Improving Accuracy in Effects-Based Analysis: An Incentive-Oriented Approach

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Introduction

- Central argument: The way the analysis under Art 81 EC is structured, gives parties incentives to enter into socially undesirable settlements

- Concerned with effects-based analysis, not per se
- Debate about over-inclusiveness of the analysis under Art 81(1) EC

- My paper:

  (a) If indeed over-inclusive, what is the effect on firm behaviour?

  (b) Impact assessment of raising the standard employed in Art 81(1) EC
- Sub (b) is left out here

A closer look at the argument

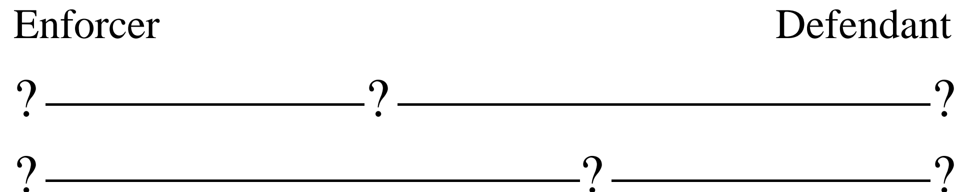
- Over-inclusiveness of Art 81(1) and the correction funtion of Art 81(3)
- My argument: Art 81(3) may not function well as a correction mechanism

- Other topic discussed in my paper: consequences on firm behaviour of having erroneous decisions
- Compliance, under-compliance, or over-compliance?

- Faulty correction mechanism: the way Art 81 is structured gives firms and the agency incentives to reach settlements that are unnecessarily cautious
- A legal and both privately and socially more efficient alternative exists
- Key elements of the analysis: discretion, commitments, indispensability

Effects of a low standard

- Alternative division of the burden of proof exists that requires more effort of the enforcer and less of the defendant



- The lower the burden for the enforcer the higher the defendant's costs (C)
- Lower burden also implies reduced probability of success (p) for the defendant

  - defendant has to carry his burden more often

  - discretion in balancing

Implications for settlement negotiations

- A low burden gives the Commission more leverage to make the defendant accept a less restrictive alternative agreement (LRAA) than a higher burden

- Assumption: The closer an agreement approaches the legal standard, the costlier it is to establish its actual effects

- Two choices: full litigation (OA), or settlement (LRAA)
- Commission's dominant strategy is LRAA
- Defendant's Options: OA LRAA

  Expected Value: (p? p – C) = (C – ? p)

  EC Burden: p?, ? p -, C? => OA ? whilst C?, ? p - => LRAA ?

- So incentives to choose LRAA are more often aligned with a low burden
- Implications: **More scope for Type II errors**

Summary Statistics

- Settlements:
  - Neven, et al (1998) report discussions in 70% of the cases, and modifications to OA in 60%, i.e. LRAA
  - 100% of 2005 and 2006 effects-based decisions were commitment decisions

- Indispensability:
  - OA is prohibited because LRAA exists
  - 19 infringement decisions between 1990 and 2005, indispensability relied on in 14, decisive in 6

Conclusion

- Assigning a low burden of proof can result in the implicit prohibition of harmless agreements, by giving parties incentives to opt for a less restrictive alternative
- There are indications that the tendency to search for less restrictive alternatives is strong in EU antitrust