



European Commission

# Competition

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# The effects based approach An overview

Svend Albæk



## Outline

- Progressive adoption of effects based approach: from Green Paper on vertical restraints (1997) to Guidance on Article 102 (2008)
- Main features of an effects based approach across all antitrust and merger control instruments
- Where are we now?



## A. Progressive adoption (I)

- Reform of vertical restraints policy
  - Green Paper (1997)
  - Communication on the “Follow up of the Green Paper” :  
*“...a more economics based approach is required. Such an approach should be based on the effects on the market ...”*
  - Adoption of BER and guidelines on vertical restrictions (1999).  
Main features:
    - Wide ranging block exemption
    - Safe harbour with market share thresholds (30%)
    - No presumption of illegality above threshold. Case by case analysis, to balance anti-competitive and pro-competitive effects of the agreement on consumers.
- Similar approach introduced with regards to:
  - Horizontal agreements (2000)
  - Transfer of technology (2004)



## Progressive adoption (II)

- Guidelines on the application of Art. 101(3) (2004)
  - Effects based framework for the general interpretation of Art 101(1)
  - Interpretation of Art 101(3) as an efficiency assessment
    - Balancing test: need to compare negative effects on prices and outputs deriving from the restrictive agreement from positive effects deriving from efficiencies
    - Other benefits than efficiency gains in the market concerned not to be considered
    - Results in limited discretion to decision-maker



## Progressive adoption (III)

- New Merger Regulation and horizontal merger guidelines (2004)
  - Dominance test replaced by SIEC
  - Effects based analysis
    - Unilateral effects covered by new test
    - Consumer welfare as main goal
  - Safe harbour based on market shares and concentration
  - Efficiencies to be taken into account
- Non-horizontal merger guidelines (2007)
  - Focus on anti-competitive foreclosure
  - Effects based analysis
    - Three steps test: ability/incentives/effects
  - Safe harbour based on market shares and concentration
  - Substantial scope for efficiencies recognized



## Progressive adoption (IV)

- Guidance on Article 102 (2008)
  - Enforcement priorities (v. interpretative notice)
  - Priority in dealing with conduct that is likely to harm consumers
  - Focus on anti-competitive foreclosure theories:
    - Ensure that dominant firms do not impair effective competition by foreclosing rivals in an anti-competitive way thereby having an adverse impact on consumer welfare
  - Effects based approach
    - Likely effects on consumers to be established
    - Efficiencies to be taken into account



## B. The effects based approach

- Focus on effects on consumer welfare across all antitrust and merger control instruments
- Implications:
  - Market power required. Safe harbours.
  - Theory of harm to explain how certain conduct/agreement leads to consumer harm
    - Likely effects, not necessarily actual effects
    - Medium/long term effects on quality, innovation also matter, not only short term effects on prices.
  - Need to balance negative effects with positive ones (efficiencies)
    - Similar conditions to accept efficiencies across all instruments



## The effects based approach (II)

- Same types of market behaviour to be assessed under equivalent standards across all instruments
  - Horizontal agreements/mergers
    - Negative and positive effects to be assessed similarly.
  - Vertical agreements/mergers and unilateral conduct by dominant companies
    - Focus on anticompetitive foreclosure
      - Exclusion of competitor does not matter if no likely negative effect on consumer harm
    - Scope for efficiency justifications





## C. Where are we now?

- Substantive reform in antitrust and mergers:
  - First cycle (97-08):
    - Introduction of the effects based approach
    - Most wide-ranging substantive reform in the history of EU competition law
  - Second cycle (09-...):
    - Revision of the effects based policy on:
      - Vertical restraints (revised rules in 2010)
      - Horizontal agreements (revised rules 2010)
      - Tech transfer rules (BER expires in 2014)