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Economic Efficiency: The Sole Concern of Modern Antitrust Policy?

Non-efficiency Considerations
under Article 101 TFEU

Ben Van Rompuy



Wolters Kluwer

Law & Business

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Economic Efficiency: The Sole Concern of
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He has combined his academic work with education and consultancy activities in different disciplines and geographical locations. From 2006 to 2010, he worked as a Ph.D. candidate at the Institute for European Studies of the Vrije Universiteit Brussel. He held visiting positions at Georgetown University Law Center and New York University. He also served as a consultant in international antitrust for the US Federal Trade Commission and continues to act as a research fellow of the American Antitrust Institute.

He holds a doctoral degree in law and masters' degrees in international and European law and in communication studies. He is member of the advisory board of the International Sports Law Journal and editorial board member of the Asser International Sports Law book series.

List of Abbreviations

CCE	Chief Competition Economist
CET	Chief Economist Team
CFI	Court of First Instance
CJ	Court of Justice
DFB	Deutscher Fußballbund
DG	Directorate-General
DOJ	Department of Justice
DTCE	Draft Treaty Establishing a Constitution for Europe
EBU	European Broadcasting Union
EC	European Community
ECJ	European Court of Justice
ECN	European Competition Network
ECSL	European Coal and Steel Community
EEC	European Economic Community
EMU	European Monetary Union
EU	European Union
FAPL	Football Association Premier League Limited
FIA	Fédération Internationale de Sport Automobile
FIFA	International Federation of Football Associations
FOA	Formula One Administration

FTC	Federal Trade Commission
GC	General Court
GWB	Gesetz gegen Wettbewerbsbeschränkungen
ICN	International Competition Network
IOC	International Olympic Committee
NCA	National Competition Authority
NFL	National Football League
NRA	National Recovery Administration
OJ	Official Journal of the European Union
RPM	Resale Price Maintenance
SEA	Single European Act
SMEs	Small and Medium Enterprises
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
US	United States

Foreword

The necessary starting point for decisions about how to apply a competition law is the definition of its aims. Even in the most fully specified competition law, the key operative terms of the statute rarely are self-defining. The open texture of most statutes gives enforcement agencies and courts an important measure of discretion to determine how legal commands govern business behavior in individual cases. To choose among alternative interpretations requires the policymaker or jurist to return to the most fundamental of questions: what does the law seek to achieve?

At the time of their origin, most (perhaps all) competition laws are intended to realize multiple goals. One wonders how many of the 120 or so jurisdictions with competition laws today would have established an antitrust system if the national legislature had been asked to assume that the sole reason for the initiative was to improve economic efficiency, to the exclusion of all other possible objectives. Few, if any, would have done so.

Although multiple goals animate the formation of most competition systems, some jurisdictions – especially the oldest regimes – have adjusted their enforcement philosophy over time to narrow the range of enforcement purposes. Over the past decade, we have witnessed an apparent convergence of views among competition agency officials in the European Union and the United States about the appropriate goals of competition law enforcement. The speeches of leaders from the Competition Directorate of the European Commission, the Department of Justice, and the Federal Trade Commission often say their law enforcement programs seek to advance “consumer welfare” by means of “effects-based” analytical techniques grounded in industrial organization economics. The explicit or implicit premise of this approach is that the promotion of economic efficiency is competition policy’s paramount concern.

This development has important implications for the development of competition policy. Within the European Union and the United States, the adoption of a single-minded efficiency orientation shapes the selection of cases and the pursuit of specific remedial goals. The transatlantic progression toward an efficiency orientation – guided by what European officials call a “more economic approach” – also serves the stated aim of enforcement agencies to establish common enforcement norms, bolster policy coherence, and increase predictability for commercial behavior subject to examination

under the Treaty for the Functioning of the European Union and the US federal antitrust laws. Still more broadly, owing to the considerable influence that the EU and the US exert in the development of global competition policy norms, through bilateral agreements and participation in multinational bodies such as the International Competition Network and the Organisation for Economic Co-operation and Development, EU/US acceptance of an efficiency-based conception of competition law could move other jurisdictions to embrace goals frameworks that give greater emphasis to efficiency.

In this excellent, timely volume, Ben van Rompuy raises profound and vital questions about the shift to an efficiency orientation within the European Commission's Competition Directorate. For several reasons, his rigorous examination of the evolution of the EU competition regime and current law enforcement and policymaking surrounding the implementation of TFEU Article 101 will enlighten and inspire students of the EU system and competition policy experts in other jurisdictions, as well. First, he forces us to consider the basis on which an enforcement agency or a court properly can decide to walk away from objectives that the legislature has declared to be integral to the application of the law. What is the source of legitimacy for a shift from a legislatively mandated goals structure that encompasses non-efficiency ends? Van Rompuy highlights this query by demonstrating a striking gap between official EU pronouncements that endorse an efficiency orientation and actual practice in Article 101 cases, which reveals fidelity to a more pluralistic goals framework.

A second major contribution is to underscore the inherent ambiguity of EU policy statements in the past decade that profess to adopt an efficiency orientation. Seen in close detail, the language of the EU's pro-efficiency policy pronouncements does not preclude the consideration of non-efficiency goals. The key operative phrases that supply the basis for the apparent consensus, such as "consumer welfare" and "effects-based analysis," lend themselves to a variety of possible interpretations in practice. Van Rompuy underscores that the professed redirection of aims has not, and likely will not, wring goals pluralism out of EU enforcement policy and jurisprudence.

Finally, Van Rompuy's work is significant well beyond the boundaries of Europe. The choice of and emphasis upon goals is crucial to the implementation of all competition laws. He leads us to consider whether we might see a similar evolution of goals in other nations, and he gives the competition community in each country a useful way to think about the sensibility of a migration that deemphasizes some original legislative aims in favor of others. These basic issues assume all the more importance in the face of economic upheaval that has led many countries to reassess the aims of competition law and other forms of economic policy intervention. In doing so, Van Rompuy delivers valuable lessons about matters of pressing immediate concern and enduring importance. This is the certifying market of scholarship at its very best.

William E. Kovacic
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Ben Van Rompuy
The Hague, June 2012

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