td>
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<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
</tr>
<tr>
<td>84</td>
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<td>Pre-trial</td>
<td>Undecided</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
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<td>85</td>
<td>Greater Providence v MI</td>
<td>32 F.Supp. 2d 491 (1998)</td>
<td>Pre-trial</td>
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<td>40 F.Supp. 2d 109 (1999)</td>
<td>Pre-trial</td>
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<td>Rule of reason</td>
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<td>Rule of reason</td>
<td>Prima facie case</td>
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<tr>
<td>89</td>
<td>Adias v NCAA</td>
<td>64 F.Supp. 2d 1097 (1999)</td>
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<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
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<td>Interio v Design</td>
<td>73 F.Supp. 2d 829 (1999)</td>
<td>Pre-trial</td>
<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
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<td>Virgin v BA</td>
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<td>Rule of reason</td>
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<td>Chawla v Shell</td>
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<td>Defendant</td>
<td>Rule of reason</td>
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<td>Rule of reason</td>
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<td>Virg Vermiculite v Grace</td>
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<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
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<td>107</td>
<td>Morales v Garcia</td>
<td>137 F.Supp. 2d 44 (2001)</td>
<td>Pre-trial</td>
<td>Defendant</td>
<td>Rule of reason</td>
<td>Prima facie case</td>
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<td>108</td>
<td>Moecker v Honeywell</td>
<td>144 F.Supp. 2d 1291 (2001)</td>
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<td>Rule of reason</td>
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<td>Viazis v AAOrthodontists</td>
<td>182 F.Supp.2d 552 (2001)</td>
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<td>Prima facie case</td>
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