



Efficiencies in EU competition law

Unpacking the black box

Prof. Dr. Ben Van Rompuy
AAI Symposium - 18 June 2014



1

Role of efficiency considerations (1)

- EU merger control
- Verifiable + pass on (at least in part) to consumers + merger-specific
- Only relevant when anti-competitive effects are relatively limited (market-structural criteria)
- So far no successful efficiency “defense” in horizontal merger cases
- In principle no out-of-market efficiencies
- Short-term marginal cost savings > fixed cost savings
- Static > dynamic efficiencies



1

Role of efficiency considerations (2)

- Agreements (Article 101(3) TFEU)
- Verifiable + fair share for consumers + agreement-specific
- Out-of-market efficiencies?
 - Standard test: markets are related + groups of consumers are “substantially the same”
 - Star Alliance (2013): “commonality” of consumer groups across two sets of markets
- Cost efficiencies
- Qualitative efficiencies (quality, variety, innovation)



1 Role of efficiency considerations (3)

- Abuse of dominant position (Article 102 TFEU)
- CJ, C-209/10, *Post-Danmark* (2012)
- Test
 - Efficiency gains offset likely negative effects on competition and consumer welfare?
 - Efficiency gains have been (or are likely to be) brought about as a result of the potentially abusive conduct
 - The potentially abusive conduct is necessary for achievement of efficiency gains
 - No elimination of all or most sources of competition
- Limited importance in practice



- Hybrid test
- Importance of efficiency defenses limited by market-structural criteria
 - Countervailing power, probability of market entry, failing firms, ...
 - Relevance of rivalry
 - Relevance of market integration objective
- The “efficiency black box”





3

Non(?) -efficiency considerations (1)

- Example of agreements

Article 101(3) TFEU

- “improving the production or distribution of goods or to promoting technical or economic progress”
- Post 2004: restricted to objective economic efficiency benefits in EC guidelines

Quid objectivity and predictability?





3

Non(?)-efficiency considerations (2)

- Environmental benefits (eco-efficiency)
- Scenario: “Almost all EU washing machine producers and importers agree, with encouragement of a public body, to no longer manufacture and import washing machines that do not comply with certain environmental criteria (energy efficiency). Washing machines of the older generation will be phased out (i.e. significant proportion of the total sales) and replaced with more environmentally friendly, but more expensive products.”



3

Non(?)-efficiency considerations (3)

Input → **BLACK BOX** → Output

- The “old” approach
 - EC, *CECED decision* (2002)
 - 2001 *Horizontal agreements guidelines*: economic benefits at individual (price) or aggregate level (environmental benefit) must outweigh negative competitive effects (cost-benefit analysis)
- The “new” approach
 - 2010 *Horizontal agreements guidelines*: qualitative efficiencies (“more washing machine programs can be used”) + cost efficiencies for purchasers



3

Non(?)-efficiency considerations (4)



- Need for *ex ante* guidance that carefully circumscribes:
- (1) which efficiency / inefficiency benefits can be accepted; and
- (2) how they must be factored in



3

Non(?)-efficiency considerations (5)

Input → **BLACK BOX** → Output

- Dutch National Competition Authority: 2014 guidelines on sustainable development agreements
 - Broad welfare standard
 - > benefits in terms of price, quality or product variety
 - > short-term effects
- Test: net effect must at least be neutral from the point of view of directly affected consumers; flexibility for trade-off with future consumers
- + pointers for self-assessment based on past enforcement experience



Thank you for your attention

Prof. Dr. Ben Van Rompuy
T.M.C. Asser Institute, The Hague / VUB, Brussels
b.van.rompuy@asser.nl