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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 Modern Antitrust Policy?

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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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The present book is a revised and updated version of my Ph.D. dissertation, which I defended at the Faculty of Law and Criminology of the Vrije Universiteit Brussel (VUB) in October 2011. Many people have contributed to the completion of this work. Although I cannot thank everyone who provided invaluable support, there are a few names I would like to mention explicitly.

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Ben Van Rompuy
The Hague, June 2012

Table of Contents

About the Author	v
List of Abbreviations	vii
Foreword	ix
Acknowledgements	xi
General Introduction	1
PART I	
The Objectives of US and EU Antitrust Policy: A Historical and Comparative Perspective	11
I. The Concept of Antitrust Enforcement Norms	12
[A] Views about the Types of Enforcement output an Enforcement Agency Ought to Pursue	13
[B] The Means by Which an Enforcement Agency Attempts to Achieve the Set Objectives	15
II. The Factors That Shape Antitrust Enforcement Norms	16
[A] Political Factors	17
[B] Economic Learning	19
[C] Institutional Factors	20
[D] Antitrust Jurisprudence	21
[E] Typology of Factors That Shape Antitrust Enforcement Norms	22
CHAPTER 1	
Antitrust's Objectives: Theoretical Perspectives	25
§1.01 Introduction	25

§1.02	Enhancing Economic Efficiency and Promoting Economic Welfare	27
[A]	Introduction	27
[B]	Definition of Some Essential Concepts	27
[1]	Consumer Surplus, Producer Surplus, Total Surplus	27
[2]	Allocative Efficiency, Productive Efficiency, Dynamic Efficiency	28
[3]	Market Power	29
[C]	Static Efficiency and Market Power	30
[1]	Introduction	30
[2]	The Model of Perfect Competition	31
[a]	The Characteristics of Perfect Competition	31
[b]	The Efficiency and Welfare Implications of Perfect Competition	33
[3]	The Monopoly Model	34
[a]	The Characteristics of Monopoly	34
[b]	Efficiency and Welfare Implications of Monopoly	36
[4]	The Oligopoly Models	38
[5]	Conclusions	39
[D]	Dynamic Efficiency and Market Power	40
[E]	Whose Welfare Is to Be Served?	43
[1]	Introduction	43
[2]	The Total Welfare Standard	45
[3]	The Consumer Welfare Standard	48
[4]	Alternatives to the Two Welfare Standards	50
[F]	Conclusions	50
§1.03	Non-efficiency Objectives	52
[A]	Introduction	52
[B]	Market Integration	52
[C]	Fairness and Equity Objectives	54
[1]	The Protection of Individual Economic Freedom	55
[2]	Protection of SMEs	58
[D]	Conclusions	59
§1.04	Theoretical Arguments for Exclusive Adherence to the Objectives of Enhancing Economic Efficiency and Promoting Economic Welfare	60
[A]	Consistency and Objectivity	60
[B]	Legal Certainty	64
§1.05	Conclusions	66
CHAPTER 2		
	The Objectives of US Antitrust Policy	69
§2.01	Introduction	69
§2.02	The First Period (1890–1914): The Adoption of the Sherman Act and Its Early Interpretations	71
[A]	The Sherman Act (1890)	72

Table of Contents

	[1] The Statute: Origins and Content	72
	[2] Early Interpretations of the Sherman Act	74
	[B] The Clayton Act and the FTC Act (1914)	78
	[1] The Clayton Act	78
	[2] The FTC Act	78
§2.03	The Second Period (1915–Mid-1930s): A Period of Relative Repose	79
§2.04	The Third Period (Mid-1930s–Mid-1970s): The Trust-Busting Era	81
	[A] Background	81
	[B] Substantive focus / decisional practice	85
	[C] Conclusions	91
§2.05	The Fourth Period (Mid-1970s–Beginning 1990s): The Ascent of the Chicago School	92
	[A] Background	93
	[1] The Normative Orientations of Orthodox Chicago School	93
	[a] Firms Are Rational Profit-Maximizers	94
	[b] The Pursuit of Economic Efficiency as the Exclusive Purpose of Antitrust Law	95
	[i] Bork's Thesis: Legislative Intent	95
	[ii] Bork's Thesis: Administrability Arguments	98
	[c] Activity That Does Not Restrict Output Is Efficient	98
	[d] Limited Role for Antitrust	99
	[e] The Decision to Make Economic Efficiency the Exclusive Guide for Antitrust Policy is Non-Political	99
	[2] The Rise of the Chicago School's Model	100
	[B] Substantive Focus / Decisional Practice	102
	[1] From a Forms-Based to an Effects-Based Approach	102
	[2] Embrace of an Efficiency and Welfare Approach	104
	[3] Retrenchment of Public Antitrust Enforcement	107
	[C] Conclusions	107
§2.06	The Fifth Period (Beginning 1990s–Today) Compliance with an Efficiency and Welfare Norm	108
	[A] Background	109
	[B] Substantive Focus / Decisional Practice	111
	[1] Influence of Post-Chicago Economics	111
	[2] The Broad Acceptance of an Economic Efficiency and Welfare Norm	114
	[C] Conclusions	117
§2.07	Conclusions	118
CHAPTER 3		
	The Objectives of EU Antitrust Policy	121
§3.01	Introduction	121
§3.02	The objectives of the EU	124

	[A] The EEC and EC Treaty	124
	[B] The TFEU	125
§3.03	The EU Antitrust Rules: Legislative History and Early Interpretations	128
	[A] The Ordoliberalism of the Freiburg School	129
	[B] The Drafting of the EU Antitrust Rules in the Process of Negotiating the EEC Treaty	133
	[C] The Substantive EU Antitrust Provisions	135
	[D] Establishing the Principles (1958–1962)	138
§3.04	The First Period (1962–Mid-1970s): The Foundational Period	139
	[A] Background	140
	[B] Substantive Focus / Decisional Practice	142
	[1] Market Integration as the Core Objective Guiding Antitrust Policy	142
	[2] Marginal Role of Other Objectives	144
	[3] Strong Reliance on Legal Formalism and Empirical Presumptions	146
	[C] Conclusions	147
§3.05	The Second Period (Mid-1970s–Mid-1980s): Antitrust Policy and General Economic Policy as Gozinta Boxes	148
	[A] Background	148
	[B] Substantive Focus / Decisional Practice	151
	[1] Market Integration	154
	[2] The Promotion and Maintenance of Workable Competition	155
	[3] Fairness and Equity Objectives	157
	[4] Enforcement Remained Forms Based	158
	[C] Conclusions	159
§3.06	The Third Period (Mid-1980s–End of 1990s): A Period of Transition	160
	[A] Background	160
	[1] Constitutional Context: From Market Integration to Policy Integration	160
	[2] Institutional Context: The Role of the European Commission and the EU Courts	162
	[B] Substantive Focus / Decisional Practice	164
	[1] The “Public Turn” in EU Antitrust Policy	165
	[2] More Interest in the Generic Benefits of Competition	166
	[a] Revision of the Enforcement Norms to Assess Vertical Agreements and Horizontal Cooperation Agreements	167
	[b] Increased Enforcement Action against Cartels	171
	[3] Link with General Objectives of the EU and other EU Policies	172
	[C] Conclusions	179

Table of Contents

§3.07	The Fourth Period (End of 1990s–Today): The Modernization of EU Antitrust Policy: Discovering the Consumer	180
[A]	Background	180
[B]	Substantive Focus / Decisional Practice	183
[1]	Enhancing Economic Efficiency and Promoting Consumer Welfare: The Exclusive Objectives of Modern EU Antitrust Policy?	183
[2]	Consolidation of a More Economic and Effects-Based Approach	187
[3]	Unprecedented Enforcement Action against Cartels	190
[4]	Link with General Objectives of the EU: “Strategic” Competition Enforcement	191
[5]	Amalgam of Regulatory Policy and Competition Enforcement	194
[C]	The Modern Adjustment of the Objectives of EU Antitrust Policy: Policy versus Law	194
[1]	Continuing Relevance of the Market Integration Objective	195
[2]	Rejection of a Consumer Welfare Standard by the CJ	196
[D]	Conclusions	200
§3.08	Conclusions	200
	Conclusion to Part I	205
PART II		
	The Role of Non-efficiency Considerations in the Application of Article 101 TFEU: Case Study of the Audiovisual Sector	211
CHAPTER 4		
	The Justifiability of Incorporating Non-efficiency Considerations in Article 101 TFEU	217
§4.01	Introduction	217
§4.02	The Treaties Demand Non-efficiency Considerations to Be Taken into Account	219
[A]	Resolving Conflicts Created by the Treaties	220
[B]	Cross-Sectional Clauses	223
[C]	Institutional Framework	227
[D]	Conclusions	227
§4.03	Non-efficiency Considerations under Article 101(1) TFEU	229
[A]	Introduction	229
[B]	Undertakings	230
[C]	Agreements	232
[D]	Restriction of competition	232
[1]	Agreements That Have as Their Object the Restriction of Competition	233
[2]	Agreements That Do Not Have as Their Object the	