**AMSTERDAM CENTER FOR LAW AND ECONOMICS WORKING PAPER**

# Empiricism in Private Enforcement

## AN ESSAY ON THE BENEFITS OF USING QUANTITATIVE DATA OF A BEHAVIOURAL NATURE IN PRIVATE COMPETITION SUITS

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**ABSTRACT**

*Since May 2004 national courts can be called upon to decide whether the positive effects on competition of an agreement outweigh its negative effects. Before only the Commission was empowered to apply this test of Art 81(3). It will be examined in this paper whether differences between EC administrative procedure and national civil laws could result in this substantive norm being applied differently. It is found that the Commission's rather intuitive approach to balancing effects may not satisfy the standard of sufficiency by which factual analysis is evaluated in Dutch civil law. It will be argued that application of the methodology set out in the Commission's new Notice on Art 81(3), which is based on quantitative data of a behavioural nature, will take away these problems. It will be shown however that this Notice addresses the balancing of cost related efficiencies only, and that this could imply that in balancing efficiencies not related to costs these problems could persist. It will be concluded that if this methodology is applied rigorously to Art 81(1) as well, having to balance efficiencies not related to costs can largely be avoided.*

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## INTRODUCTION

Since May 2004 the road has been opened for private enforcement of Art 81 EC Treaty[1]. This has been achieved by removing a forty years old blockade formed by the Commission's monopoly on the application of Art 81(3). The provision in Regulation 17[2] that gave the Commission sole power to apply this third paragraph was not incorporated in its replacement, the new Regulation 1/2003[3]. It is intended therefore that Art 81 as a whole has direct effect, and can be relied on to be applied in its entirety by national private courts.

Paragraph 3 of Art 81 determines that the prohibition pursuant to Art 81(1) of an agreement that has been found restrictive of competition may be put aside. The conditions are that the agreement must provide economic advantages of which consumers get a share, that in order to achieve these benefits the restriction of competition is necessary, and lastly that it does not eliminate competition.[4] The focus in this paper will be on this first two conditions only, whether the agreement provides benefits which accrue at least in part to consumers. The function of Art 81(3) of declaring the prohibition of Art 81(1) inapplicable makes clear that this paragraph is relevant to cases in which

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[1] Hereafter referred to as 'Art 81'. In the following many terms and names will be used repeatedly. In many instances a short version of these names will be used. This is indicated by (hereafter …). To save space the source/location of the document referred to in this way will be mentioned in a footnote only once in every paragraph in which it features.

[2] Art 9(1) of Regulation 17/62, OJ [1962] 13/204 (hereafter Regulation 17).

[3] Regulation 1/2003, OJ [2003] L1/1 (hereafter Regulation 1/2003).

[4] Article 81 for as much as is relevant here reads as follows:

> 1. *The following shall be prohibited as incompatible with the common market: all agreements between undertakings (…) which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market (…)*
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> 3. *The provisions of paragraph 1 may, however, be declared inapplicable in the case of (…) any agreement (…) which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*
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> *(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
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> (b) *afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*

somehow negative and positive effects come into play simultaneously. It has been clear from the start of EC competition law that some form of balance of these effects must be understood to form part of the analysis under Art 81(3) to see whether an exemption should be granted. In *Consten and Grundig* for example this element of the analysis under Art 81(3) is expressed as follows:

> […] *the very fact that the Treaty provides that the restriction of competition must be 'indispensable' to the improvement in question clearly indicates the importance which the latter must have. This improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.* […][5]

This implies a simple rationale: if the net effect of the agreement is positive, it is exempted, if the balance strikes the other way it remains prohibited. In principle of course this substantive norm should be the same regardless of whether it is being publicly or privately enforced. There are substantial differences however between the administrative procedure before the Commission, and a proceeding before a national private court. It will be examined in this paper whether such differences in procedure could lead to material differences in outcomes between these procedures. In particular it will be assessed whether the rather intuitive approach that the Commission has in practice often taken to balancing effects, could be adopted in private enforcement as well. For this purpose a comparison will be made of the way factual questions are dealt with in EC administrative competition procedures and Dutch civil law. Specific attention will also be given to a Notice issued by the Commission in April 2004, containing guidelines on the application of Article 81(3).[6] This *Notice* forms part of a broader set of notices aimed at promoting private enforcement and above all at ensuring its consistency. The *Notice* sets out a methodology for analysing and balancing efficiencies which is new to EC

[5] Cases 56 and 58/64 Connsten and Grundig v. Commission [1966] ECR 299, at 341 (hereafter *Connsten and Grundig*).
[6] Commission Notice containing guidelines on the application of Article 81(3) of the Treaty (81(3) Guidelines), OJ 2004 C101/97 (hereafter *Notice*).

competition law in that it focusses the assessment on quantitative data on prices and costs.

**Private enforcement**

The introduction of rules on competition in the EC Treaty brought something which at the time was quite new to Europe. A system was created in which exemption had to be applied for, and could be granted by the Commission only. It was judged that this would better ensure the emergence of a uniform culture of competition in Europe, than if that paragraph could be applied directly by national courts of all Member States.[7] The system worked such that prior to its taking effect, an agreement that had the potential to harm competition had to be notified to the Commission. The Commission would then decide whether the agreement infringed Art 81(1), and if so whether the conditions were met to issue an exemption. The incentives for parties to notify their agreements were strong. In principle exemptions were not granted retroactively. If an agreement that was not notified was found to have some anti-competitive aspect, it would remain prohibited pursuant to Art 81(1), even if in case it would have been notified it would have been eligible for an exemption. In addition parties were granted immunity from fines from the date of notification, which allowed them to implement their agreement.[8]

The flood of notifications that ensued required much of the Commissions resources to deal with. Over the years the Commission took various measures to alleviate its workload, including the issuing of various explanatory notices, the adoption of block exemption regulations[9], and a faster method of dispensing of cases by means of so-called 'comfort letters'. Nonetheless the burden imposed by notifications remained heavy, which kept the Commission from pursuing more pernicious competition problems such as cartels and abuse of dominance. In light of the accession of many new Members, the decision was taken at the end of the last century to modernise competition procedure. The new regulation containing rules on the implementation of Art 81, Regulation 1/2003, introduced change along two lines. Firstly the Commission's monopoly in the application of Art 81(3) was abolished. The provision could now be applied by national competition

[7] See the Commission's White Paper on Modernization, OJ [1999] C132/1.

[8] For a more detailed discussion of the old and new systems of enforcement see e.g. R. Whish, *Competition Law*, 5th edition, Lexis Nexis UK 2003, at p 245 a.f.

authorities as well as national courts. Secondly, the system of exemption as a constitutive act was abandoned. This implies that no notification is necessary for the third paragraph to take effect. In fact it isn't even possible anymore to notify agreements. Art 81(3) is interpreted as an exception to Art 81(1), and the whole article has direct effect. To ensure the consistent and uniform application of Community competition law by national competition authorities and courts the Commission has issued several notices, amongst which is the *Notice* containing guidelines on the application of Art 81(3) which will be discussed in this paper.

Private enforcement takes the form of an interested party challenging the validity of an agreement before a national court, on grounds that it infringes Art 81. It will be evident that under the old regime such cases were few in number. With the whole article having direct effect, the door is open now for private enforcement.[10] The sort of claims one could think of in this respect are different forms of tort and breach of contract. A plaintiff could for example say that an action by the defendant which infringes Art 81 caused him damages. Or a distributor who is summoned to court by his supplier for failure to comply with the terms of their agreement could defend himself by claiming that it violates Art 81.[11]

**Balancing**

In practice competitive effects are balanced in two distinct ways: by means of a full factual investigation into the effects of the agreement, or by application of a rule. For many years EC competition law was essentially form-based. Specific classes of agreements were considered generally to lead to a certain competitive outcome. On the basis of such assumptions rules were drawn up either prohibiting or sanctioning such

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[9] These are regulations in which classes of agreements are described which are exempted en bloc, so that notification and individual exemption is not necessary.

[10] Clearly however there will not be as many private competition cases as there were notifications, as it may be expected that only parties that consider the chances of their winning the suit to be considerable, will want to bear the risk of having to pay for the costs of the procedure. In the previous system it was safest to just notify any agreement, also because the expenses incurred filling out a notification form were relatively limited. This difference may be mitigated however by the fact that if a party has a strong incentive to go to court, the extra expense of adding an infringement of Art 81 to its pleas will be marginal (they could increase if an expert is called in).

[11] Especially in this latter case, where firstly the distributor is the defendant and therefore does not make the decision to go to court, and secondly he need not show any related damages as in a tort case, the incentives to base the defense on competition grounds should be great.

classes of agreements: the balance was made ex ante and in abstracto. Block exemption regulations 1983/83[12] and 1984/83[13] can serve as examples. In these block exemptions permissible and impermissible clauses in exclusive distribution and exclusive purchasing agreements were listed. This implies that the analysis was mostly focused on the wording of the agreement at issue in a case. The outcome was determined by the category in which the agreement fitted. At the ending of the last century – shortly before the procedural modernisation was started – the interpretation of the substance of Art 81 was modernised. A so-called effects-based regime was introduced in which not the form, but the actual impact of an agreement in the market would determine the outcome of proceedings.

Under this new regime rules are still applied in balancing however. Modern block exemption regulations were adopted i.a. for vertical restraints[14], motor vehicle distribution[15], specialisation agreements[16], and research and development agreements[17]. These introduced free havens for agreements between companies whose market shares do not exceed certain caps. The balancing rule here is that agreements concluded by small and medium sized companies cannot impede competition. These regulations also contain provisions regarding hard-core infringements.[18] Agreements which contain such clauses are considered to practically always to harm competition, and they are therefore excluded from the benefit of the block exemption.[19] Such clauses include certain forms of price-fixing, such as fixing minimum retail prices for distributors, or fixing the price at which the product of a specialisation agreement is to be sold to third parties, as well as commitments to reduce output, or impose export bans. These rules apply a fortiori to agreements concluded by larger undertakings that do not fall under the market share cap, which is made clear by both the Vertical Guidelines and the Horizontal Co-operation

[12] Commission Regulation 1983/83, OJ [1983] L173/1 (hereafter Regulation 1983/83).
[13] Commission Regulation 1984/83, OJ [1983] L173/5 (hereafter Regulation 1983/84).
[14] Commission Regulation 2790/99, OJ [1999] L 336/21 (hereafter Vertical Block Exemption).
[15] Commission Regulation 1400/02, OJ [2002] L203/30 (hereafter Motor Vehicle Block Exemption).
[16] Commission Regulation 2658/00, OJ [2000] L304/3 (hereafter Specialization Block Exemption).
[17] Commission Regulation 2659/00, OJ [2000] L304/7 (hereafter R&D Block Exemption).
[18] See Articles 4 of the Vertical Block Exemption, and the Motor Vehicle Block Exemption, and Articles 5 of the Specialization Block Exemption, and the R&D Block Exemption.
[19] They are also unlikely to benefit from an individual exemption, see point 46 of the Commission's notice containing guidelines on vertical restraints, OJ 2000 C291/1 (hereafter Vertical Guidelines).

Guidelines[20] issued to assist in the analysis of such cases. And in practice there are other rules not listed as hard-core infringement, but which have the same effect. In the case of selective distribution agreements for example, if it is found that the retailers to be allowed into the network are selected on the basis of quantitative rather than qualitative criteria, no exemption will be granted.[21] So when in an individually examined case it is found that the agreement or the way that it is put into practice satisfies the criteria laid down in any of these rules, the process of weighing and comparing both effects pursuant to Art 81(3) is cut short.

**Scope**

In this paper the Commission's practice in balancing will be analysed to see how this exercise will be performed in private competition suits. For this purpose only decisions in which competitive effects are balanced on the basis of a fully factual analysis in an individual case will be discussed. The conclusions to this paper therefore do not cover any cases in which a rule determining the outcome of the balance is applied, even if such cases may be used as examples at some points.[22] The types of agreements discussed will be both vertical restraints and horizontal co-operation agreements. In cartel cases there generally is no balancing of effects based on a factual analysis, so these will not be discussed.

In analysing the Commission's decision practice attention will be drawn to two particular aspects thereof. One is the type of facts on which the Commission relies to identify competitive effects. The other is how the nature of the negative effect relates to the nature of the positive effect, and how this influences the way in which balancing takes place. It is important to note here that in the following paragraph the focus will be on the method that the Commission employs for balancing effects. The purpose is not to assess what economics dictates that the decision should have been in the cases discussed.

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[20] Commission Notice containing guidelines on horizontal co-operation agreements, OJ [2001] C3/2 (hereafter Horizontal Co-operation Guidelines).

[21] See e.g. Commission decision of 11 January 1991 in case IV/31.624 - Vichy, OJ 1991 L75/57 in which the ECJ's L'Oréal Judgment, case 31/80 [1980] ECR 3775, is referred to. See also points 184-198 of the Vertical Guidelines.

[22] Of course cases in which Art 81(3) is applied, but which are decided on grounds relating to the third or fourth condition of that paragraph (indispensability or elimination of competition), before the issue of the balance is reached, are also excluded from the scope of this paper.

Lastly it must be mentioned that there are no individual exemption decisions taken after the Vertical Guidelines were issued in the year 2000. In principle therefore the decisions regarding vertical restraints that will be discussed below reflect the thinking expressed i.a. in Regulations 1983/83 and 1984/83. There are however two decisions taken at a time when the Commission had already begun the proceedings to modernise its approach to verticals. These cases - *Van den Bergh Foods*[23] and *Bass*[24] – will be given special attention. There are on the other hand quite a number of decisions in cases regarding co-operation by competitors dating from after the Horizontal Guidelines were issued in 2001.

## § 1 COMMISSION PRACTICE WITH RESPECT TO BALANCING

### Restrictive effect

A survey of Commission decisions reveals that the type of facts which it looks at in examining the restrictive effect of an agreement, are those which relate to the commercial freedom of market participants. When for example assessing a network of exclusive purchasers of branded ice cream being provided freezer cabinets in the case of *Van den Bergh Foods*[25], the Commission found that the contracts restricted the ability of the contracting retailers to stock and offer for sale ice cream from competing suppliers, and that competition between suppliers for such outlets was therefore impeded.[26] The

[23] Commission decision of 11 March 1998 in cases IV/34.073, IV/34.395 and IV/35.436 - Van den Bergh Foods Limited, OJ 1998 L246/1 (hereafter *Van den Bergh Foods*).

[24] Commission decision of 16 June 1999 in case IV/36.081/F3 - Bass, OJ 1999 L186/1 (hereafter *Bass*). In fact that year the Commission took decisions in two more cases relating to beer supply agreements in the UK, *Scottish and Newcastle* (Commission decision of 16 June 1999 in case IV/35.992/F3 – Scottish and Newcastle, OJ 1999 L186/28) and *Whitbread* (Commission decision of 24 February 1999 in case IV/35.079/F3 - Whitbread, OJ 1999 L88/26). For the purposes of this article these papers are identical to the decision in Bass. They will therefore not be discussed separately.

[25] Supra footnote 23.

[26] In the very similar *Langnese-Iglo* case (Commission decision of 23 December 1992 in case IV/34.072 - Langnese-Iglo GmbH, OJ 1993 L183/19) also involving a network of exclusive purchasers being provided freezer cabinets, the Commission expressed the concern that competition for retailers between Langnese-Iglo and other suppliers was precluded by those agreements, that entry into the market was made difficult by the existence of such networks, and that distributors were not free to sell competing supplier's goods. The Commission's decision in *Jahrhundertvertrag* (Commission decision of 22 December 1992 in case

*Bass*[27] decision relates to agreements requiring tenants of pubs owned by this UK brewery to purchase from it the bulk of their beer. The Commission argued that such agreements prevented wholesalers that offered Bass products from competing with Bass for the favour of these retailers, as well as keeping other suppliers from selling their brands to outlets tied by Bass. In the *Grundig*[28] case regarding a network of selective distributors the Commission found that requirements on the retailers to offer a wide range of Grundig's products and maintain ample stocks, limited their commercial freedom. This concern with the competitive process is equally visible in all the most recent cases regarding horizontal co-operation agreements. In the decision in *Visa – Multilateral Interchange Fee*[29] the main restriction of competition identified was a restriction of the freedom of a card-issuing bank to determine for itself the height of the fee charged to the merchant's bank for payments made with the card. Similarly in *UEFA* [30] football clubs were found to be prevented from individually marketing certain media rights, and restricted in their exploitation of other such rights, and in *IFPI – Simulcasting*[31] the price of a global license for broadcasting music over the internet was considered to be largely pre-determined. In *O2/T-Mobile UK*[32] - regarding an agreement to co-operate in the set-up of 3G mobile telephone networks – the objection raised by the Commission was that the joint venture could facilitate collusion.[33] In summary it can be said that under Art 81(1) the Commission conceptualises a restriction of competition as an impediment to the competitive process. This is the process of rivalry between firms for the favour of

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IV/33.151 – Jahrhundertvertrag, OJ 1993 L50/14) also concerns an exclusive purchasing agreement. A group of German electricity producers committed themselves to buy all their inputs in the form of coal from a group of German coal producers. The Commission considered that this agreement limited the electricity producer's opportunities to choose to buy coal from other producers or to employ different energy sources such as gas, oil, wind or water as inputs.

[27] Supra footnote 24.

[28] Commission decision of 21 December 1993 in case IV/29.420 - Grundig – EC distribution system, OJ 1994 L20/15 (hereafter *Grundig*).

[29] Commission decision of 24 July 2002 in case IV/29.373 - Visa International – Multilateral Interchange Fee, OJ 2002 L318/17 (hereafter *Visa – Multilateral Interchange Fee*).

[30] Commission decision of 23 July 2003 in case IV/C2-37.398 - UEFA Champions League, OJ 2003 L291/25 (hereafter *UEFA*).

[31] Commission decision of 8 October 2002 in case IV/C2-38.014, - IFPI – Simulcasting, OJ 2003 L107/58 (hereafter *IFPI – Simulcasting*).

[32] Commission decision of 30 April 2003 in case IV/38.370, - O2 UK/T-Mobile UK, OJ 2003 L200/59 (hereafter *O2/T-Mobile UK*).

[33] The same fear can be seen expressed e.g. in *GEAE/P&W* (Commission decision of 14 September 1999 in case IV/36.213/F2 - GEAE/P&W, OJ 2000 L58/16), a case involving two of the three producers of jet engines in the market.

consumers. When determining whether a restriction has occurred, it looks at whether the freedom of market participants to independently make commercial decisions is obstructed.

Analysis of these decisions also reveals the following about where the Commission looks to make a finding of a restriction of commercial freedom. Historically such findings are based primarily on interpretation of the nature of the agreement. That means that limitations of conduct are in the first place derived from the wording of the agreement.[34] The decision on the distribution agreements in the *Grundig* case mentioned above can be used as an example. The obligation on the retailers to offer a wide range of the contract goods and keep substantial stocks were interpreted as restricting their freedom to fill those parts of their shelf and storage space with competing products. This was sufficient for the Commission to make a finding that Article 81(1) was infringed. In recent years it has been possible in a number of cases to see a shift in the type of facts examined under Art 81(1). In the few recent cases relating to vertical restraints, facts concerning the market (such as market shares) have been examined to assess whether the assumptions based on the wording of the agreement hold. In *Bass* the Commission determined that indeed there was a negative impact on the market when it found that the tied outlet accounted for between 50 and 60% of the sales volume in the UK beer market. And likewise in *Van den Bergh Foods* the Commission rigorously scrutinised the structural aspects of the market. It found that in some 40% of all outlets the only freezer cabinets for storage of ice cream were those of Van den Bergh. In addition it examined the likelihood of retailers switching supplier or dealing with an extra supplier. Citing market tests it concluded that for the majority of outlets incentives to do so were absent. The approach in these two cases contrasts sharply therefore with the *Grundig* decision. In decisions on horizontal co-operation agreements there does not seem to be such a profound shift. With regard to such cases it could be argued that in recent years the

[34] This is so despite the fact that from very early on the Commission has been criticized for using this method. The main problem with finding that virtually any restriction of conduct infringes Art 81(1) is that up until the modernization it required the Commission to spend a considerable proportion of its resources on dealing with an enormous amount of agreements. In part these problems have been dealt with by the issuing of block exemption regulations. See V. Korah, 'The judgment in Delimitis: a milestone towards a realistic assessment of the effects of an agreement – or a damp squib?' in [1992] 5 *EIPR* 167, who mentions a series of authors who voiced criticism at the Commission's over inclusive approach to Art 81(1), starting with René Joliet in 1967.

Commission appears to be more willing than before to find that agreements do not infringe Art 81(1).[35] However, neither these negative clearance decisions nor decisions to exempt horizontal co-operation reflect as thorough an analysis as was made in *Bass* and *Van den Bergh Foods*. *Visa – Multilateral Interchange Fee*, and *IFPI – Simulcasting* for example both involved some form of explicit price-fixing, which was taken as a self-evident restriction of the rivalry between competitors sufficient to make a finding that Art 81(1) applied. This despite the fact that in *Visa – Multilateral Interchance Fee* it was found under Art 81(3) that the price was fixed at the best possible approximation of marginal cost. Of course there are decisions in which the Commission's finding of an infringement is based on more market related circumstances as well. This is the case in *O2/T-Mobile UK* for example, where the possibility of collusion was entertained because of the tight oligopoly setting in which the agreement was drawn up.[36] But the investigation of whether this effect would materialise was made within the scope of Art 81(3), and no analysis of actual market data such as in *Bass* and *Van den Bergh Foods* was made.

**Beneficial effect**

The Commission's findings of positive 'effects' take various forms. In *Van den Bergh Foods* for example one of the benefits of the networks of exclusive purchasing agreements that was discussed, was that wide availability of freezer cabinets in retail outlets ensured that consumers could buy ice cream at many different points of sale.[37] The benefits resulting from the beer supply agreements found in *Bass* were that they made it significantly easier to establish, modernise, maintain and operate a pub. In *Grundig* the positive effects of the agreements were that they made it possible i.a. to provide a high level of pre-sales information and after-sales service. In *Visa* –

[35] See e.g. Whish (2003), supra footnote 7, at p 128, and decisions such as *DSD II* (Commission decision of 17 September 2001 in cases IV/34.493, IV/37.366, IV/37.299, IV/37.291, IV/37.288, IV/37.287, IV/37.526, IV/37.267, IV/37.254, IV/37.252, IV/37.250, and IV/37.242-246 - DSD, OJ 2001 L319/1), *Visa International* (Commission decision of 9 August 2001 in case IV/29.373 - Visa International, OJ 2001 L293/24, and *Identrus* (Commission decision of 31 July 2001 in case IV/37.462 - Identrus, OJ 2001 L249/12).

[36] The same can be said for the identification of the negative effect in *GEAE/P&W*, supra footnote 33.

[37] The benefit identified found in *Langnese-Iglo*, supra footnote 26, was identical, and the positive effect of the exclusive purchasing agreement in *Jahrhundertvertrag*, supra footnote 26, was safeguarding the constant supply of electricity.

*Multilateral Interchange Fee* it was considered that establishing a fixed fee for all payments made by card holder's banks to accepting merchant's banks benefited the whole Visa network. It made it possible to divide the costs of maintaining the network evenly over all parties involved, such that they were kept down to the best approximation of marginal cost. This made it as attractive as possible both for consumers and merchants to join the network, which in turn was argued to benefit incumbent cardholders and merchants. The joint sales program in *UEFA* was found to be advantageous to media companies wanting to buy the rights to broadcast the league's matches. Rather than having to negotiate over those rights with the individual soccer clubs involved in each match, this scheme greatly reduced their search and transaction costs. Moreover the bundling of these rights made it economically viable for broadcasters to transmit a program covering only the most interesting parts of UEFA matches of the week. The agreement by royalty collecting societies in *IFPI – Simulcasting* was intended to make possible the creation of a new product. The existing system for collecting royalties based on licenses extending over national territories did not provide an adequate framework for broadcasting of music over the internet which is inherently international. The multi-territorial simulcasting license therefore made it possible to reach by means of the internet a very wide group of consumers and generated substantial cost efficiencies for broadcasting companies by creating a one-stop-shop for acquiring a global license. Lastly, in its *O2/T-Mobile UK* decision the Commission argued that the agreement made possible for these companies to offer 3G services in a far greater part of UK than they would have been able to individually, by sharing the physical infrastructure of the 3G network in some parts of the UK, and in other areas by allowing customers to make use of each other's network there where only one had roaming.[38]

These diverse but perhaps rather more concrete findings show that the Commission's interest in the investigation of the existence of positive effects pursuant to Art 81(3) is not so much on the competitive process. Rather than looking for any positive effect of the agreement on the rivalry in which Visa was engaged with other card systems, the

[38] Similarly, in *GEAE/P&W*, supra footnote 33, the combination of two specific types of technologies by these companies allowed for the development of a new more fuel-efficient engine within a shorter timeframe than would otherwise have been possible. The resulting cost savings were considered to benefit manufactures of aircraft, airlines and ultimately consumers.

investigation in *Visa – Multilateral Interchange Fee* for example, centred on the positive effects for the two types of consumers involved: card holders and shop owners. And in *Grundig* the positive effects discussed were the benefits to consumers of pre-sales advice and after sales service. In fact this shift of focus when stepping from the analysis under Art 81(1) to Art 81(3), from the rivalry between the companies involved to the implications for customers on the other side of the market, is apparent in all cases mentioned above. It should be borne in mind here of course that it is the wording of Art 81(3) itself which leads the investigation in this direction, speaking of improvements in production or distribution, or promotion of technological progress for the benefit of consumers. This is not to say that no mention is ever made of effects that enhance the competitive process in this respect. In *Van den Bergh Foods* for example, an intensification of inter-brand competition was mentioned as a potential advantageous effect of the exclusive purchasing agreement under investigation, and in the Vertical Guidelines[39] it is stated of vertical agreements in general that they often have positive effects by promoting non-price competition. The point made here however is that the main concern in assessing the positive effects of agreements is their likely effect on consumer welfare.

As is the case with identifying restrictions of competition, findings of positive effects are primarily made on the basis of interpretation of the nature of the agreement at issue. Given that it is often hard to draw a line between the Commission's identification of a possible beneficial effect, and its decision as to whether this effect outweighs the restriction – the question of the verification of these assumptions regarding efficiencies is best discussed together with the analysis of its approach to balancing.

**Balancing exercise**

Analysis of how – after having identified these negative and positive effects – the Commission proceeds to balance them shows that in a number of cases it remains somewhat unclear what method and standard are applied. The way in which findings on both effects are made, and the difference in the terms in which they are stated contribute to this vagueness. It is stressed again here, that the objective of this survey is not to show

[39] Supra footnote 19.

what (modern) economic insights tell us about the appraisal of these cases. The point is to lay bare the Commission's method for balancing effects on competition.

One of the issues discussed with respect to the improvement which the freezer cabinet agreements made to distribution was that in case Van den Bergh would be prohibited from attaching an exclusivity clause this would probably lead to its products being less widely available. Faced with such a prohibition it would be likely to stop supplying some smaller and/or outlying retailers, of which it was uncertain whether they would be picked-up by competing producers of ice cream. In this regard the Commission determined that the advantage of these outlets continuing to offer ice cream (in case exclusivity would be maintained) could not weigh up against the disadvantages posed by the barriers to entry. With respect to efficiencies in terms of planning and logistics for which the agreements allowed, the Commission argued as follows. The exclusivity agreements not only lead to such distributive efficiencies for Van den Bergh, but also to inefficiencies for its competitors, because they forced them to compete not only in the supply but also in the distribution of ice cream. The disadvantages of the resulting strengthening of Van den Bergh's position in the market, clearly outweighed any distributive efficiencies according to the Commission. To this it added – when discussing the fair share which consumers should get from the agreements – that given Van den Bergh's market share, it was not guaranteed that any such efficiencies would be passed on to consumers. These assessments are perhaps intuitively appealing, but they do not shed much light on how exactly the comparison between these effects is made. In particular it remains unclear how the Commission estimates the relative magnitude of the effects.

This vagueness as to how the identified effects relate exactly can be seen in decisions regarding horizontal co-operation agreements as well. In *UEFA* for example, the Commission's analysis under Art 81(3) sums up the improvements brought about with the agreement, and shows how they would be beneficial to consumers. It does not however discuss why the possible exercise of market power which it identified as a concern in its analysis under Art 81(1) will not prevent these cost efficiencies becoming reality. Even though in its assessment of the relevant market it has mentioned that national first and second leagues are EUFA's main competitors, that there is a drive for

differentiation in the market, and that prices paid by broadcasting companies for soccer related media rights are very high, the Commission does not examine any of these aspects in its analysis of the first two conditions of Art 81(3). It does not show what the competitive pressures on UEFA are which will make it choose to pass on to its customers the cost efficiencies that the agreement will afford it, rather than to set a high price. In short, it does not become clear why the beneficial scenario will become reality rather than the market power scenario.

To show why the way in which findings on competitive effects are made, and the difference in the terms in which they are stated contribute to this vagueness, the Commission's decision in *Yves Saint Laurent*[40] will be discussed.[41] This producer of luxury cosmetics products notified a network of selective distribution agreements. The distributors were selected on the basis of qualitative criteria, relating to professional qualifications and the appearance of the outlet. The procedure for admission to the network could be lengthy, and involve Yves Saint Laurent asking retailers to make adjustments to their shop. In addition the agreements contained a minimum annual purchase requirement, and a stock holding provision. The Commission's main concern expressed in the decision was that the combination of the admission procedure with these additional requirements could in effect function as a restriction on access to the network. The admission procedure might scare away distributors because during the period in which the application is being reviewed they may have to make investments, without being able to sell the product. Similarly, the minimum annual purchasing clause could keep some distributors from applying to be admitted to the network, for fear of not being

[40] Commission decision of 16 December 1991 in case IV/33.242 - Yves Saint Laurent, OJ 1992 L12/24 (hereafter *Yves Saint Laurent*).

[41] An analysis similar to that made here can for example be made of the following Commission decisions: *Grundig*, in which it remains unclear why the increase in service and information will be felt stronger than a price increase; *Jahrhundertvertrag*, supra footnote 26, where it is left in the dark how the increase in security of electricity supply relates to the possibly higher price; *Givenchy* (Commission decision of 24 July 1992 in case IV/33.542 - Givenchy, OJ 1992 L236/11), also concerning a network of selective distribution agreements for luxury cosmetics, in which it is left unclear how come the benefit of increased service and availability cancels out the prospect of a higher price exactly; *ARG/Unipart* (Commission decision of 22 December 1987 in case IV/31.914 - ARG/Unipart, OJ 1988 L45/43), regarding an agreement between the Austin Rover Group and Unipart for the latter to i.a. exclusively distribute ARG spare parts, in which it is not made explicit how it is exactly that the wide availability of ARG spare parts compensates for the restrictions imposed by the exclusivity clause; and *Saba II* (Commission decision of 21 December 1983 in case IV/29.598 - Saba's EEC distribution system, OJ 1983 L376/41), regarding a network of selective

able to meet the requirement. And at the same time this clause restricts those who do enter the network in their sales of competing brands because they have to devote a significant proportion of their activities to selling the contract goods. Moreover the clause affects their freedom to choose their supplier of Yves Saint Laurent products, as only goods purchased from the manufacturer itself or its official agents are counted.

The part of the decision relating to Art 81(3) starts with the statement that exclusivity is what it is all about with this type of product, and that this extends also to the way it is distributed. It then discusses how the provisions of the admission procedure are necessary to for organisational purposes, how the purchasing requirement allows Yves Saint Laurent to concentrate on outlets which generate an adequate volume of business, and ensures that retailers are willing to make the necessary promotional efforts, and how the requirements regarding stocks guarantee high quality and availability of the whole Yves Saint Laurent range of products. The Commission then states that these benefits therefore clearly outweigh the disadvantage that not all qualified retailers will seek admission. It considers also that the agreements will be beneficial to consumers because their main aim is to preserve exclusivity – which is exactly what consumers want – and because they focus competition on other factors than price alone, such as advisory service, and availability of products in all ranges.(42)

Having read earlier on in the definition of the market that Yves Saint Laurent is only a small player with numerous competitors, this decision is intuitively appealing. But again also it must be said that the decision does not make explicit how exactly it is determined whether these benefits create more value than is destroyed by the restriction. As was described above, the Commission's identification of both types of competitive effects is in large part based on interpretation of the terms of the distribution agreements. The restrictions which the Commission sees in Yves Saint Laurent's distribution agreements

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distributors of consumer electronics, in which again it remains unclear why the improvements in terms of advice and service offset the price effect.

[42] The third element of Art 81(3), the indispensability is also satisfied. Careful investigation of applying distributors is necessary for the cohesiveness of the network, the purchasing clause is needed to ensure that the extra investments by Yves Saint Laurent in distribution are met by matching efforts of retailers, and the stock provision prevents distributors from concentrating their promotional activities on the brand leader products only. Lastly, competition is not eliminated in respect of a substantial part of the products in question. Yves Saint Laurent distributors will be able to take advantage both of inter- and intra-brand competition, given that there is a large number of other companies producing (luxury) cosmetics, and the agreements do not contain a non-competition clause.

are stated in terms of their effect on commercial freedom. The benefits of the agreement are expressed in terms of their effect on consumer welfare. In order to compare them the Commission does not clearly analyse what for example the effect of these restrictions would be on consumer welfare. The two remain stated as such, i.e. in different terms. The Commission isn't explicit about how it estimates the magnitude of each effect either. The data about market shares is not discussed in this part of the decision for example. And the Commission does not report facts found in the market dating from the period after notification which support or stand in the way of the outcome of its balancing exercise.
In other words, what the Commission does not do is the following. The Commission's competitive concerns can be translated in terms of their effect on price, which is directly related to consumer welfare. It could be argued that de facto limitation of the number of distributors, and the restriction on their sources of supply, could – in a differentiated market like this – lead to price increases. The same could be maintained as to the obstruction to in-house inter-brand competition. Now, the benefits to consumers of the distribution agreements related to increased quality, which can also be related to consumer welfare. Given however that to achieve these benefits investments will have to be made, it is probable that they too have a price increasing effect. So the comparison that should be made in this case is one between a higher price, and a higher level of quality. Little is made clear in the decision about how the Commission has determined that the increase in quality is the stronger of the two effects. Also it does not discuss facts which verify this outcome, such as for example an increase in Yves Saint Laurent's output in the period after notification.

Given that the Commission decisions are subject to review, it is useful to examine whether cases as described above withstood the scrutiny of the European courts. In §3 attention will specifically be drawn to the attitude of the courts to the rather wide margin of appreciation in the interpretation of facts which the Commission accords itself in those decisions.

## § 3 COMMUNITY COURTS' STANCE ON THE COMMISSION'S APPROACH

Art 230 EC Treaty makes possible to challenge Commission decisions by applying for annulment. Until 1989 all such cases were brought before the European Court of Justice (ECJ). In that year the Court of First Instance (CFI) was created. Apart from improving judicial protection in the EC, the main reason for the establishment of the CFI was to alleviate the workload of the ECJ. Jurisdiction was therefore given to the CFI in particular to hear those Art 230 cases which involve analysis of complex issues of fact, including competition cases. Appeal to the ECJ is possible on points of law only.

The scope of review is the legality of the administrative decision. From the start the ECJ has defined this test rather narrowly when reviewing decisions involving complex evaluation of economic situations. In the above-mentioned *Consten and Grundig* judgement for example, when scrutinising the Commission's analysis under Art 81(3), the Court stated that,

> […] *the exercise of the Commission's powers necessarily implies complex evaluations on economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces there from.*[43]

And in *Remia* expression was given to this need to exercise restraint in the scrutiny of the Commission's assessment of economic matters, as follows:

> *Although as a general rule the court undertakes a comprehensive review of the question whether or not the condition for the application of Article 85(1) are met, it is clear that in determining the permissible duration of a non-competition clause incorporated in an agreement for the transfer of an undertaking the Commission has to appraise complex economic*

[43] Supra footnote 5 at p 347.

*matters. The court must therefore limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the Decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers*.[44]

As is clear from these quotations, the economic appraisal of complex factual situations can be at issue both in the analysis under Art 81(1) and in the assessment of whether Art 81(3) must be applied. It is clear that the stance which the Courts take allows the Commission considerable discretionary room in its analysis under Art 81(3). It would appear however that the Courts accord the Commission a narrower margin of discretion in its examination pursuant to Art 81(1). To this it must be added that the CFI in general takes a tougher stance towards the Commission's analysis of facts than the ECJ did.[45]

**Restrictive effect**

Already in 1966 the ECJ spoke out against the Commission's method for finding an infringement described above. The court of appeals in Paris had made a reference for a preliminary ruling in the case of *Société Technique Minière*[46]. Its questions related to an exclusive distribution agreement. In the course of the proceedings the Commission submitted observations to the effect that a finding based solely on the language of the agreement that it restricts commercial freedom would be sufficient to establish that Art 81(1) is infringed. The ECJ considered that if the wording of the agreement does not allow for the conclusion that the parties had the object to restrict competition, its consequences must be considered in their actual context to see whether competition has

[44] Case 42/84 Remia et al v. Commission, [1987] ECR 2545, at para. 34 (hereafter *Remia*). Discretionary as to the assessment of facts have been recognized in other fields of EC law as well, such as transport (see e.g. SAM Schiffahrt, cases C-248/95 and C-249/95, [1997] ECR I-4475), and the Common Agricultural Policy (see e.g. Fifth Roquette, case 138/79, [1980] ECR 3333. See H.G. Schermers and D.F. Waelbroeck, *Judicial protection in the European Union*, 6th edition, Kluwer Law International 2001, at § 809 and further.

[45] See e.g. M. van der Woude, 'The Court of First Instance: The first three years', *Fordham International Law Journal*, [1992-1993] vol 16, p. 412, H.P. Nehl, *Principles of Administrative Procedure in EC Law*, Hart Publishing Oxford, 1999, and A. Jones and B. Sufrin, *EC Competition Law, Text, Cases*, and Materials, Oxford 2000.

[46] Case 56/65 Société Technique Minière v. Maschinenbau Ulm GmbH, [1966] ECR 235.

in fact been distorted to an appreciable extend. It further indicated that for this purpose it is appropriate to take into account i.a. the nature and quantity of the contract good, and the market positions of the parties.

This technique of looking at the full context to determine whether an agreement which appears to imply a restriction does so in fact, has since often been applied by the ECJ, for example in cases such as *Brasserie de Haecht*[47], *Metro Grossmärkte*[48], *Nungesser*[49], *Pronuptia*[50], *Gottrup-Klim*[51] and very importantly in *Delimitis*[52]. The preliminary ruling in the latter case related to beer supply agreements like in *Bass*[53]. Stergios Delimitis was the operator of a pub owned by Henninger Bräu. The brewery had imposed an exclusive purchasing agreement on Delimitis. Upon termination of the contract by Delimitis, Henninger Bräu deducted from a deposit to be repaid to Delimitis, the price of the purchasing requirements left unfulfilled. The main issue in the case was Delimitis' claim that the brewery was not entitled to do so because the beer tie infringed Art 81(1). In its ruling the ECJ gave a very detailed description of how the analysis under that provision should be conducted. It started out by stating that if an agreement does not have the object to restrict competition, it must be assessed whether it has such an effect. Citing its judgment in *Brasserie de Haecht*, it stated that the effects of such an agreement – including the cumulative effect of combinations of such agreements – should be assessed in the context in which they occur. The Court set out three steps in which to assess Delimitis' claim that these agreements prevented new breweries from gaining access to the market and frustrated incumbents in their efforts to increase their market share. Firstly the relevant market had to be identified. Then the cumulative effect of all such agreements in the market had to be examined both by focusing on the structure of the market, and on the concrete possibilities for entry. If this led the national court to a finding that access was made difficult, then it would still have to be examined by

[47] Case 23/67 Brasserie de Haecht v. Wilkin, [1967] ECR 407 (hereafter *Brasserie de Haecht*).
[48] Case 26/76 Metro SB – Grossmaerkte v. Commission, [1977] ECR 1875.
[49] Case 258/78 LC Nungesser KG v. Commission, [1982] ECR 2015.
[50] Case 161/84 Pronuptia de Paris v. Schillgalis, [1986] ECR 353.
[51] Case C-250/92 Gottrup-Klim Grovvareforeninger v. Dansk Landburgs Grovvarenselskab AmbA, [1994] ECR I-5641.
[52] Case C-234/89 Stergios Delimits v. Henninger Bräu A G, [1991] ECR I-935 (hereafter *Delimitis*).
[53] Supra footnote 24.

reference to an analysis of market structure whether the agreements entered into by Henninger Bräu contributed appreciably to this effect.

Nevertheless – that is, even though the Commission has since held on to its approach in many cases (see the description in the previous paragraph) – there is not a great number of cases in which the ECJ faulted the Commission's analysis. Specifically, there do not seem to be cases in which the ECJ overruled the Commission for using the wrong technique to establish an infringement, i.e. for relying solely on interpretation of the nature of the agreement in its investigation under Art 81(1). It is beyond the scope of this work to examine how come this is possible(54), especially given the fact that in any case it is clear that the CFI has repeatedly found fault with the Commission's analysis under Art 81(1).

It should be noted here at the outset of the discussion on the review by the CFI, that – of course – the CFI recognises the Commission's discretion in the assessment of complex economic situations. Both in *Metropole II*(55) (in the course of the analysis under Art 81(1)) and in *Matra Hachette*(56) (with respect to Art 81(3))(57) for example, the CFI expressly referred to *Remia*. But still in its ruling in *European Night Services*(58) it can be seen clearly reflected that the discretionary room accorded to the Commission in the

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54 It would seem however that the following factors could play a role. Firstly, the ECJ has been most pronounced in expressing the need to take all circumstances into account in preliminary rulings. This gives the impression that perhaps part of the reason for putting such emphasis was to send out a signal to national courts rather than to the Commission. Secondly, it could be that the ECJ considered the method used by the Commission to be insufficient grounds to annul a decision if the final conclusion reached with its more inclusive test was the same. This can be illustrated by reference to the judgment in *Metro I* (Case 26/76 Metro Grossmaerkte GmbH & Co KG v. Commission, [1977], ECR-1875) for example. The facts in this case are very much comparable to those in the *Grundig* case. In its decision in this case (Commission decision of 15 December 1975 in case IV/847 - SABA, OJ 1976 L28/19) the Commission found that clauses requiring retailers to provide service, offer for sale a wide range of Saba products and keep ample stocks of them, inherently restricted their commercial freedom and therefore fell foul of Art 81(1). The same was the case with prohibitions to supply dealers not appointed by Saba. In its review of the Commission's assessment – applied for by Metro, a wholesaler competing with the Saba distribution network – the ECJ applied its much broader test. It took into account data concerning price competition, the nature of inter-brand and intra-brand competition in the market, as well as factors concerning non-price competition. Reaching the same conclusions however, it nevertheless determined that the Commission had not gone awry.

55 Case T-112/99 Métropole Télévision M6 et al v. Commission, [2001] ECR II-2459, at para 114.

56 Case T-17/93 Matra Hachette SA v. Commission, [1994] ECR II-595, at para 104.

57 The CFI made similar statements about the scope of its review of Commission decisions applying Art 81(3) e.g. in cases T-39/92 and T-40/92, Europay International SA v. Commission, [1994] ECR II-49, at para 109, in case T-395/94, Atlantic Container Line AB et al v. Commission, [2002] ECR II-875, at para 348.

assessment under Art 81(1) is limited. In this case the CFI subjected the Commission's factual analysis to intense scrutiny and found serious shortcomings in its arguments establishing the negative effects of the agreement under investigation. European Night Services was a joint venture company set up by several European rail operators to provide overnight passenger transport from the UK to the continent through the Channel Tunnel. Despite its very low share of the market – also comprising air and ferry transport – the Commission had issued an exemption decision with far reaching conditions, rather than a negative clearance. Citing *Delimitis* the CFI emphasised that in assessing an agreement under Art 81(1) account should be taken of the actual conditions in which it functions. It found that the Commission had failed to do so in a number of respects. The Commission had argued that by entrusting these rail services to ENS, the parent undertakings had appreciably restricted potential competition, because it prevented each parent from setting up subsidiaries in the Member States of the other parents and so offer these services themselves and in competition with each other. The CFI considered this to be

> […] *a hypothesis unsupported by any evidence or analysis of the structures of the relevant market, from which it might be concluded that it represented a real, concrete possibility.* [(59)]

**Beneficial effect**

On the basis of *Métropole I*[(60)] it could be argued that the CFI takes a similarly tough approach to the reasoning necessary to establish that a positive effect flows from the agreement. This case concerned the exemption by the Commission of a network agreement between public broadcasting companies to share television rights i.a. relating to sports events. One of the issues in the procedure before the CFI was whether the Commission had sufficiently analysed the facts to decide whether the rules regarding admission to the network were of an objective nature and whether they were applied in a

[58] Cases T-374/94, T-375/93, T-384/94, and T-388/94, European Night Services Ltd et al v. Commission, [1998] ECR II-3141.
[59] Supra footnote 58, at para 142.

non-discriminatory manner. The CFI found that the Commission had not investigated these matters, and determined that without this precondition being fulfilled it was impossible for the Commission to have assessed whether the restriction was indispensable. Another issue dealt with was whether the particular public mission carried out by non-commercial broadcasting companies could constitute the type of benefits required by Art 81(3). The CFI determined that in principle the Commission is entitled to consider factors relating to the public interest as beneficial effects under Art 81(3). It found however that in this case the Commission had failed to show that exclusivity of rights to transmit sporting events was indispensable in order to receive a fair return on their investments made in carrying out this public task. The CFI considered that the Commission's assertions in this respect apparently were not based on a minimum amount of actual economic data.[61]

**Balancing exercise**

When it comes to performing the exercise of balancing these effects however, there are as yet no signs that either the ECJ or the CFI allows the Commission a narrower margin for appraisal. There appear to be no judgements in which fault was found in the method which the Commission uses to analyse whether an agreement provides objective advantages which compensate for the restrictions found (i.e. the first two conditions of Art 81(3)) – even though a number of cases involving Art 81(3) have come before the Courts. More specifically, there seems to be no ruling in which the Commission was required to spell out with greater detail how the effects relate. In *Leclerc*[62] – regarding the Commission's decision in *Yves Saint Laurent*[63] – the CFI dismissed all the applicant's arguments to the effect that the selective distribution agreements did not improve production or distribution in such a way as to benefit consumers. It did not find wanting the Commission's reasoning as to how the effects related.[64] In *Matra Hachette*

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[60] Cases T-528/93, T-542/93, T-543/93, and T-546/93, Métropole Télévision SA et al v. Commission, [1996] ECR II-649.
[61] Supra footnote 60, at para 120.
[62] Case T-19/92 Groupement d' achat Edouard Leclerc v. Commission, [1996] ECR II-1851.
[63] Supra footnote 40.
[64] The same is true for the identical case T-88/92 Groupement d' achat Edouard Leclerc v. Commission, [1996] ECR II-1961 regarding the Commission's decision in *Givenchy*, supra footnote 41.

and *SPO*[65] – in both of which cases the first two conditions of Art 81(3) were at issue – the CFI did not find that the Commission had made a manifest error of assessment.[66]

## § 4 BALANCING EFFECTS BY NATIONAL PRIVATE COURTS

### Evidentiary sufficiency and discretion

The reluctance of the Courts to probe decisions on the point of balancing, brings with it a considerable margin of discretion for the Commission. This discretion is of such a nature that it is not required for the Commission to explain in detail how the magnitude of each effect relates to that of the other. As a result, what is reported in the Commission's decisions as to the outcome of the balance gives the impression of being to some extent based on its intuition. Of course all would agree that in principle rigorous analysis is preferable to an approach based in part on intuition, as the latter is more likely to produce mistaken outcomes. It is obvious that it must be avoided that agreements which are beneficial in terms of welfare are prohibited, and that agreements which harm consumers are condoned. The Commission's approach must however be understood in the light of the vast amount of notifications it had to deal with over the years as the monopolist in the application of Art 81(3). Conducting a full factual investigation in all cases would have put too much strain on its resources. In fact redistribution of its resources has been one of the Commission's most important aims in the modernisation of EC competition law. I will attempt to present an argument here to the effect that in private enforcement of Art 81 – which may be expected to produce far fewer cases than the previous system – the standard for proving the outcome of the balance should be pushed upwards. This argument is based on Dutch civil law. No broader survey is made here, to see whether the findings correspond to the situation in other Member States. It is my –cautious –

[65] Case T-29/92 Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid et al v. Commission, [1995] ECR II-289.

[66] Cases also concerning the application of Art 81(3), but decided on grounds relating to the third condition of that paragraph (indispensability) were the following: *Langnese-Iglo* (case T-7/93 Langnese-Iglo v. Commission, [1995] ECR II-1533), *Van den Bergh Foods* (case T-65/98 Van den Bergh Foods Ltd v.

expectation however that the findings reported below would be largely comparable to those that would be made in other Member States that stand in a civil law tradition.
It will not be discussed whether the interpretation of the Article 81 set out by the Commission in its Notices and Guidelines would be capable of binding Dutch civil courts. Nor will it be addressed whether on the basis of arguments relating to the principle of good faith, an agreement that is found to violate Art 81, could still be enforced.(67)

The concept of discretion in Dutch administrative law is of course tied to the existence of vague norms. When a rule leaves room for interpretation, the question is whether it is the agency or the reviewing court that has the last say on that matter. If review of the agency's reasoning is integral, there is no room for discretion. If however the court does not superimpose its own opinion, there is freedom of appraisal for the agency. In Dutch administrative law a distinction is made between what is called *beleidsvrijheid*, and *beoordelingsvrijheid*.(68) Beleidsvrijheid (lit. policy freedom) denotes the freedom to decide whether and how to exercise a power if the conditions therefore are met. Amongst the many examples in administrative law, the freedom for the mayor to decide how to exercise his powers pursuant to Art 172 of the Municipalities Act (Gem.W) to restore public order can be mentioned. Beoordelingsvrijheid (lit. freedom of appraisal) on the other hand is freedom to evaluate whether the conditions for the exercise of a power are met. Again, examples abound. Mayors are attributed considerable freedom to assess whether public order has been disturbed under Art 172 of the Gem. W, and the executive committee of a municipality for example has a wide margin of discretion to determine whether a request for a building permit conforms to appropriate standards for the external appearance of buildings(69), as does the Deputy Minister in determining whether

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Commission, [1998] ECR II-2641), *Europay* (cases T-39/92 and T-40/92 Europay International SA v. Commission, [1994] ECR II-49), and *Vichy* (case T-19/91 Vichy v. Commission, [1992] ECR II-415).

67 One of the arguments on which such a decision could be based is the use of the word 'can' in Art 81(3). In the following discussion it will be assumed that in case all the conditions of Art 81(3) are met, the exception will automatically apply, as is the spirit of Regulation 1/2003, supra footnote 3.

68 See W. Duk, 'Beoordelingsvrijheid en beleidsvrijheid', in *RM Themis* [1988] vol 4, p. 156.

69 See A. Klap, *Vage normen in het bestuursrecht*, Tjeenk Willink Zwolle 1994, at p. 209.

information provided pursuant Public Access to Government Information Act is sufficiently complete.[70]

In the literature on Dutch civil law, the existence of discretionary powers – not for an agency or one of the parties, but for the court – has been recognised.[71] The distinction between beleidsvrijheid and beoordelingsvrijheid has also been made in this respect. This concerns two specific provisions of the Dutch Civil Code (BW). The first relates to agreements concluded on the basis of an erroneous assumption relating to facts or to law, that would not have been concluded in absence of the mistake. In principle the consequence provided by Art 6:228 (1) BW is that the contract is voided. However if one of the parties so requests, Art 6:230 (2) BW gives the court the power to decide whether in stead it should alter the substance of the agreement to take away the disadvantage.[72] Similarly in case of unforeseen circumstances Art 6:258 (1) BW allows a court to choose between ending the contract, and altering its substance, as well as between giving the measure chosen retroactive force or not.[73] These powers appear comparable to the administrative law concept of policy freedom. Similarly the court could be considered to exercise freedom of appraisal when determining pursuant to Art 6:230 (1) BW whether a proposal of the opposing party in a procedure regarding an agreement based on a mistake, takes the disadvantage away to a sufficient extent.

There is however a very important difference between such powers in administrative and civil law. In civil law there can never be the question of who has the last say. The court's decision as to whether the proposal is sufficient, or whether to apply the alteration in substance retroactively, is one that will always be subject to full review in appeal. The issue of 'discretion' in civil law is therefore one of application of vague norms. How does the court give substance to a provision that is not explicit as to how it should be interpreted?[74] This is a question that applies to many more provisions and concepts, than

[70] See Klap (1994), supra footnote 69, at p. 218.
[71] See in particular M.E. Peletier, *Rechterlijke vrijheid en partij-autonomie*, Boom Juridische Uitgevers 1999.
[72] See Peletier (1999), supra footnote 71, at p. 58.
[73] See Peletier (1999), supra footnote 71, at p. 113.
[74] It would be more appropriate to speak of discretion in civil law when discussing the extent to which civil law courts are free in relation to the legislator to interpret norms which are not formulated in a typically vague manner. See Chapter V of J.M. Barendrecht, *Recht als model van rechtvaardigheid, Beschouwingen over vage en scherpe normen, over binding aan het recht en over rechtsvorming*, Kluwer 1992. Another

those already mentioned.[75] Vague norms can be found in very specific fields of Dutch civil law. Courts have ample room for interpretation in deciding whether negotiations to conclude a contract have reached such a stadium as to make it unfair to abort these efforts without paying compensation. The same can be said of the question whether the employer is entitled to end a labour contract immediately on 'pressing grounds'. These are constituted by acts or behaviour which make that it could not reasonably be required of the employer to continue the contract. But such norms also apply to very broad issues which are relevant to e.g. all suits for damages. In Art 6:98 BW it is determined that proven damages can only be compensated if certain conditions are met. The damages must be related to the act on which the liability is based in such a way as that they can be attributed to this act as their consequence. For economists: the legal lingo gets worse. It is stipulated that in determining whether this is the case the court shall take into account the nature of both the liability and the damages. What this means is that a simple physical relation of cause and consequence between the act and the damage is not sufficient. The court has to decide whether in view of the circumstances mentioned it would be reasonable to consider the damages as the 'legal' consequence of the act. What these examples point at, and what a survey of other vague norms confirms, is that in Dutch civil law open norms are given substance on the basis of the principle of good faith.[76] By appealing to its sense of fairness, a court can fine-tune its decision to the specific circumstances of the case. Such fine-tuning often requires a balance to be made to reconcile the interests of the parties (sometimes with the public interest).[77]

Let me return to the Commission's discretion in the application of Art 81(3), and its implications for civil suits based on EC competition law. This discretion relates to the question whether the advantageous effects of the agreement outweigh the restrictive effects. Given that the issue at stake is therefore whether the conditions for exemption are met, under Dutch administrative law this discretion would fall in the category of

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instance where one could speak of discretion for the civil law court is its decision as to the stage of the proceedings at which it will address a certain issue, see e.g. HR 26 juni 1998, RvdW 1998 no 134.

[75] See in particular Barendrecht (1992), supra footnote 74.

[76] See J.M. Barendrecht, supra footnote 74, and M.W. Hesselink, *De redelijkheid en billijkheid in het Europese privaatrecht*, Kluwer 1999.

'freedom of appraisal'.[78] The interpretation that has been given to Art 81 by the Commission (and the European Courts) as to how it is to be determined whether the restriction is compensated for is firmly based in micro economics. This can be seen reflected in (review of) decision practice, and more expressively in the Commission's notices and guidelines. The recently issued *Notice* on the application of Art 81(3)[79] is of particular interest here. It sets out in detail the concepts that underlie its interpretation of that paragraph.

In point 33 the Commission explains that:

> *[t]he aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains […]. Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product. When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules.*

In point 85 it goes on to explain what the benchmark is for determining this net effect of the agreement:

> *The concept of 'fair share' implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1). In line with the overall objective of Article 81 to prevent anti-competitive agreements, the net effect of the agreement must at least be neutral from*

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[77] See A.S. Hartkamp, *Asser-Serie, Verbintenissenrecht, Deel III de verbintenis uit de wet*, Tjeenk Willink 1998, at §51g.

[78] It will not be discussed in this paper whether the Commission, and therefore the courts, have policy freedom not to apply Art 81(3) if the conditions are met. It is assumed that this is contrary both to the Commission's practice so far, and to Regulation 1/2003.

[79] Supra footnote 6.

*the point of view of those consumers directly or likely affected by the agreement […]*

So the net effect of the agreement on welfare must at least be neutral for the prohibition of Art 81(1) to be inapplicable.

As was explained above, it is in making this complex economic assessment that the European Courts allow the Commission a measure of freedom. This is markedly different from substantiating vague norms in individual civil law cases, not only because this freedom implies that the assessment will be reviewed marginally. More importantly the Commission's theoretical framework for the application of Art 81(3) excludes any arguments based on fairness (in as much as they do not coincide with efficiency). Of course this interpretation will be adapted if advances in insight so require, but these advances will be made in the field of economics, and not morality. Rather than falling within the range of normative issues therefore, this question will have to be classified as a factual one in civil law.[80] This would correspond to the treatment in other fields of civil law of scientific knowledge used in the analysis of complex issues (e.g. the consequences of Asbestos and DES, and the existence and source of environmental pollution). When it comes to establishing facts (i.e. whether something has occurred, as opposed to the qualification of facts, i.e. whether that which has occurred constitutes a situation to which a certain rule should be applied) however, civil law courts have much less room for appraisal than in the application of open norms. It is necessary therefore to examine whether the way in which the Commission has reported about balancing effects, would be sufficient under the standard applicable in Dutch civil law. Or – to put it in different words – whether a court would be able to decide on the outcome of the balance when presented with the type of arguments expressed in the Commission's decisions.

[80] Of course as with every form of science, and with the acceptation of protecting consumer welfare as the appropriate standard for EC competition law, this is in itself a normative issue. The point made here however is that such questions – although their answer is found using methods based on a normative system – will be qualified in civil law as being of a factual nature, to which the standard for factual analysis must be applied.

The civil law standard for evidentiary sufficiency requires a court to come to the conviction that a fact has occurred with a reasonable measure of certainty.[81] Courts are bound to motivate their reasoning in this respect. And rules of civil procedure prevent courts from independently discovering facts deemed relevant in solving the dispute. In Dutch civil law the parties give form to the proceedings. Now, the Commission is able to make a decision on the outcome of the balance on the basis of incomplete information because it can rely on extensive experience in the analysis of complex economic issues amongst its staff. Even if it has not fully worked out in terms of consumer welfare the scenario of the restriction of the number of distributors in *Yves Saint Laurent*[82], the assessment up to that point allows it to make a decision with sufficient certainty as to the outcome of the balance. Dutch civil law courts cannot be relied on to have an intuition in economic affairs comparable to that of the Commission. No great emphasis is put on the study of economics in the education of the Dutch judiciary. And the Law & Economics approach taken to such fields as contract and tort law in the US is almost completely absent in the practice of Dutch civil law. In practice it can be seen that courts are reluctant to decide on any kind of disputed factual matter – economic or other – which requires more than common knowledge to analyse, without the assistance of an expert witness.[83] All of this is not to say that the question of Art 81(3) should not be put in the hands of civil law courts. The argument made here is that in private enforcement the reasoning will have to be more extensive. It will have to include expressing the restriction in terms of its effect on welfare, as well as giving as accurately as possible an estimate of the magnitude of each effect, so that a net effect can be established in a manner which allows a court to convincingly motivate its ruling. Courts will feel constrained to do so

[81] See I. Giesen, 'De bewijswaardering in civiele zaken: vage noties of scherpe normen?', in *Ars Aequi* [1999] vol 48 no 9, p 623. This is held to be a stricter standard than the balance of the probabilities, which is used in Dutch administrative law and for example in UK common law.

[82] Supra footnote 40.

[83] A quick survey of recently reported rulings by the Dutch supreme and appellate courts shows that expert opinions were asked with regard to: the existence of a causal link between groundwater extraction and the subsiding of nearby farms (HR 7 mei 2004, NJ 2004, no 422); the measurement of the surface area of a house (HR 4 juni 2004, NJ 2004, no 397); the calculation of damages in a case of expropriation (HR 5 september 2003, NJ 2004, no 385); the cause of damage to the nervous system (HdB 22 juli 2003, NJ 2004, no 367); the development of the plaintiff's income after a criminal investigation against him (HR 19 december 2003, NJ 204, no 348); the causal link between complaints associated with a whiplash syndrome, and an accident (HR 9 april 2004, NJ 2004, no 308); the calculation of damages due to flooding (HR 30

especially because most competition cases that will be brought before them will carry important financial implications for at least one of the parties. This does not mean that there can be no margin of appreciation as to the outcome of the balance at all. Where an estimation has to be made on the basis of historical data as to the future effects of an agreement, certainty can by definition not be had. Uncertainty of this kind – provided that the estimation is well argued – should not lead to problems under the standard of evidentiary sufficiency however.

## § 5 EMPIRICISM IN BALANCING

Apart from the concepts underlying its interpretation of Art 81(3), the Commission's *Notice*[84] discussed in the previous paragraph also addresses the methodology of the application of this provision. And where the description it gives of the theory does not appear to imply substantial policy changes, the method that the Commission describes for the actual analysing and balancing of effects on competition is markedly different from the its practice described above. This method is of a more objective empirical nature, and it will be argued here that its application in civil law competition suits would allow a court to take a well founded decision.

The *Notice* shows that the Commission interprets the negative effect of the agreement in terms of market power. This part of the investigation must be focused on whether the agreement affords the undertakings involved the ability to raise price profitably, by restricting output.[85] It takes the same approach to the analysis of the efficiencies stemming from the agreement, in that these are also expressed in terms of their effect on price.[86] Both verticals and horizontals, it is asserted, may create efficiencies by allowing the undertakings in question to perform a task at lower cost or with higher added value

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january 2004, NJ 2004, no 270); and the causes of a disability to perform a certain type of work (HR 7 november 2003, NJ 2004, no 174).

[84] Supra footnote 6.

[85] Supra footnote 6, at points 95 and 101.

for consumers. Such efficiencies can be exploited by the companies by increasing output. This may lower price, but given their reduced costs, this is likely to be profitable. The exercise of balancing these effects which the Commission proposes, requires one to decide which of the two incentives that the agreement gives will be stronger. Will it be more profitable for the companies to restrict output, then the agreement must remain prohibited. If their best option is to increase output, and thus pass on the benefits to consumers, then the agreement is beneficial.[87] For this purpose, the *Notice* states explicitly, the value (or magnitude) of each effect must be determined, and compared.[88] These values are to be calculated as accurately as reasonably possible.[89]

The implications of the approach which the Commission proposes in the Notice can be illustrated by looking at how the Commission compared the restrictive and beneficial effects stemming from the beer supply agreements in *Bass*[90]. In this decision dating from 1999 the Commission was able to put much of what is described above into practice. Before doing so it must be mentioned here that in the Notice the Commission describes the method for balancing from an ex ante perspective. This conforms both to its practice so far of decisions taken upon notification, and to the approach expressed in the Horizontal Merger Guidelines[91] (to which it bears remarkable resemblance). The concepts of this method can however very easily be adapted to a situation where an ex post perspective will be taken in the analysis of the facts. This is important not only for the understanding of the decision in *Bass*. It may be expected that private enforcement of Art 81 will often take an ex post perspective in relation to the facts – as is the case cartel analysis in the EC and with private enforcement of §1 of the Sherman Act[92] in the US. In that case the relevant question is not which scenario will be chosen by the companies, but rather whether the pricing behaviour witnessed in the market reflects the exercise of market power.

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[86] Supra footnote 6, at points 96 and 101.
[87] Supra footnote 6, at point 101.
[88] Supra footnote 6, at points 50, 55 and 56.
[89] Supra footnote 6, at point 56
[90] Supra footnote 24.
[91] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ [2004] C31/5.
[92] 15 USC §1

The decision in *Bass* relates to a period in which the beer industry in the UK was in transition. Prior to 1989 the UK beer supply market was characterised by the fact that a large proportion of pubs were owned by the brewers, and either exploited by them or leased to a tenant under an exclusive purchasing and non-competition obligation. In that year the Monopolies and Mergers Commission (MMC) completed an investigation of the beer supply market, and issued the so-called Beer Orders[93]. The Beer Orders were aimed at relaxing the ties between the brewers and the outlets. This aim was pursued i.a. by ordering the largest brewers – including Bass – to divest a substantial proportion of the pubs they controlled. Furthermore in 1995, the Office of Fair Trading (OFT) conducted an enquiry into the UK brewers' wholesale pricing policy. This resulted in the adoption of an internal report in the same year (OFT Report).[94] In 1996 Bass notified to the Commission the standard form of lease (including the beer tie) which it had been using since 1991. In the year of notification Bass still tenanted around 1.300 pubs, down from around 4.800 in 1987 and 2.400 in 1991. In the years 1997 and 1998 Bass sold of almost all remaining tenanted pubs, retaining only 20 at the time that the decision was taken. Given that the notification satisfied the conditions of Art 6 of Regulation no 17, the exemption could be granted with retroactive effect starting from 1991.

This set of circumstances allowed the Commission to take a decision which was particular in two respects. Firstly, as a result of the reports mentioned, there was an unusual amount of empirical data about the market available to the Commission. Secondly, given that Bass held only an insignificant number of pubs in 1999, the Commission was able to take a purely ex post perspective in its analysis of this data. It had only to determine whether the net effect of the agreements on competition had been beneficial or restrictive. It was not required to make an estimation of future effects.

The Commission found that the beer supply agreements used by Bass had the nature of restricting competition for the following reasons. The exclusive purchasing and non-competition obligations prevented retailers from purchasing beer from other suppliers. These other suppliers were both competing brewers (restriction of inter-brand

[93] Supply of beer (loan ties, licensed premises and wholesale prices) Order 1989, SI 1989/2258, and Supply of beer (tied estate) Order 1989, SI 1989/2390

[94] OFT report on the Enquiry into brewers' wholesale pricing policy, on which a press release was issued by the OFT on 16 May 1995.

competition) and wholesalers selling Bass products (restriction of intra-brand competition). It then used the data from the OFT Report as well as the results of its own inquiries, to reinterpret these findings about the restrictive effect in terms of price. This is to say that the Commission looked for indicators in terms of price that indeed these agreements and its position in the market shielded Bass from the pressures of competition. In doing so a structural differential was found between the price paid for beer supplies by tied lessees and the price paid by 'free' pub operators. This price differential gradually increased from GBP 19 per barrel in 1990/1991, to GBP 48 per barrel in 1996/1997.

The Commission then set out to test this hypothesis that the agreements and its market position had allowed Bass to raise price. This involved evaluation of an alternative explanation offered by Bass. Bass argued that the agreements also afforded the tenants a host of benefits, ranging from rent subsidies, to value added services (such as bulk buying and procurement services), and access to direct operational support. Bass argued that it were the costs incurred in providing these services which were reflected in this price differential. As accurately as reasonably possible the Commission proceeded to quantify the price effect of each of these benefits, after which it calculated the aggregate benefit for the tied outlets. A comparison of the two effects yielded that in all but one of the seven years under investigation, the value of the benefits was larger than the price differential. Faced with these facts the Commission discarded the monopolistic interpretation of the price differential. Given that the benefits of the agreements compensated the tenants for the higher price they paid for beer, they were deemed to have brought about an improvement in distribution that did not harm consumers.

The method described in the *Notice* and applied in *Bass* has the merit of making the exercise of balancing transparent, and its outcome verifiable. The restriction of competition is stated in terms of an increase in the purchasing price for beer paid by tied houses. The benefits are constituted by cost reductions that the agreements allow them to make in the exploitation of their pub. The magnitude of both effects is quantified, which makes it possible to compare them. A simple exercise in subtraction suffices to show that the reductions in cost have at least the same value as the price increase. The conclusion to

a party brief or an expert opinion applying this method should therefore be easily interpretable for a civil law court, and would allow it to express its reasoning on this matter in a consistent manner.

It must be remembered that in *Bass* the facts were looked at for their historical value only. It was not necessary to use them to make a projection of future effects on competition. It cannot be said on the basis of *Bass* therefore whether civil law courts would have problems in deciding on a case taking an ex ante perspective. There is no room here to examine whether the quantitative techniques used to make such projections – known mostly from merger assessment – would allow a court to decide a case with sufficient certainty. In any case it is my expectation that the scope in Dutch law for Art 81 cases of such a nature would be limited. Both in case of an injunction (Art 3: 296 BW) and an action for breach (Art 6:74 BW), it would seem to me that courts would be reluctant to declare an agreement void before it takes effect on competition grounds, if there is no clear indication of competition related damages for the plaintiff.(95)

The conclusions in this paper apply only ex post analysis therefore. Of course in the litigation of such cases strong emphasis will be put on establishing effects, i.e. on the correct way to quantify them. This can be seen in the CFI's judgement in *Joynson*(96), the appeal to the *Bass* decision. Joynson, an operator of a pub tied by Bass, argued that in addition to the price differential the lower profitability of tied houses should be taken into account in the analysis of the restrictive effect. He also made several pleas claiming that the countervailing benefits had not been correctly quantified. Clearly this will confront civil law courts with complex arguments to assess, to which they cannot apply the *Remia*-test(97) as did the CFI. However with the help of expert witnesses (party and independent) it should be possible to decide on these matters, just as civil law courts have done in other fields involving complex scientific questions, such as those referred to above. The main difficulties with quantitative analysis of the agreements at issue in this paper are largely comparable to those in cartel (ex post) and merger (ex ante) investigations. These issues

[95] It would be interesting in this regard to look at the US doctrine of antitrust injury, see e.g. R. Blair et al, 'Rethinking antitrust injury,' in Vanderbilt Law Review, vol 42 (1989), p 1539, and W. Page, 'The scope of liability for antitrust violations,' in Stanford Law Review, vol 37 (1985), p 1445.
[96] Case T-231/99 Colin Joynson v Commission, [2002] ECR II-2085.
[97] Supra footnote 44.

are well known,[98] and their discussion is beyond the scope of this paper. Some – cautiously intended – remarks will be made however in an Appendix on issues relating to the data necessary for this type of analysis. In the following paragraph it will be discussed whether the Commission's new approach can be used to analyse all relevant types of agreements, and what its implications are for the burden of proof in a civil law competition suit.

## §6 QUALITATIVE EFFICIENCIES AND THE BURDEN OF PROVIDING QUANTITATIVE PROOF

### Dealing with qualitative efficiencies

Assuming that the necessary data is available, the method described above can be useful especially in the analysis of horizontal co-operation agreements. Given that both parties to such contracts produce similar goods or services, overt co-operation between them will mostly be directed at jointly shouldering or avoiding certain costs. As was shown above such cost related benefits are easily related to price effects. Take for example the case of *Visa – Multilateral Interchance Fee*.[99] The restriction contained in the agreement which concerned the Commission was the fixing of the price for the service rendered by the card-issuing bank to the accepting bank. The benefit however was that that clause allowed the banks to set the price at the best possible approximation of marginal cost, in stead of each charging his own price. That price was likely to be higher and would make the network less attractive for both consumers and merchants. The relationship between the 'restriction' and the benefit is clear. In fact, the implications for consumer welfare can hardly be more evident.

Suppose however that the Commission's method would be applied ex post to the facts of *Yves Saint Laurent*[100]. What would the analysis in this case have looked like then? As in

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[98] For issues in quantitative cartel analysis see , for an overview regarding merger analysis see M. Goppelsröder, *Simulation analysis in merger control, A review of the development and application of merger simulation techniques in the EU and US*, Netherlands Competition Authority Working Paper, forthcoming.

[99] Supra footnote 29.

[100] Supra footnote 40.

*Bass*[101] the first step would be to attempt to find an indication of an increase in Yves Saint Laurent's pricing. This would provide initial support for the theory that the combination of the admission procedure with the additional requirements could serve to limit the number of points of sale, and hence to restrict output. Let us assume that a price increase would indeed be discernable in the data. The analysis would then turn to the beneficial effects of the distribution agreements, to see whether somehow these compensate for this disadvantage. Yves Saint Laurent claimed that the minimum annual purchase requirement allows it to rationalise supplies and to concentrate distribution on cost effective outlets. The same argument was made as to the result of the requirement for the distributors to engage in promotional efforts. It is probable that these efforts by the retailers lead to cost reductions for Yves Saint Laurent, the magnitude of which one could try to estimate. However it should be taken into account that on the other hand these requirements imply extra costs for the distributors. They have to make sure that they have a fashionable shop with the products rightly displayed, they must spend much more attention to each customer than in a super market, they are obliged to offer for sale a wide range of products not all of which will make a lot of volume, they are required to keep ample stocks, and they have to advertise the products. So the positive effect for consumers is not in lower costs and prices. On the contrary, a net price increase is more likely. The benefit they experience is the improvement in quality (exclusivity: advice, range, stocks etc) that the agreement makes possible. This makes the balancing exercise in this case very different from the one in *Bass*. Firstly it is hard to determine whether the price increase found is indeed the result of the exercise of market power. They could just as well reflect an increase in costs needed for the improvement of the quality of the product. And then a comparison will have to be made between the price increase, and the improvement in quality, to see whether the latter makes good for the former. This can be very difficult.

In fact many vertical agreements are like the one in *Yves Saint Laurent*. The supplier and the retailer do not stand in a competitive relationship as do the parties to a horizontal agreement. Rather their interests are complementary. Both want the product to do well. Agreements between them often have the purpose of inducing the parties to make

[101] Supra footnote 24.

investments which enhance the quality of the product, which absent co-ordination neither of the parties would be willing to make. Take the *Grundig*[102] case discussed above for example. The agreements require the distributors to provide pre-sales advice and after-sales services (including repairs) to customers. These services enhance the quality of the product. The retailers are however unlikely to incur the necessary costs, if Grundig were to make its products available to other distributors who do not have to engage in such efforts. Customers would come to appointed distributors for information and service, but buy the product cheaper elsewhere. Grundig on the other hand would not want to pay for the training of the retailers' staff if the outlets would not ensure it of sufficient turnover by engaging in promotional efforts.

That many vertical agreements generate benefits of a qualitative nature is confirmed by the Commission in point 115 of its Vertical Guidelines, where it states that:

> *It is important to recognise that vertical restraints often have positive effects by, in particular, promoting non-price competition and improved quality of services.*[103]

And it should be taken into account also that non-price related efficiencies are amongst the objectives of many a horizontal co-operation agreement. In *UEFA*[104] for example the arrangement made it economically viable for broadcasters to transmit a program covering only the most interesting bits of UEFA matches of the week. Without the agreement prices of the matches would supposedly be so high that they could not be paid for by only filtering out the most attractive parts. The same is the case for the internet license in *IFPI – Simulcasting*[105]. The existing system for collecting royalties based on licenses extending over national territories did not provide an adequate framework for broadcasting music over the internet, which is inherently international. The multi-territorial simulcasting license therefore made possible the creation of a new product.

[102] Supra footnote 28.
[103] Supra footnote 19.
[104] Supra footnote 30.
[105] Supra footnote 31.

And lastly in *O2/T-Mobile UK*[106] the agreement ensured that customers would get better value by offering them roaming in a much larger area of the UK.
Despite the fact that non-price efficiencies are quite pervasive then, the language in the *Notice*[107] on this matter is short. The Commission suffices with the following:

> *Consumer pass-on can also take the form of qualitative efficiencies such as new and improved products, creating sufficient value for consumers to compensate for the anti-competitive effects of the agreement, including a price increase.*
>
> *Any such assessment necessarily requires value judgment. It is difficult to assign precise values to dynamic efficiencies of this nature. However, the fundamental objective of the assessment remains the same, namely to ascertain the overall impact of the agreement on the consumers within the relevant market. Undertakings claiming the benefit of Article 81(3) must substantiate that consumers obtain countervailing benefits* […]
>
> *The availability of new and improved products constitutes an important source f consumer welfare. As long as the increase in value stemming from such improvements exceeds any harm from a maintenance or an increase in price caused by the restrictive agreement, consumers are better off than without the agreement and the consumer pass-on requirement of Article 81(3) is normally fulfilled. In cases where the likely effect of the agreement is to increase prices for consumers within the relevant market it must be carefully assessed whether the claimed efficiencies create real value for consumers in that market so as to compensate for the adverse effects of the restriction of competition.*[108]

[106] Supra footnote 32.
[107] Supra footnote 6.
[108] Supra footnote 6, at points 102-104.

This is much less concrete than what the Commission explains for the balancing of cost efficiencies. It does not tell how it should be determined whether sufficient value is created by the improvement in quality to compensate for the increase in price. This is not very surprising however, as there isn't really a good way to do this. It would require an estimate to be made of the welfare gains of customers that previously did not buy Yves Saint Laurent products because they were not sufficiently exclusive. And one would have to identify a group of consumers harmed by the agreement because they thought the products sufficiently exclusive already (some of whom may stop buying them), and make an estimate this loss. These are tentative affairs. It is possible to obtain information by means of market testing, consumer questionnaires. But there simply aren't any good methods which yield clean quantitative expressions of both effects that can be compared as with the balancing of cost efficiencies. As has so far been the Commission's practice with regard to balancing in general, the analysis of the competitive effects of agreements involving non-price efficiencies will therefore inescapably require a comparison to be made of effects stated in different terms.[109]

**The burden of providing quantitative proof**

If then it is not possible to give good guidance as to how a comparison of apples and pears must be evaluated by courts, it should be avoided as much as possible that they are confronted with this issue. In other words if it is not strictly necessary, the stage of balancing competitive effects should not be reached. The importance thereof becomes more evident if one considers the implications for balancing effects of Art 13 of the Dutch General Provisions Act (WAB) in combination with the division in the burden of proof of Art 81. In Art 13 WAB it is determined that courts cannot refuse to pass judgment in cases brought before them. If unable to decide on a certain factual issue, a court therefore – as a technical matter – has to find for the opponent of the party who bears the burden of proof in this respect. In such a case what has actually occurred does not determine the outcome of the proceedings. Regarding the burden of proof Art 2 of Regulation 1/2003[110] determines that

[109] See also RBB Brief 15, available at http://www.rbbecon.com/publications/downloads/rbb_brief15.pdf.
[110] Supra footnote 3.

> *In any national or Community proceedings for the application of Articles 81 and of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.*

The combination of these two factors implies that if because of the qualitative nature of the efficiencies involved in a case a civil law court cannot reach a decision on the outcome of the balance, it will have to find for the plaintiff. The negative interpretation of the agreement will prevail therefore, even if the court is uncertain as to the actual effect.
The number of cases in which this can occur depends of course on the level at which the standard of proof is set in the first paragraph of Art 81. The easier it is to get through the first paragraph, the more cases reach the third paragraph. And the easier it is to get through the first paragraph, the more agreements in which there is no real competition problem reach Art 81(3). The cases of *Yves Saint Laurent* and *Grundig* can be thought of as examples here. In both cases the suppliers had small market shares, there was a relatively large number of competitors, and no report was made of signs of diminished competition in market. It is not very likely therefore that if the level of proof required to show a restriction had been higher, there would have been any need for an analysis under the third paragraph. In both decisions however the Commission did reach the stage of balancing the improvements in quality resulting from the distribution agreements, against the 'restriction' found.
It will be argued here that the *Notice* must be understood and applied in such a way as to require more empirical evidence regarding market power, as this will lead to fewer cases in which it will be necessary to balance the effects.

Although the Commission's *Notice* does contain a summary discussion of the Analysis under Art 81(1), it does not make explicit who bears the burden of adducing the kind of evidence referred to above. All that can be said in this respect is that the Commission

discusses the empirical methodology wholly within the scope of the third paragraph. Analysis of the decision in *Bass* could lead one to the same conclusion that perhaps the Commission intends for such evidence to be considered under the third paragraph only. The analysis of the price differential and the computation of the countervailing benefits is reported of by the Commission in the section of its decision titled 'The Facts'. In the subsequent legal assessment under Art 81(1) no mention is made of the price differential at all. Closely following the reasoning of the ECJ's ruling in *Delimitis*[111], the Commission makes a structural analysis. Firstly the relevant market is identified. Then the potential restrictive effects of the beer supply agreements are deduced from the wording of the Standard Agreement. Next the cumulative effect of all Bass's supply agreements in the market is examined by focusing on the structure of the market, and the (theoretical) possibilities for entry. Finding that access was made difficult, it finally investigated market structure whether the agreements entered into by Henninger Bräu contributed appreciably to this effect. The price differential and its comparison to the countervailing benefits are discussed again only within the scope of Art 81(3).

If the objective is to analyse agreements on the bases of empirical data of a behavioural nature however, there would seem to be no good reason to do so only within the scope of Art 81(3). On the contrary it would be more in line with the case law of the European Courts to require the plaintiff to show an indication of market power based on behavioural data. It was shown above that the European Courts have always required the analysis under Art 81(1) to go beyond interpretation of the wording of the agreement. Judgments in cases such as *Delimitis* and *European Night Services*[112] indicate that a detailed structural analysis of the market must be made to confirm the competitive concerns based thereon. If the purpose is to go beyond the use of structural data to an assessment of agreements based on quantitative behavioural data, then the statement repeated frequently in those judgments that all relevant factual, economic and legal circumstances must be taken into account in the analysis under Art 81(1), stands in the way of restricting the use of such data to the analysis under Art 81(3) only.[113] One could argue that the defendant is often much likelier to be in possession of such data, so that the

[111] Supra footnote 52.
[112] Supra footnote 58.

burden is better placed on him.[114] Apart from the fact that probably this would be contrary to the precedents of the Courts, it would also strike me as odd to require Bass to point out the existence of the price differential itself. In that position a defendant is more likely to focus on the benefits of the agreement, which will lead to the situation which must be avoided, i.e. in which a not fully developed argument on a restriction is to be weighed against some (possibly qualitative) efficiency.

Requiring the plaintiff to show an indication of market power based on empirical data of a behavioural nature will have significant consequences. The decision in Bass clearly shows that an indication of market power based on structural analysis is not conclusive. After the analysis of Bass' pricing behaviour under Art 81(3), the Commission determined that the anti-competitive explanation could not be maintained. This is confirmed by empirical studies in Industrial Organization. These show that high concentration ratio's are not significantly related to the existence of market power, and that a high individual firm market share does provide a good indicator of market power, but one that needs to be verified because the likelihood of entry could for example stand in its way. Such verification should take the form of checking whether firm behaviour conforms to the assumption about performance derived from the analysis of market structure.[115] It seems reasonable to expect therefore that if such verification is to be conducted within the scope of Art 81(1) there will be a sizable group of cases in which nothing comparable to the price differential in Bass would be found. Cases such as *Visa – Multilateral Interchange Fee*, *Yves Saint Laurent*, and *Grundig* would probably not pass the hurdle of Art 81(1) at all.

But the implications would be further reaching than that. This can be illustrated by assuming that the case of Bass would be brought before a civil law court. If after the plaintiff had pointed to the price differential, Bass would have pleaded that this differential was not the result of market power but of higher *costs*, this claim would in my opinion have to be dealt with under Art 81(1). This would entail Bass demonstrating by means of their quantification that the costs incurred in providing the rent subsidy,

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[113] See the cases mentioned in footnotes 47-52.

[114] In fact there are many examples in Dutch civil law where the burden of proof is shifted because the plaintiff does not have access to sufficient information which is in the sphere of the defendant.

assistance etc, fully accounted for the price differential. Surely in *Metropole II*[116] the CFI made clear that there is no room for balancing pro-competitive effects in the analysis under Art 81(1). But balancing pro-competitive effects under Art 81(3) implies that one estimates the value in terms of welfare of a service or good provided to the receiving end of a market. That is not what I propose. I agree that if an estimation of the value to the retailers of the services provided by Bass is to be made, then the analysis must be moved over to the third paragraph. If however one looks at the costs made by Bass for this purposes, no estimation of any welfare effect is made. It is simply looked at whether there is an alternative to the market power explanation of the price differential. Market power is the ability to raise price profitably, i.e. to raise price over costs. If Bass shows that the price increase corresponds to a cost increase, then the court would have to dismiss the plaintiff's claim because there is insufficient indication of the exercise of market power (unless of course he would come up with some additional charge). This is nothing different from a claim in a genuine cartel case that a price increase is caused by cost increase of an input used by the defendants, which would also be dealt with under Art 81(1).[117] Only in case the increase in costs would not be sufficient to explain the increase in price, would there be a reason to estimate the value of all the benefits of the agreements to Bass' customers under Art 81(3).

The same argumentation could be used when in other cases involving vertical agreements such as in *Yves Saint Laurent* or *Grundig* an indication of an increase in price would be found. If the defendant is able to show that this increase corresponds to the investments made by both parties (for a suitable shop, training, pre-sales advice, after-sales services) then there would be no need to estimate the value of any of these benefits.[118]

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[115] See R. Schmalensee, 'Inter-industry studies of structure and performance', in *Handbook of Industrial Organization*, Elzevier Science Publishers 1989.

[116] Case T-112/99 Métropole Télévision (M6) et al v. Commission, OJ [2001] ECR II-2459.

[117] For example if a price increase appears to follow the conclusion of a contract by two competitors to jointly produce intermediate product A which they both use, this fear can be taken away within the scope of Art 81(1) by pointing to an increase in the cost of an input which both parties use.

[118] Of course the type of argument described in footnote 145 (involving an increase in a cost not related to the benefit) can also be advanced in the assessment of both vertical restraints and horizontal co-operation agreements. For example if a price increase appears to follow the conclusion of a contract by two competitors to jointly produce intermediate product A which they both use, this fear can be taken away within the scope of Art 81(1) by pointing to an increase in the cost of an input which both parties use.

In summary it can be said that if the Notice is understood such that standard of proof of Art 81(1) is raised by requiring an indication of market power on the basis of empirical data of a behavioural nature, it is necessary to estimate the value of efficiencies in fewer cases than has been the Commission's practice. In particular, focusing on the cost increase incurred in bringing about the qualitative benefits of a vertical agreement has the potential to remove the need estimate their value and balance them. If this strategy is followed, it could at least be said of those cases in which it would still be necessary to balance qualitative efficiencies, that a strong indicator of some measure of market power has been found. A technical decision in favour of the plaintiff in case the court is undecided would be less detrimental then.

## CONCLUSION

At the beginning of this paper the question was asked whether with regard to the balancing of effects required by Art 81(3) the same standard of proof would be applied in private enforcement as has been the case in the Commission's practice. It was found that the standard of proof reflected in the Commission's decision practice is set at such a point that it is uncertain whether Dutch civil law courts will be able to take a decision on the balancing of competitive effects with sufficient certainty. This is because the negative effect is stated in terms of a restriction of commercial freedom, whereas the beneficial effect is expressed in terms of consumer welfare. I have contended here that the standard of evidentiary sufficiency in Dutch civil law does not allow courts to take a decision on the factual question of the balance without detailed information on how the effects correspond as the Commission has so far done.

The question was also raised what the implications of the Notice would be in this respect. It was argued in this paper that application of the methodology set out therein, which involves analysis of price and cost related restrictions and benefits, would in effect raise this standard to the level at which these problems do not occur – at least for agreements assessed ex post. The *Notice* however does not give guidance on how the effect on

welfare of an agreement improving quality should be measured and balanced. This could mean that in the assessment of a considerable class of vertical restraints and horizontal co-operation agreements, it would still be necessary to balance effects stated in different terms. It was shown that if in line with the case law of the EC Courts the Notice is applied such as to require the plaintiff to show under Art 81(1) that there is an indication of market power on the basis of empirical data of a quantitative nature, the number of cases in which it is necessary to balance effects is reduced compared to the Commission's practice. In particular, focusing on the cost increase incurred in bringing about the qualitative benefits of a vertical agreement, has the potential to remove the need estimate their value and balance them. And if this strategy is followed, it could at least be said of those cases in which it would still be necessary to balance qualitative efficiencies, that a strong indicator of some measure of market power has been found. A technical decision in favour of the plaintiff in case the court is undecided would be less detrimental then.

## APPENDIX

### DATA RELATED ISSUES

Quantitative analysis of competitive effects requires the availability of suitable data.[119] What suitable data is depends on the circumstances of the case of course. In general however it can be said that the data required for analysis from an ex ante perspective will be the same as when the facts are understood historically only. This will in both instances be data relating to prices, costs, and volumes. Apart of being the right kind of information, it must also consist of sufficient and comparable observations over a

[119] See on this issue in general S. Bishop and M. Walker, *Economics of EC competition law: concepts, application and measurement*, 2nd ed Sweet& Maxwell 2002, at §§8.14-19, D. Hosken et al, *Demand system estimations and its application to horizontal merger analysis*, FTC Working Paper 2002, available on http://www.ftc.gov/be/workpapers/wp246.pdf, Goppelsröder, supra footnote 98, and D. Scheffman and M. Coleman, *FTC perspectives on the use of econometric analyses in antitrust cases*, available on http://www.ftc.gov/be/ftcperspectivesoneconometrics.pdf.

relevant period of time. Scanning companies, A.C. Nielsen (Nielsen) and Information Resources Incorporated (IRI) being the most important, collect data concerning prices and volumes of consumer goods at retail level.[120] The channels of information which are covered in their data are supermarkets, drug stores, mass-merchandisers, and convenience stores. The information from scanning companies can generally be very helpful in the quantitative analysis of competition cases. Such data has been used in quite a number of cases both in the EC and (more so) in the US.[121] In other lines of business, such as the sale of beer in pubs like in *Bass*[122], the availability of suitable information is less obvious. As was explained above, in that respect the circumstances in this case were out of the ordinary. It is clear from the decision that in addition to information provided by Bass and flowing from its own investigation, the Commission relied heavily on the reports on the beer market by the OFT and the MMC, especially also on issues relating to prices.[123] The question must therefore be raised whether in absence of such extensive industry wide investigations, sufficient data will surface within the scope of a civil law competition suit not relating to scanned goods. In this regard it should be kept in mind that such cases will include those relating to transactions at the manufacturing level. Companies like Nielsen and IRI scan at the retail level of trade only.

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[120] To some extent also they capture the level of promotional efforts. On scanner data see Hosken et al (2002), supra footnote 119.

[121] The following are examples of cases in which the use of scanner data was explicitly reported. For the EC see *Barilla/BPL/Kamps* (Commission decision of 25 June 2002 in case IV/M2817 Barilla/BPL/Kamps), *Coca-Cola/Nestlé* (Commission decision of 27 September 2001 in case IV/M2276, Coca-Cola Company/Nestlé), *Van den Bergh Foods*, supra footnote 10, *Kimberley-Clark/Scott* (Commission decision of 16 January 1996 in case IV/M623), and *Nestlé/Perrier* (Commission decision of 22 July 1992 in case IV/M190 – Nestlé/Perrier), for the US see C.K. Robinson, 'Quantifying unilateral effects in investigations and cases' in *George Mason Law Review* vol 5:3 1997, at p 388, who describes the use of such data by the DoJ in the analysis of three merger cases.

[122] Supra footnote 24.

[123] Supra footnote 24, para 60 reads:

> *"As individuals who are not tied for their beer purchases to another company (individual free-house operators) can obtain in the United Kingdom discounts for their beer purchases which are not available to the tied operators, the Commission has assessed (i) the net price differential for beer purchases from Bass between the price paid by individual free-house operators and Bass' tied lessees and (ii) the value of benefits which are granted by Bass to its lessees and which are not readily available to the individual free-house operators. The starting point for this assessment was the report of the Office of Fair Trading on their enquiry into brewers' wholesale pricing policy of May 1995 ('the OFT report'), which was supplemented by further investigations of the Commission."*

It would seem that although many of the cases in which quantitative methods are applied relate to consumer goods[124], there are also a number of such cases in which data from other sources than scanning companies was used. An interesting example is represented by the FTC's investigation into the cruise line industry.[125] After 10 months of intense scrutiny the FTC decided to oppose neither of two rival mergers in this industry (the friendly combination of Royal Caribbean Cruises with P&O Princess, challenged by the hostile bid for P&O Princess by Carnival). It did so despite the fact that the market was highly concentrated and consisted of only four major competitors prior to the merger. Quantitative analysis played an important role in this decision. The investigation focused on the risk of co-ordinated interaction among the firms remaining in the market after the merger. One of the scenario's that was looked at was whether the participants in the post-merger market would have an incentive to align prices. Various empirical tests were conducted to see whether systematic patterns could be discerned in pricing behaviour, and whether a set of inelastic consumers could be identified. The results did not support a theory of co-ordinated interaction on prices. These tests were made possible by large amounts of data made available by the parties, covering actual prices, related to the type of cabin sailed in, and the time and place at which the booking was made. An EC example can be seen in *Volvo/Scania*[126] in which the Commission had an econometric study made on the basis of data made available by these companies in order to attempt to measure directly what the effects of their merger would be on prices charged for heavy trucks in various national markets. And in a case related to electricity supply – clearly also a market not covered by scanning companies – *Sydkraft/Graninge*[127], sufficient data

[124] Apart from cases such as those mentioned above in footnote 98, there is a considerable number of cases both in the EC and the US in which some form of quantitative method was used in the analysis, but in which the source of the data is not specified. For a recent European case of this kind see *Philip Morris/Papastratos* (Commission decision of 2 October 2003 in case IV/M3191 - Philip Morris/Papastratos). US examples are *Swedish Match* (FTC v Swedish Match, 131 F Supp 2d 151 (DDC 2000), and *Kraft* (New York v Kraft General Foods, 926 F Supp 1545 (D Del 1995). Note that although it was not mentioned, it is clear from Hosken et al (2002), supra footnote 119, that in *Swedish Match* in fact scanner data was used by the FTC.

[125] See the Statement of the Federal Trade Commission concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc, FTC file no 021 0041, available at http://www.ftc.gov/os/2002/10/cruisestatement.htm. On the empirical analysis made, see also the slides of the FTC Presentation on this case: Cruise Investigation: empirical economic & financial analyses, available at http://www.ftc.gov/be/hilites/ftcbeababrownbag.pdf.

[126] Commission decision of 14 March 2000 in case IV/M1672 - Volvo/Scania, OJ 2001 L143/1/

[127] Commission decision of 30 October 2003 in case IV/M3268 - Sydkraft/Graninge.

was available to employ a model to simulate the effect on prices of changes in the structure of the Scandinavian electricity market caused by the merger of these two energy companies. Other cases include *Saint Gobain/Wacker-Chemie/NOM*[128], *Mannesman/Vallourec/Ilva*[129], *Gencor/Lonrho*[130], and (US) *Staples/Office Depot*[131]. Examination of such cases gives the impression that a lot of necessary data (also on costs)[132] may be extracted from the companies involved in the proceedings, from competitors, and from industry studies.[133] This may mean that part of the problem of availability of data is in the asking for it.

The form in which the data comes available can also complicate the analysis. Scanning companies typically aggregate data about individual transactions in a certain geographical area over a certain period of time. This implies that they would for example only provide information on the average price charged in all supermarkets for a certain type of Bass beer in the London Metropolitan area in week 36, rather than the price charged at an individual supermarket (chain). The way in which such aggregations are made often requires the analyst to make a number of assumptions which influence the outcome of the analysis.[134]

And lastly it should be taken into account that the data in *Bass* clearly showed a difference in the price which free house operators and tied house operators were charged. Such apparent price discrimination – which was for example also looked for by the FTC in Cruise investigation[135], and was actually found in *Staples/Office Depot* – makes the claim of an anti competitive behaviour intuitively acceptable to all. In other cases however – where prices are thought to have been raised across the bench – the shift will have to be established not by reference to a different group, but by reference to a change

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[128] Commission decision of 4 December 1996 in case IV/M774 – Saint Gobain/Wacker-Chemie/NOM, OJ 1997 L247/1.

[129] Commission decision of 31 January 1994 in case IV/M315 - Mannesmann/Vallourec/Ilva, OJ 1997 L102/15.

[130] Commission decision of 24 April 1996 in case IV/M619 - Gencor/Lonrho, OJ 1997 L11/30.

[131] FTC v Staples, Inc, 970 F Supp 1066 (DDC 2000).

[132] N.B. that although scanning companies do not collect data about costs, they do have information on shelf prices. See Hosken et al (2002), supra footnote 119.

[133] See in this sense also Bishop and Walker (2002), supra footnote 119, at §8.15.

[134] See Hosken et al (2002), supra footnote 119, and Scheffman and Coleman, supra footnote 119. These papers relate to merger analysis, but it may be expected that aggregation issues come into play in ex post assessment as well.

[135] Supra footnote 125.

visible over time. It could be argued that this should not be as problematic as in cartel analysis, because the starting date of the overt type of agreements at issue here is of course known. It is well possible however that companies exercising market power will be smart enough not to let this be reflected too clearly in their prices. They may alter those only gradually so that no clearly interpretable shift is visible in the data.(136)

[136] See J.E. Harrington Jr, 'Cartel pricing dynamics in the presence of an antitrust authority,' Johns Hopkins University, 2003 – forthcoming in the *RAND Journal of Economics*, available at http://www.jhu.edu/people/harrington/wp487_harrington.pdf.