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CHAPTER 1

Introduction

1.1 Subject matter

European antitrust theory and practice is in a constant state of flux. Over the past ten years in particular, there have been a great number of reforms and revisions in all major fields of European antitrust policy.[1] The first area of competition policy to be affected by this modernisation wave was the law on agreements that are restrictive of the competitive process but also have the potential to generate efficiencies[2] (which are assessed under the so-called effects-based standard of Art 81 EC).[3] The objective of these reforms was to increase the reliance on economic analysis in the assessment of restraints. Whilst these reforms have been used as a point of reference in subsequent

[1] With regard to enforcement procedures, see Regulation 1/2003 ([2003] OJ L1/1) – which relates to the implementation of Artt 81 and 82 EC – and Regulation 139/2004 ([2004] OJ L24/1) – which relates to merger policy. With respect to substantive issues, the reforms of the way effects-based analysis is carried out under Art 81 EC can be mentioned. See i.a. Regulation 2790/99 on vertical restraints ([1999] OJ L336/21); Regulation 2658/00 on specialisation agreements ([2000] OJ L304/3), as well as the Guidelines on vertical restraints ([2000] OJ C291/1) and the Guidelines on horizontal co-operation ([2001] OJ C3/2). The proper framework for assessing the behaviour of dominant firms is also under review. In this regard, see the 2005 discussion paper on Art 82, published on the Commission's website. In the sphere of hardcore cartels, the European Commission's (Commission) leniency policy has been reviewed several times (see the Notice on immunity from fines, [2006] OJ C298/17). Finally, as regards state aid, see the State Aid Action Plan of June 2005, published on the Commission's website.

[2] Not all restrictions of competition are harmful to society and not all restrictions are caught by Art 81 EC. Harm is evident in a limited number of restrictive practices, but most restrictions may equally well produce beneficial effects. Antitrust law prescribes different methods of investigation for these categories of restraint. In the former case, evidence that the defendant engaged in such a practice provides sufficient grounds to find an infringement. If we are dealing with a restriction that has both restrictive and efficient tendencies, more is required. Then, the actual impact of the restraint of competition must be demonstrated. This assessment is referred to as effects-based analysis. See Chapter 2, Section 2.2, for a more detailed discussion of the distinction between practices that are considered *per se* illegal and practices that are subjected to effects-based analysis.

[3] The Commission started its policy overhaul in the second half of the 1990s by reviewing its policy in the field of effects-based analysis, which resulted in a number of regulations (i.a. the block exemption regulation no. 2790/99 on vertical restraints, [1999] OJ L336/21) and guidelines (i.a. the guidelines on vertical restraints, [2000] OJ C291/1). In 2003 a regulation setting out new enforcement procedures was adopted (Regulation 1/2003, [2003] OJ L1/1). For a more detailed discussion, see Chapter 2, Section 2.4.

discussions on modernisation in other fields,[4] today, effects-based analysis under Art 81 EC is not at the centre of the academic debate on antitrust. This thesis revisits the field of effects-based analysis under Art 81 EC and examines what has come of this first round of reforms in practice.

Before the turn of the century, effects-based analysis under Art 81 EC commanded considerable attention, both from policymakers and academics. In this period firms that wanted to implement restrictive agreements were required to seek the European Commission's (Commission) approval. In a bid to limit the scope of member state intervention in antitrust, the Commission – effectively backed by the European Court of Justice (ECJ) – adopted a very wide notion of restrictiveness.[5] As a result, large numbers of notifications were made to the Commission.[6] For obvious reasons these excluded plainly harmful agreements. This system was criticised for relying on outdated economic concepts in the analysis of restraints, for imposing high compliance costs on firms, and for holding the Commission back in detecting and punishing hardcore infringements.[7] Modernisation of its substantive approach and abolishment of the notification procedure finally freed the Commission's hands to intensify enforcement in other fields of antitrust.

This thesis suggests that, a decade later, there are strong reasons to re-open the debate on the regulation of the more numerous group of restrictive agreements that are not harmful and unlawful *per se*, but require close scrutiny under the effects-based standard. Whilst the Commission's increased reliance on rigorous economic analysis has been underlined in official statements, guidelines, and notices, day-to-day practice in this field continues to show considerable traits of the old expansionist approach. This raises questions about legal certainty, that is, about firms ability' to accurately predict whether their agreement might be challenged and found to violate Art 81 EC. These concerns are further increased by the new procedural arrangements, which require firms to assess the legality of their agreement independently in the face of possible intervention, rather than in a process of consultation with the Commission.

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[4] See e.g. speech no. 05/537 of 23rd of September 2005 on Art 82 EC reform delivered by Commissioner Neelie Kroes (available at the Commission's website), see also Gual et. al (2005).
[5] In this sense, see e.g. Gerber (1998: 334) and the discussion below in Chapter 2, Section 2.3.
[6] Wils (2002: 104) mentions the number of 40.000 notifications in the first years of the application of Regulation 17.
[7] References are provided in the more detailed discussion of this matter below in Chapter 2, Section 2.3.

The main objective of this thesis is, therefore, to evaluate the level of legal certainty in European effects-based analysis as reflected in the Commission's post-modernisation practice and to examine whether enforcement of agreements with the potential to generate efficiencies can be made more efficient (without adversely affecting enforcement in other fields of antitrust). For this purpose, a rigorous framework of analysis is developed that relies on existing law and economic theory on the functioning and performance of the legal standards in the enforcement of laws. The effects-based standard is, thus, conceptualised as the dividing line between permissible and impermissible restrictions of competition that firms may discern by looking at case law, decision practice, and guidelines. Given uncertainty about the precise location of the legal standard, firms may end up signing socially harmful or unnecessarily cautious agreements. This means that to the extent that uncertainty can be reduced, there is scope for improving the efficiency of enforcement.

1.2 Structure of the argumentation

This argument is developed in three major steps. First, this introductory chapter is complemented in Chapter 2 with essential background information on Art 81 EC. This includes a detailed review of the 'old' debate on European effects-based analysis and a discussion of the way in which and the reasons why the method adopted in this study differs (considerably) from the approach taken in earlier contributions. In addition, Chapter 2 addresses important issues of scope. Parts 2 and 3 contain the core of the analysis. Part 2 (chapters 3-5) is concerned with the evaluation of the current situation in effects-based analysis, whilst measures to improve the performance of the effects-based standard are considered in Part 3 (chapters 6-8).

Part 2

First, Chapter 3 develops a conceptual model (or analytical framework) that enables us to evaluate current performance by describing (1) the variables influencing the calibration of the legal standard and (2) the effects thereof on the behaviour of firms. Next, Chapter 4 uses this conceptual model as the framework for the comparison of European effects-based analysis with its US counterpart, the *rule of reason*. Expressing the differences in the way both systems conceptualise and apply this legal standard, in terms of the incentives they produce for potential offenders, opens up a

first perspective on the state of effects-based analysis in EU antitrust. In particular, this exercise shows that European antitrust imposes fewer requirements on the Commission to show that an agreement produces harmful effects, and, thus, affords it relatively more freedom to intervene in market behaviour. It must be expected, therefore, that in Europe firms perceive relatively more risk of intervention when they consider including a restriction in their contract with a reduced potential to enhance market power and, thus, to produce antitrust harm.

Chapter 5 examines the effects on legal certainty of two structural breaks in policy. The first major change examined is the modernisation of the Commission's policy in the late 1990s. These reforms sought to replace an over-inclusive, rule-based approach with the requirement that a full scale economic investigation be made of the effects of individual agreements. It is argued that, for firms, assessing the width of the new space opened up by these reforms is complicated by three factors. First, predicting the impact of an agreement on the market is inherently more difficult than determining whether it contains clauses that are black or white-listed. Second, this should be seen against the background of developments in economics, which suggest that, over time, uncertainty has increased about the circumstances under which practices with the potential for harm will actually produce such effects. Third, and crucial, self-assessment is complicated by the fact that there is a paucity of detailed infringement decisions reflecting the new learning, whilst the many of the Commission's exemption and commitment decisions tend to reflect the old and expansive notion of restrictiveness.

The procedural reforms of 2003 provide the second structural break examined in this chapter. It is argued that the replacement of a broad-scope *ex ante* system of enforcement with a system of selective *ex post* control significantly increases the importance for firms of having a substantial body of precedents from which the limits of the prohibition contained in Art 81 EC can be deduced with reasonable measure of certainty. This is because the former system depended to a large extent on negotiation with the Commission in order to fine-tune agreements and remove concerns, whereas currently firms have to assess the legality of their contracts independently. Therefore, the risk of inefficient behaviour resulting from a low level of legal certainty is larger under the new system. This effect is reinforced by the removal of the immunity from fines that firms were granted upon notification.

Part 3

Having found considerable indications that legal certainty is under pressure, the final part of this thesis examines how European effects-based analysis can be improved. Like Part 2, it commences (in Chapter 6) by creating a framework for the analysis. Arguing that to increase legal certainty the Commission should be required to show more conclusive evidence of harmful effects, this chapter examines the precise effects of improving the level of accuracy in the investigation of restraints. These are argued to be different depending on how firms respond to uncertainty. Incentives for firms that are already prone to cross the line would be strengthened if the increase in the Commission's burden leads to a lower level of enforcement. If firms are over-deterred, however, less but more focused enforcement is precisely what is needed.

Chapter 7 describes in detail how the legal standard should be adjusted to make European effects-based analysis more focused and rigorous. The way to achieve this, it is argued, is for the Courts – and in their wake, defendants – to insist that the Commission presents an intelligible theory of the harm that it expects from a restraint and as much empirical evidence as needed to render this claim sufficiently plausible before the burden can shift to the defendant. This will force the Commission to concentrate enforcement efforts on those cases of which we are more certain that harm has actually occurred. At the same time, it serves to ensure potential offenders that the less obvious it is to them that the contract they intend to sign will harm consumers, the less likely it is that it will be challenged. The second half of this chapter examines the compatibility of these changes with the division of the burden of proof set out in the Court of First Instance's (CFI) ruling in the case of *Métropole*.[8] and arguments to the effect that European antitrust was intended to protect against

A final chapter concludes.

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