



Brugge

College of Europe
Collège d'Europe



Natolin

Economic Reasoning before the European Union Courts in Competition Law

Bernard van de Walle de Ghelcke



DEPARTMENT OF
EUROPEAN ECONOMIC STUDIES

Bruges European Economic Policy Briefings

44 / 2018

About the author

Bernard van de Walle de Ghelcke (born 1947) graduated at the Law Faculty of the Leuven University (KUL) and holds specialist degrees in European Law from the Leuven University and in Economic Law from the Université Libre de Bruxelles (ULB). He is a member of the Brussels bar since 1979 and was a partner at Linklaters LLP until 2010. He is currently Of Counsel in the Brussels Office of Linklaters. As a practitioner he specialises in EU Law, free movement, competition law and State aid. On that basis, he advises and assists clients on various aspects of EU and national competition law, including merger control. He regularly pleads cases before the Union courts. He has represented the Belgian State in numerous preliminary ruling and infringement proceedings regarding i.a. taxation, free movement of workers and freedom of capital movement.

He was a professor at the College of Europe (Bruges) from 1994 to 2017.

Bernard van de Walle is founding member and past president of the “*Global Competition Law Centre*” of the College of Europe and was a member of its Executive Committee until 2014. He is also past president and was until 2017 member of the editorial board of “*Tijdschrift voor Belgische Mededinging/Revue de Concurrence Belge*”.

Bernard van de Walle is the author of various publications of European Law and Competition Law and regularly speaks at conferences and seminars.

Address for Correspondence

bernard.van_de_walle@linklaters.com

Disclaimer

The views presented here are strictly those of the author and do not reflect the views of the institutions with which he is affiliated.

ECONOMIC REASONING BEFORE THE EUROPEAN UNION COURTS IN COMPETITION LAW

BEEP n°44

Bernard van de Walle de Ghelcke

Abstract

The European Union Courts have since the beginning of the enforcement of the Treaties exercised their jurisdiction in all the domains covered by the Treaties, including in competition law. The area of the competition rules is fact intensive and often requires economic analysis. The degree and intensity of economic assessment at the level of the Union Courts is inherently linked to the way the Courts exercise judicial review over the Commission's decisions, but also depends on the willingness of the Union judges to examine the facts of the case and to analyse economic concepts. The Union Courts have often been criticised for being too deferential to the Commission's factual findings and economic reasoning. Recent developments indicate a trend towards a closer scrutiny of the Commission's decisions, and a more "effects based" approach, whilst the Union judges make increasingly use of economic concepts. At the same time, economic analysis and economic theories have become more important, and even decisive, for the resolution of competition cases, in particular in the areas of merger control and abuse of dominance. As a result the Union courts are required, in conducting their judicial review, to assess sophisticated economic analysis and to integrate such concepts into legal norms and consistent case law.

This paper discusses the main developments of the Union Courts case law in the use of economic reasoning in competition law. It reviews how economics have gradually gained importance and relevance as well as methods adopted by the Union judges for the acceptance of economic concepts which are gradually transformed into legal norms.

Keywords: Competition Law, European Union Courts, Judicial review, Economic analysis

Introduction

All jurisdictions that have to deal with commercial or economic law are, in some way or other, faced with “economic facts” or reasoning, or with econometric tools that are necessary or useful for a proper understanding of the case, assessment of the arguments and ultimately a correct resolution of the dispute. The Courts of the European Union are no exception and have since the beginning of the enforcement of the European treaties exercised their jurisdiction, by the very nature of the predominantly “economic” subject matters of the treaty policies, in reviewing and assessing economic concepts. However the way the EU courts proceed in that respect must be understood in the light of the institutional framework of the treaties and of the functions entrusted to the Court of Justice of the European Union. The relevance of economics for the application of the rule of law and the intensity of review will depend on the subject matter and on the procedural circumstances. The importance of economics in the reasoning of the Union courts has developed and grown considerably over the more than fifty years of case law history.

Competition law is “economic law” par excellence. To state the obvious, the application of the legal provisions, whether at national or European level, governing the rules on competition, requires the regulatory authorities, the parties and ultimately the judges at the very least to have a proper understanding of the products and the markets concerned, of the competitive situation on these markets, and more broadly of the economic context surrounding the behaviour of the undertakings. Such understanding and assessment of economic principles, phenomena, and mechanisms form the necessary background not only for the enforcement of the competition rules in individual cases, but also for shaping the competition policies adopted and conducted by the competent authorities. At the same time, economic tools and models are necessary for a correct and objective analysis of the relevant facts.

The practice of competition law is very often, if not always, fact-intensive. “Economic facts” that are needed for an appropriate analysis in competition law are, on top of more circumstantial information and evidence, at some stage gathered and submitted according to econometric methods and models, which not only generate data but also attempt to distil from such numbers the information that is relevant for applying the competition rules. The extent to which economic concepts and methods are indeed used and applied (visibly or more implicitly) vary according to the evolution of the case law in history, the set of the legal rules to be applied (e.g., antitrust proceedings or merger control), the procedural situation or stages in the proceedings (from the administrative proceedings to appeal proceedings before the competent jurisdictions), the nature of the case (the analysis of contractual clauses, the finding of evidence of cartel behaviour, assessment of the existence of a dominant position, or the ex-ante control of a concentration), and eventually the nature and intensity of judicial review.

Competition law is largely if not essentially case law based. As in many other jurisdictions, the substantive European Union treaty provisions that contain the basic competition rules are very general and of a quasi-constitutional nature. The examples listed in Article 101 (1) sub (a) to (e) TFEU and in Article 102 (1) sub (a) to (d) TFEU provide a more concrete roadmap for finding behaviour that constitutes infringements of the competition rules. Where, on the basis of the facts of the case, as determined by the Commission, an agreement or conduct can be brought into one of these categories, the Union courts may have little hesitation to find a restriction of competition. In many cases, not much economics is considered as being necessary to make that assessment. The Courts have repeatedly stated that these lists are not exhaustive¹. The treaty texts have not changed since the signing of the EEC treaty in 1957, showing the adaptability of the fundamental norms to a completely different, and still rapidly changing, economic environment. And indeed, the modernisation reform of 2003 has drastically reduced the importance of the more prescriptive rules resulting from the now abandoned prior exemption system, which allowed for a more formal and mechanical “tick the box” approach. There is of course the special situation of the rules on the control of concentrations, based on secondary law that emerged much later. However, since the introduction of the “significant lessening of effective competition” test in 2004, the essential standards are stabilised.

Since the very beginning of the application of the competition rules of the then EEC, the Court of Justice, since its landmark judgment in *Technique Minière* of 19662, constantly reaffirmed that, in the finding of a restriction of competition, regard must be had to the whole economic context in which the competition would occur in the absence of the agreement concerned. This includes “the nature and quantity... of the products covered by the agreement” and “the position of the parties on the market for the products concerned”. This very basic law is more generally applicable, well beyond situations regarding disputes over the validity of agreements, and the ruling has indeed affirmed the requirement for the assessment of the relevant facts and use of economics in competition policy and enforcement.

As mentioned in the book by Faull and Nikpay back in 1999, “it is now normal to discuss competition cases in terms of market power, entry barriers, sunk costs, etc, and to evaluate cases according to their effects on the market”³. Since then, economic concepts are used (both in the Commission’s decision practice and in court) with ever increased sophistication including among others the notions of “average avoidable costs”, the “as efficient competitor test” and the conditions for finding a risk of coordinated effects in merger control.

¹ Case 6/72, *Europemballage Corp & Continental Can v Commission* [1973] ECR 215, para. 26 (“*Continental Can*”); Case C-95/04 P, *British Airways v Commission* [2007] ECR I-2331, para. 57 (“*British Airways*”); Case C-333/94 P, *Tetra Pak v Commission* [1996] ECR I-5951, para. 37 (“*Tetra Pak*”); Case C-549/10, *Tomra and Others v Commission* [2012] ECLI:EU:C:2012:221, para. 69 [“*Tomra (CJ)*”].

² Case 56/65 *Société Technique Minière v Maschinenbau Ulm*, [1966] ECR 235.

³ J. Faull and A. Nikpay, *The EU Law of Competition*, OUP 1999, p. 4.

It cannot be the purpose of this brief paper to discuss the economics of competition⁴. It suffices to mention that over time, and between the United States and Europe, economists and their various schools, have diverged sometimes fundamentally about the aims of competition law, how the competition rules should be enforced, when a given behaviour should be regarded as unlawful, which interests should be protected and how markets (should) work.

These discussions and the successive positions which were advocated at the more political level, even the different views and accents as to the aims and purposes of the Union competition policy as they may have been expressed by the European Commission itself, have not markedly influenced the case law of the Union Courts. The Courts have firmly maintained the reference to the goal of preserving undistorted competition in the internal market, and have tried to decide cases as much as possible by reference to and in consistency with previous case law, albeit allowing for evolution, additional criteria and distinctive features. The Courts proceed in that way because they apply the rule of law, which entails providing legal certainty and predictability. The consequence of such judicial technique is that economic concepts, once accepted, over time lose their identity and become absorbed as legal notions in their own right.

Law is not economics, although law that ignores economics cannot be good law.

In this contribution we illustrate to what extent, how and to what effect the Union courts have accepted economic theories and applied economic models and reasonings⁵. Such review does not as such discuss the much-debated issue whether the Union courts should adopt a (more) effects-based approach (in particular in the field of Article 102 TFEU), rather than applying a form-based or presumptive system⁶. While a “pure” effects-based approach will require more and in-depth economic analysis specific to the case (and a special effort to state reasons at the level of the General Court), even a more form-based approach must be based on a correct assessment of the economic facts, including the functioning of the market concerned, allowing one to identify at least a likely or plausible distortion or restriction of

⁴ E. Deutscher and S. Makris, “Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus”, *The Competition Law Review*, Vol. 11, Issue 2 (2016) pp. 181-214.

⁵ This topic was extensively and even exhaustively discussed by A.-L. Sibony, *Le juge et le raisonnement économique en droit de la concurrence*, L.G.D.G. Paris 2008. See also: D. Neven, “Competition economics and antitrust in Europe”, pp. 1-34, available at:

http://ec.europa.eu/dgs/competition/economist/economic_policy.pdf; M. Merola and J. Derenne (ed), *The Role of the Court of Justice of the European Union in Competition*, GCLC Annual Conference Series, Vol 2, Proceedings of the Sixth Annual Conference (2010), Brussels 2011; P. Hubková, “Economic Reasoning in the Court of Justice of the EU”, Thesis, European University Institute, Florence, 2014.

⁶ See i.a. W.J. Wils, “The judgment of the EU General Court in Intel and the so-called ‘more economic approach’ to abuse of dominance”, *World Competition*, Vol. 37, Issue 4 (2014); pp. 405-434; P. Rey and J.S. Venit, “An Effects-based Approach to Article 102: A Response to Wouter Wils”, *World Competition*, Vol 38, Issue 1 (2015), pp. 3-30.; see also more generally: J. Bourgeois and D. Waelbroeck (ed), “Ten years of effects-based approach in EU competition law”, GCLC Annual Conference Series, Vol. 3, Proceedings of the Seventh Annual Conference (2011), Brussels, 2012.

competition. No theory of harm can be upheld on the basis of a mere formal and abstract characterisation of a type of conduct.

This short study deliberately focuses on the case law of the Court of Justice (including some leading preliminary ruling cases) because ultimately it is at that level that the prevailing rule of law is formulated. This has the inherent limitation in that the Court of Justice, on appeal, cannot review the facts⁷. However, the acceptance or rejection of an economic theory or method in the finding of a restriction or distortion of competition is within the scope of the Court's jurisdiction. Nevertheless, a number of important cases decided by the General Court are taken into account as well.

The highest intensity of the use of economics, both in terms of volume of data and economic analysis inevitably occurs in the area of merger control, at the stage of the administrative proceedings and in the Commission's decisions. In that domain, it is undisputed that "economists are kings". However, relatively few concentration cases are brought before the Union courts. Yet those that are decided are often of paramount importance for the competition enforcement regarding merger control. Next in importance for economic assessment, is, by far, the interpretation and enforcement of Article 102 TFEU, a domain of law where the case law of the Union courts plays a decisive role. The application of Article 101 TFEU, in contrast, shows much less or quasi no economic reasoning. Economics can be relevant in assessing the "effects" of an agreement or conduct. Because cartels are infringements "by object" these cases therefore do not necessitate any in-depth analysis⁸. Economic reasoning may be required where efficiencies must be demonstrated (and quantified) in the context of an assessment under Article 101 §3 TFEU. However, the case law on such issues, at least at the level of the EU courts is inexistent.

Finally, economic analysis plays a role in State aid law. Prominent areas of economic reasoning in the domain of State aid include i.a. (i) the determination of the compensation for the performance of services of general interest (ii) the assessment of the private market operator principle (iii) the notion of operators in a comparable situation for the definition of the conditions of advantage and selectivity. However, a discussion of that case law would exceed the limits of this paper⁹.

⁷ In preliminary ruling proceedings the Court of Justice is dependent on the extent and the quality of the economic analysis conducted before the national judge.

⁸ Much economic analysis will be needed in damage claim disputes. These are litigated before the national courts. However, issues involving economic reasoning emerge in case of preliminary references to the Court of Justice.

⁹ See generally J. Derenne, M. Merola, *Economic analysis of State aid rules – contributions and limits* – Proceedings of the Third annual conference of the Global Competition Law Center (GCLC), September 2006, College of Europe, Lexxion, Berlin 2007.

I. The standard of judicial review

As a rule, the Union courts, which conduct a legality review and only have unlimited jurisdiction regarding the imposition of fines¹⁰, afford the Commission a broad discretion on questions entailing a “complex economic assessment”¹¹. The court must, regarding the control of concentrations, “confine itself to the position adopted by the Commission (...) it must examine the way in which the law has been applied to the facts and adjudicate on the merits of the Commission’s findings concerning the effects of the concentration on competition¹²”. It therefore limits its review “to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there have been any manifest errors of appraisal or a misuse of powers”¹³.

Examples of elements requiring complex economic or technical assessments include among others:

- Cost calculation methods in order to determine whether pricing is above average variable costs, total fixed costs or incremental costs.
- Methods and tests, including cost and profit margin calculations in order to discern an “as efficient competitor” and its capability to enter the market or remain on it.
- The choice of a method of calculation as to the rate of recovery of costs and the application of such method.
- The definition of a product or service relevant market on the basis of supply- and demand-side elasticity analysis.
- The determination of the importance of a contestable market.
- The determination of a margin squeeze on the basis of charges and costs of a vertically integrated undertaking
- Methods to determine the likelihood of supra-competitive pricing in case of concentration or market power.
- The technical features of information technology or telecommunication products...

¹⁰ L.M. Baudenbacher “Aspects of competition law enforcement in selected European jurisdictions”, *European Competition Law Review* 2016, p.343; D. Geradin and N. Petit, “Droit de la concurrence et recours en annulation à l’ère post-moderne”; GCLC working paper 06/05.

¹¹ Case C-7/95 P, *Deere v Commission* [1998] ECR I-3111, para. 34; Case T-340/03, *France Télécom v Commission* [2007] ECR II-107, paras. 129 and 163 (“*France Télécom* (GC)”).

¹² Case T-342/99, *Airtours v Commission* [2002] ECR II-2585, para. 53 (“*Airtours*”).

¹³ *France Télécom* (GC), para. 129; Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601, para. 87 [“*Microsoft*”].

Yet, the general principle of Union law according to which the Union courts cannot substitute their own assessment of matters of fact for the Commission has never prevented the Courts, when reviewing whether there has been a manifest error of appraisal, from conducting inquiries as to the soundness of the Commission's decisions¹⁴. The Union courts do so by verifying whether the Commission has considered all the circumstances of the case and all the relevant facts¹⁵, and also whether it has adduced adequate legal proof of the facts and evaluations which formed the basis of the finding of an infringement¹⁶. The issue rather shifts to the question of the intensity of such review and at what point the courts will defer to the assessments of the Commission.

In *Tetra Laval* (2005)¹⁷, which concerned the control of concentrations, the Court of Justice, while recognising that the Commission has a margin of discretion in economic matters, clarified that this “does not mean that the Community courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community courts, inter alia establish whether the evidence relied upon is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (...).¹⁸”

This standard of review was adopted in subsequent cases, not least by the General Court in its *Microsoft* judgment (2007) in the application of Article 102 TFEU 19. Interestingly, the General Court added more explicitly that even though the assessment of complex economic assessments is subject only to a limited review, “this does not prevent the Community judicature from examining the Commission's assessment of economic data²⁰”.

The formula was taken over, in the cartel sector, in the *KME* and *Chalkor* judgments of the Court of Justice (2011)²¹.

Again, such guiding principle of judicial review says nothing as to how, in a particular case, the Court will conduct its examination: whether it will want to stay away from reviewing economic tests and methods (which may be uncertain or controversial), checking the robustness of data and the soundness of the conclusions derived from them, engaging in the

¹⁴ *Microsoft*, para. 86.

¹⁵ *Tomra* (CJ), para. 18; *British Airways*, para. 67; Case C-23/14, *Post Danmark II*, [2015] ECLI:EU:C:2015:651, para. 68 (“*Post Danmark II*”).

¹⁶ Case 27/76, *United Brands v Commission* [1978] ECR 207, para. 267 (“*United Brands*”).

¹⁷ Case C-12/03 P, *Commission v Tetra Laval* [2005] ECR I-987 (“*Tetra Laval*”).

¹⁸ *Tetra Laval*, para. 39.

¹⁹ *Microsoft*, para. 89.

²⁰ *Microsoft*, para. 482.

²¹ Case C-389/10 P, *KME Germany and Others v Commission* [2011] ECR I-13125, para. 121; Case C-272/09 P, *KME Germany and Others v Commission* [2011] ECR I-12789, para. 94; Case C-386/10 P, *Chalkor v Commission* [2011] ECR I-13085, para. 54. See also the Opinion of Advocate General M. Wathelet of 21 February 2018 in case C-123/16P *Orange Polska S.A. v. Commission* at para 103.

understanding of matters requiring deep technical knowledge, or on the contrary will want to allocate capacity to conduct an in-depth and thorough review and discussion of the economic arguments submitted. In any event, the Court's abovementioned formula sets the framework of review that parties are entitled to expect.

Much concrete economic analysis can be avoided and dispensed with in view of the fact that the Court's constant case law regarding certain practices is that, for the purposes of establishing an infringement, it is sufficient to show that such practices "tend to restrict competition" or that a certain conduct "is capable to have that effect"²². Thus, the Court's control of legality does not go beyond assessing whether the Commission has plausibly demonstrated the likelihood of such effects. Actual effects on the market need not to be proven²³.

Without entering here into the heated debate as to whether the Court's analysis should be (more concretely) "effect-based" – and what such approach entails – , it should be noted that for example in *France Télécom* the General Court observed that showing an anticompetitive object and an anticompetitive effect "may in some cases be one and the same thing". This is because "if it is shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition that conduct will also be liable to have such an effect"²⁴.

Another consideration to bear in mind is that, as already mentioned above, gradually and over time, economics are imported and translated into law²⁵. The legal categories so created – when is there predation? when are rebates capable of being exclusionary? when is tying or bundling likely or bound to foreclose? – will themselves entail certain conditions and a checklist of factors that allow one to identify and assess the conduct under the competition law rules. The reference then becomes the settled or constant case law²⁶, rather than the underlying (accepted) economic theory or method. In that next step, the Court's review will focus on the question whether what has become a given rule of competition law, was correctly applied to the facts in a particular case (which again may require complex economic assessment), and whether the legal conditions to find the existence of a restriction or distortion of competition are satisfied or should be distinguished. Some will characterise this

²² *British Airways*, para. 293; Case T-155/06, *Tomra Systems and Others v Commission* [2010] ECR II-4361, paras. 287-89 ["*Tomra* (GC)"]; Case C-413/14P, *Intel v Commission* [2017] EU:C:2017:632, para. 142 ("*Intel*"); *Post Danmark II*, para. 66; Case C-52/09, *TeliaSonera Sverige* [2011] ECR I-527, para. 64 ("*TeliaSonera*").

²³ On the contrary the Court sometimes finds comfort on evidence that competitors were not foreclosed, Case C-209/10, *Post Danmark A/S v Konkurrenceradet* [2012] ECLI:EU:C:2012:172, para. 39 ("*Post Danmark I*").

²⁴ In the next paragraphs the Court invokes practices (selling below AVC) that are deemed to be abusive. In the reasoning of the Court such practices are so necessarily harmful that they cannot but have the object of restricting competition.

²⁵ A.-L. Sibony, "Limits of imports from Economics into Competition Law", in I. Lianos and D. Sokol (eds.), *The Global Limits of Competition Law*, Stanford 2012.

²⁶ See e.g. Case T-203/01, *Michelin II* [2003] ECR II-4071, paras. 56-60, 100 and 243 ("*Michelin II*").

judicial technique as a return to formalism, which can be criticised if it introduces a review by presumptions, sacrificing economic reality to a certain vision of the desired structure of competition on the market, and also where it contains new rigidity. It must be noted that, when such transposition into a rule of law has occurred, the economics are no longer points of fact (which the Court of Justice is barred from examining on appeal) but points of law which can be confirmed, qualified or distinguished in later case law.

II. The acceptance of economics

A. Economic instruments (data and surveys) and economists' expert opinions.

The EU courts have due regard to and take into account, just as all relevant factual evidence, data, surveys and economic studies submitted (whether part of the administrative file or adduced – if admissible – at the judiciary stage), needed or useful for the economic analysis. The lack of robust data or uncertainty may lead to annulment²⁷. The Courts used to be elliptic as to the nature of the evidence that they had reviewed, using vague references such as “studies in the Court’s file²⁸”, to “the facts as established in the parties’ statements²⁹” or referring to unspecified “economic theory³⁰”.

However, the more recent case law is much more specific and discusses by name the studies and surveys undertaken by the parties, which can be of technical or econometric nature. In *France Télécom*, the General Court relied on a study examining the high-speed and low-speed technologies and how they are used³¹. In *Hilti*, it discussed technical characteristics and market descriptions by engineers³². In *AKZO*, data on costs structure were closely analysed, comparing the Commission’s estimates with reports produced by AKZO³³. The General Court’s judgment in *Microsoft* systematically refers to various consultants’ surveys and data³⁴ and even finds flaws in some reports. In *Airtours*, the General Court had special regard to the expertise of an economist mentioned by name³⁵, which is more exceptional. However, as already studied in detail³⁶, beyond the (partisan) experts’ evidence already in the administrative file or submitted at the judiciary stage, the EU courts hardly rely on expert witnesses and never or only very exceptionally resort to a court-appointed (neutral) expert.

²⁷ *Continental Can*, para. 31; *United Brands*, paras. 264-265.

²⁸ *United Brands*, para. 28.

²⁹ Case 322/81, *Michelin I* [1983] ECR 346, para. 149 (“*Michelin I*”).

³⁰ *United Brands*, para. 253.

³¹ *France Télécom (GC)*, para. 82.

³² Case T-30/89, *Hilti v Commission* [1991] ECR II-1439, paras. 48, 51, 72-77 (“*Hilti*”).

³³ Case C-62/86, *AKZO Chemie BV v Commission* [1991] ECR I-3359, para. 83 (“*AKZO*”).

³⁴ *Microsoft*, paras. 365 et seq. and 565-643.

³⁵ *Airtours*, paras. 212 and 226.

³⁶ E. Barbier de la Serre and A.-L. Sibony, “Expert evidence before the EC courts”, *Common Market Law Review*, Vol. 45 no. 4, pp. 941-985 (2008).

The flip side regarding the use of economic data or studies is that the observance of the rights of defence requires that the undertaking concerned be given the opportunity to “make known its views on the truth and relevance of the facts and documents used by the Commission to support its claims”. In the UPS37 case, the Commission’s decision to prohibit the merger between UPS and TNT was annulled because the Commission had failed to communicate to the parties an econometric model on which it relied in its decision, In Intel, the Court of Justice ruled that the arguments of the applicant to call into question the validity of the Commission’s finding concerning the foreclosure capacity of rebates must be examined and it annulled the judgment of the General Court that had failed to take into account Intel’s arguments concerning alleged errors of the Commission in applying the “as efficient competitor test”³⁸.

B. Economic theories

The acceptance of economic theories and their translation into legal concepts and benchmarks cannot be seen in isolation from the objectives and aims of the competition policy and rules. There is an intimate relationship between the economic rules that (at a certain moment in time) will favour a certain form of the functioning of the markets, in view of desired outcomes such as economic growth, wealth creation, consumer welfare, appropriate allocation of resources and fair re-distribution of income (none of which is politically neutral), and the political vision or economic constitutions that govern economic policies within jurisdictions as well as in the international relationships. There is a constant interaction between these two sets of principles and they fluctuate over time. Economic schools can influence public opinion and politics while politics may inspire or manipulate economic thinking.

Courts have the mission to apply the rule of law. This, in European Union law, means ensuring that the aims and objectives of the treaties (including as interpreted by the Courts’ case law) are respected and that the attainment of these objectives occurs in compliance not only with the treaty rules but with all applicable legal principles. At the same time, the rule of law must provide predictability and legal certainty. Therefore, it is not the Union Courts’ task to assess the merits or soundness of certain economic theories nor to exercise judgment on political choices that are made from time to time by the competent authorities or regulators (except to the extent that the Courts are exercising their duty of control of the validity of decisions and acts).

Nevertheless, in the performance of these tasks, the Courts, having the duty to take into account all the circumstances of a case, will systematically use and refer to certain basic economic assumptions elevated to forms of legal principles or paradigms about which there is a large consensus. Although constant refinement is possible, as well as the gradual addition

³⁷ Case T-194/13, *United Parcel Service v Commission* [2017] ECLI:EU:T:2017:144.

³⁸ *Intel*, paras. 139-147.

of novel norms, there are some established pre-supposed beliefs that are not fundamentally put in doubt. These points of reference all originate in economic reasoning, but have lost that nature to become generally accepted legal rules. Economic theory is then absorbed into legal doctrine, which allows the courts to refer (as much as possible and appropriate) to their own sets of precedents or “settled case law”. Some of the most frequently applied economic assumptions are discussed below.

(i) Competition (and competitors) that should be protected

The Continental Can judgment of 1973 contains a developed theory on relationship between the objectives of the treaty and on the spirit, scheme and wording of Article [86 EEC Treaty]. The Court of Justice had to rule in special circumstances, as it had to decide whether Article 86 was applicable to the acquisition of an undertaking by an undertaking in a dominant position. However, this landmark judgment goes well beyond that specific issue. The Court based itself on the then Article 3 (f) EEC Treaty, according to which the Community’s activity shall include the institution of a system that ensures that competition in the common market “is not distorted”. A fortiori, competition must not be eliminated. In addition, the Court emphasised that according to the then Article 2 EEC Treaty, the task of the Community is to promote “a harmonious development of economic activities”, and it considered that the “weakening of competition” would conflict with the aims of the common market. Hence, Articles [85] and [86] seek to achieve the same aim i.e. “the maintenance of effective competition within the common market”. This quasi-constitutional ruling does not of course decide what type of competition should be protected, what degree of competition must be maintained, which restraints can be admitted when a distortion occurs, nor as from what moment competition is weakened to an unacceptable level. This is left to policy and case law, as they develop over time and according to changing circumstances.

It is unnecessary to repeat here the intense debates, including between economic schools, that discuss these various factors. And indeed, differing accents and visions can influence the case law.

The EU courts have never radically opted, at least not explicitly, for one or other model of competition. The case law is well settled on the principles that the competition rules concern the “structure of the market”³⁹ and that “genuine undistorted competition” should not be impaired. Whether such distortion exists is decided according to the (type of) conduct and (type of) practice concerned, taking into account “all the circumstances of the case”.

Recent decisions include a rather remarkable statement in *TeliaSonera*, implicitly referring to the Continental Can judgment, according to which the function of the competition rules is “to prevent competition from being distorted to the detriment of the public interest, individual

³⁹ Case 85/76, *Hoffmann-La Roche & Co v Commission* [1979] ECR 461, para. 91 (“*Hoffmann-La Roche*”); *AKZO*, para. 69; *Michelin II*, paras. 70 and 97; *British Airways*, para. 106; *France Télécom* (GC), para. 103.

undertakings and consumers, thereby ensuring the well-being of the European Union”⁴⁰. Here, the Court puts the emphasis on the interests to be protected, rather than referring to the structure of the market. The judgment goes on by clarifying that Article 102 TFEU refers not only to practices which may cause damage to consumers directly but also to those which are detrimental to them through their impact on competition⁴¹.

The “as efficient competitor test” provided the occasion to qualify the notion of a competitor worth protecting. In *Post Danmark I*⁴², and more famously in *Intel*⁴³ the Court of Justice ruled that Article 102 TFEU does not seek to ensure that competitors who are less efficient than the undertaking with the dominant position should remain on the market.

(ii) Competition on the merits

There is a well-accepted belief that competition should be “on the merits” and that the use of “methods different from those governing normal competition” hurt the maintenance or development of the level of competition.⁴⁴

This paradigm raises a number of issues and questions at least as to its consequences at the stage of applying the law. First, it requires a term of comparison : what is “normal competition” at a given moment, in a given sector or in a certain market? What is understood by “the merits” as opposed to “other methods”? How to assess whether a certain pattern of an undertaking’s commercial relationships with its suppliers or customers (e.g., exclusivities, privileged terms, rebates, bundling, duration of contracts) is a method that “differs” from a “normal” method of operating? There is the recurrent ambiguity that an undertaking is held dominant (also) because it is able to impose such conditions or clauses on its customers or suppliers, whereas the correct analysis should be whether such methods are abusive. In this respect, the criterion that such “differing” methods are used only by undertakings in a dominant position (and are evidence that the undertaking can behave independently from its customers and suppliers) seems to be flawed: in many situations, such methods are used by other undertakings as well, but they are considered to be harmful and abusive (exclusionary or exploitative), only when applied by a dominant operator that has “special duties” not to (further) impede competition⁴⁵. Thus, the most striking feature is that the use of such methods is assumed to produce, or is capable of having the effect of, lessening or impeding competition, which, in view of the presence of a dominant operator, is already weakened⁴⁶.

⁴⁰ *TeliaSonera*, para. 22.

⁴¹ *TeliaSonera*, para. 22.

⁴² *Post Danmark I*, para. 21.

⁴³ *Intel*, para. 133.

⁴⁴ *Michelin I*, para. 70; *Tomra (CJ)*, para. 17.

⁴⁵ *Hoffmann-La Roche*, para. 91; *AKZO*, para. 69; *Michelin II*, para. 97.

⁴⁶ *Hoffmann-La Roche*, para. 90; *Post Danmark II*, para. 29.

Depending on the behaviour or practice at stake, the formulation may be more precise. Regarding rebates, a much-used qualification is that it procures an advantage “that is not based on an economic transaction” or more appropriately, “not based on a service” (i.e., conditions that are not linked to an advantage accruing to the undertaking concerned, such as economies of scale owing to volume, cost savings from the reduction of transport costs or logistics services performed by the customer). Hence, the conclusion is that such rebates are therefore designed in order to tie customers, to reduce the buyers’ freedom of choice and to foreclose competitors from the market. Quantity discounts are in principle regarded as “economically justified” if they reward an economy of scale because of orders made for large quantities⁴⁷. However, in the same *Michelin II* judgment the Court required that a quantity discount granted by an undertaking in a dominant position must be based on a countervailing advantage which may be economically justified⁴⁸. In that respect, just invoking economies of scale is insufficient: the actual cost savings must be demonstrated, and “economic reasons” must explain specifically not only the rebate scheme, but “specifically the discount rate chosen for the various steps in the rebate system in question”⁴⁹.

Similarly, the Court repeatedly judges that “competition on price is not always legitimate” where it leads to the elimination of competitors and the strengthening of a dominant position⁵⁰. A bundling policy is decided not to be a “legitimate mode of competition” when it emanates from an undertaking in a dominant position, inasmuch as it is liable to deter other undertakings from entering the market⁵¹, or put differently, bundling allows (a dominant undertaking) not to compete on the merits⁵².

The above shows that “methods of competition” are in principle not assessed by themselves, but only when, if and because they are applied by an undertaking in a dominant position. This is best expressed in *France Télécom* of 2007: “... in specific circumstances, undertakings in dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings”⁵³. In *Michelin II*⁵⁴, the General Court stated that “an undertaking in a dominant position cannot have recourse to means other than those within the scope of competition on the merits”. *Mutatis mutandis* the same can apply under Article 101 TFEU about commercial terms that are not obtained by the individual merits and

⁴⁷ *Michelin II*, para. 98.

⁴⁸ *Michelin II*, paras. 98-100.

⁴⁹ *Michelin II*, para. 108.

⁵⁰ *AKZO*, para. 70; Case C-280/08 P, *Deutsche Telekom v Commission* [2010] ECR I-9555, para. 177 (“*Deutsche Telekom*”); *Post Danmark II*, para. 25; *Michelin II*, para. 57; Case C-202/07 P, *France Télécom v Commission* [2009] ECR I-2369, para. 106 (“*France Télécom (CJ)*”).

⁵¹ *Hilti*, para. 100.

⁵² *Microsoft*, para. 1038.

⁵³ *France Télécom (GC)*, para. 186.

⁵⁴ *Michelin II*, para. 97; *Tomra (CJ)*, para. 17.

autonomous action of undertakings in individual negotiations, but are the result of, or influenced by, restrictive agreements, collusion or parallel conduct in oligopolistic markets.

The notion that competition must be “on the merits” thus means that a dominant undertaking is in principle free to compete (meaning: gaining market shares, strengthening its innovative edge, increasing its profitability and financial power, and even excluding competitors) where its competitive advantages result from the quality of its products or services, obtained through innovation, manufacturing excellence, from efficiency in marketing and in the provision of services, and through smart adaptation to market and customer needs. Indeed, the Court of Justice repeated in *Intel* that “competition on the merits may by definition lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to customers from the point of view of ... price, choice, quality or innovation”.⁵⁵ Because this statement is made about exclusionary practices, it suggests that the Court accepts that a method that is by definition “not on the merits” (because it is not based on a countervailing advantage) may nevertheless not be detrimental to competition where the dominant undertaking excludes a competitor that is not “as efficient” and would leave the market anyway because of the “merits” of the dominant undertaking.

Every advantage that is not linked to and the result of such intrinsic merits is deemed to be obtained by means outside “normal competition”. This leaves open the next step issues, namely, to what extent the anticompetitive consequences can be presumed or must be demonstrated by an effects-based analysis, whether the presumption can be rebutted by evidence of the absence of any effect on the competition, and/or whether the behaviour can be justified.

More intriguing is the cryptic formula used in *TeliaSonera*⁵⁶ and repeated ever since⁵⁷, according to which a dominant position is not in itself a ground for criticism, provided that the undertaking has acquired such position “on its own merits”. This seems to be at odds with the above interpretation suggesting that it is on the basis of its special responsibility that an undertaking in a dominant position has a duty to compete on the merits and to refrain from using methods different from those which condition “normal operators”⁵⁸. This is the case where a dominant undertaking thereby strengthens its existing dominant position or leverages such position to reap additional advantages. In contrast, the way whereby a dominant position is acquired (organic growth, acquisitions, technological supremacy, incumbent monopoly position after liberalisation etc) is neutral, provided that the conduct of the undertaking (which may not yet be dominant but can have market power) was not in itself illegal under the competition rules. Presumably, it is the latter concern that the Court

⁵⁵ *Intel*, para. 134.

⁵⁶ *TeliaSonera*, para. 24.

⁵⁷ *Post Danmark II*; *Intel*, para. 133.

⁵⁸ *Hoffmann-La Roche*, para. 91.

intended to address when introducing such qualification. However, in case of past infringements they should be investigated in their own right. There are no “good” or “bad” dominant positions as such. The concern that the Court would be introducing an additional test may be caused by the Microsoft judgment, where the General Court found that Microsoft impaired the effective competition structure on the work group server market “by acquiring a significant market share”⁵⁹. Perhaps the judgment merely alluded to the well-known consideration that competition is already weakened due to the presence of the dominant undertaking. However, if given a wider or standalone application (acquiring a significant market share impairs competition and is an abuse), such rule would dangerously blur the well-established distinction between dominance and abuse.

(iii) Market entry, freedom of choice, and availability of various sources of supply

The Court’s vision of what “genuine”, “undistorted” and “effective” competition means is best reflected in its rulings highlighting the need to preserve market entry and the freedom of choice for suppliers, buyers or consumers.

When analysing practices, one needs to investigate whether they tend to remove or restrict the buyers’ freedom to choose their sources of supply, or to bar competitors from access to the market⁶⁰. It is also emphasised that Article 102 TFEU prohibits practices which make market entry very difficult or impossible for equally efficient competitors. This similarly applies to practices that make it more difficult or impossible for co-contractors to choose between various sources of supply or commercial partners⁶¹. This is sometimes expressed in terms of “equal opportunity” or by requiring that equally efficient competitors be placed “on the same footing”⁶². Practices of dominant undertakings may not interfere with the freedom of choice of operators. Discrimination is an infringement when it tends to distort the competitive relationships by hindering the competitive position of some of the business partners of the dominant undertaking in relation to others⁶³. In other words, operators cannot be (unduly) restricted (by tying clauses, fidelity rebates, exclusivities or bundling) from exercising their freedom to choose their business partners and to seize the best business opportunities. More precisely, rebates are objectionable if they are calculated to prevent dealers from being able to select freely at any time, in light of the market situation, the most favourable of the offers made by competitors and to change suppliers. Conversely, limiting the dealers’ or purchasers’ choice of supply makes access to the market more difficult for competitors⁶⁴. Or, expressed differently at the downstream level, loyalty rebates are

⁵⁹ *Microsoft*, para. 664.

⁶⁰ *TeliaSonera*, para. 28.

⁶¹ *Deutsche Telekom*, para. 175.

⁶² *Deutsche Telekom*, para. 233; *Microsoft*, para. 230.

⁶³ *British Airways*, paras. 143-145.

⁶⁴ *Michelin I*, para. 85; *Tomra (GC)*, para. 298.

prohibited because they tend to prevent customers from obtaining all or most of their requirements from competing manufacturers⁶⁵.

Conduct that prevents the appearance of a new product on the market falls under Article [102 b) TFEU]⁶⁶. The remaining competition must be “effective”. That condition is not fulfilled when competitors maintain a marginal presence in certain niches⁶⁷. Similarly, it is to no avail to justify foreclosure because a “contestable part of the market” (whatever the threshold of significance) is still sufficient to accommodate a sufficient number of competitors. In *Tomra*, the Court decided that that customers on the foreclosed part of the market should have the opportunity to benefit from “whatever degree of competition” is possible and that competitors should be able to compete “on the merits” for the “entire market” and not only part of it⁶⁸.

All these examples of reasoning and finding of the law illustrate that economic and commercial freedom (under various aspects), which must allow an appropriate allocation of resources and is needed to attain what is viewed as the optimal structure and functioning of the markets in the interest of all stakeholders, is at the basis of the notion of competition that must be maintained by the treaty’s competition law rules.

C. Methodologies

The judgments of the EU courts often and increasingly reflect the use and the discussion of methodologies applied in order to substantiate economic assessments, or at the very least they acknowledge them. Examples include:

- The use of econometric methods such as the SSNIP test to measure demand-side substitutability for the purposes of market definition⁶⁹.
- The method of discounted cash flow to calculate the discounted net value of telecommunication service subscribers⁷⁰.
- The various methods than can be used in order to determine whether prices are below average variable costs or rather below average total costs but above average variable costs (i.e. accounting basis; actual recovery of adjusted costs; the recovery of the adjusted costs foreseeable ex ante etc)⁷¹;

⁶⁵ *Post Danmark II*, para. 27.

⁶⁶ *Microsoft*, para. 230.

⁶⁷ *Microsoft*, para. 643.

⁶⁸ *Tomra* (CJ).

⁶⁹ *France Télécom* (GC), paras. 86 et seq.

⁷⁰ *France Télécom* (GC), para. 125.

⁷¹ *France Télécom* (GC), paras. 131-133.

- The method to determine the rates of recovery of cost (as opposed to the mere calculation of such costs)⁷²;
- The use of the test of the own costs (and strategy) of the dominant undertaking to assess whether the pricing practices of such undertaking are likely to eliminate an (equally efficient) competitor⁷³;
- The notion of “incremental costs” and the costs to be included to estimate the average incremental costs” and the method of attribution of the common variable costs⁷⁴.
- The various methods that can be used in order to determine whether a price is excessive and the conditions for such methods to be valid⁷⁵;
- The various conditions that are required (or tests to be conducted) in order to assess whether a refusal to deal is an abuse of dominant position⁷⁶

It is revealing that once such methodology is adopted as being appropriate to find and qualify a conduct as an infringement of the competition rules, these instruments or tests become part of the “settled case law” and are therefore replicated as benchmarks in later cases.

III. Selected case law

A. Market definition

In *Continental Can*, the Court of Justice stressed that the definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products⁷⁷. The Court drew attention to demand-side substitutability, i.e., the degree to which consumers view other products as interchangeable (being able to satisfy the same need the consumer has) with the product at issue. It also highlighted the significance of supply-side substitutability, i.e., the ease with which other firms can enter the market for the product at issue and therefore increase competition and reduce dominance.

⁷² *France Télécom (GC)*, para. 162; *France Télécom (CJ)*, para. 78.

⁷³ *Deutsche Telekom*, paras. 196-202. At para. 201, the Court of Justice clarifies that such approach is justified because “such a test can establish whether the appellant would itself have been able to offer its retail services to end-users otherwise than at a loss had it been first obliged to pay its own wholesale prices for local loop access services ...”.

⁷⁴ *Post Danmark II*, paras. 31-33.

⁷⁵ Case C-177/16, *Biedrība Autortiesību un komunikēšanās konsultāciju aģentūra - Latvijas Autoru apvienība v Konkurences padome*, EU:C:2017:689, paras. 36-40 (“AKKA-LAA”).

⁷⁶ *Microsoft*.

⁷⁷ M. Sousa Ferro, “Judicial review: Do European Courts Care about Market Definition?”, *Journal of Competition Law and Practice*, 2015, Vol. 6, No 6, pp. 400-410.

Such review led to the annulment of the Commission's decision because it had not defined the relevant market. In particular, the Commission had not distinguished the markets at issue – as light containers for canned meat products, light containers for canned seafood, and metal closures for the food packaging industry – both from each other and from the general market for light metal containers (e.g., for fruit and vegetables, condensed milk, olive oil, fruit juice).

In *United Brands*, the Court used demand-side substitutability to discern the relevant market and focused in particular on the unique features of the product in question. The inelastic demand of the consumers who would eat bananas – the old, the young and the sick (the famous “toothless fallacy”) – coupled with bananas' specific product characteristics, exemplifies that the Court's economic analysis did not just focus on price, but instead assessed the qualitative characteristics and purposes of the product in question.

The analysis was further refined in *Hoffmann-La Roche*, where the Court utilised not only the concept of demand-side substitutability but also the degree of substitutability to discern the relevant market, by finding that if a product could be used for different purposes and if these different uses are in accordance with economic needs, which are themselves also different, there are good grounds for accepting that this product may belong to separate markets. It also clarified that the concept of the relevant market in fact implies that there can be effective competition between the products which form part of it, and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned.

The concept of demand-side substitutability was further developed in *Michelin*⁷⁸, incorporating market structure in its analysis. The Court focused its analysis on the underlying reasons for which the two groups of consumers (tyres for vans and cars) demand different kinds of tyres by reference to the types of activities those consumers engage in.

Here, the Court elaborates upon supply-side substitutability first highlighted in *Continental Can*. The Court specifies the transaction costs involved in switching production from one product to another and concludes that these costs are prohibitive in the case of switching from light-vehicle to heavy-vehicle tyre production.

In *France Télécom* the General Court, in determining demand-substitutability of the different internet access speeds, relied on the hypothetical SSNIP test – as defined in the Commission's 1997 Notice on the definition of the relevant market⁷⁹ – and concluded that the great majority of customers would not switch to low-speed access in response to a 5-10% increase in price of high-speed access, thus holding that these markets were separate. The acceptance of the SSNIP test represents a shift towards a more qualitative analysis of demand-substitutability. However, the product's characteristics still informs the General Court's

⁷⁸ Case 322/81, *Michelin I*.

⁷⁹ OJ 1997 C372/5.

analysis. For example, the fact that the great majority of customers would switch to high-speed internet access from low-speed internet access (but not vice versa) highlighted the clear superiority of high-speed internet access from consumers' perspectives. Indeed, the General Court was mindful of the kinds of activities that could be undertaken with high-speed access but not low-speed access. Thus, the General Court's analysis is similar to the reasoning in *Michelin I* in the sense that it adopted a functional analysis of the product's purposes and potential uses, not just its inherent features.

Market definition, although a general requirement, plays a much lesser role in cartel cases. It is only relevant in cases where such analysis is necessary for the assessment of the conduct⁸⁰.

B. Tying/Bundling

In *Hilti*, the General Court upheld the Commission's decision, which had found that Hilti had abused its dominant position by mandating the purchase of nails from it when consumers also purchased nail cartridges. on the basis of a foreclosure theory of harm. It took the view that the practice aimed at eliminating small undertakings which were doing nothing more than exercising their rights, namely the right to produce and sell nails intended for use in Hilti nail guns. However, the Court's use of economic analysis was very limited.

Similarly, in *Tetra Pak*, regarding the abuse of a dominant position consisting in tying machinery for packaging cartons with the cartons themselves, little economic analysis was conducted. The Court of Justice relied on the nature of the practice and rather formally approved the General Court's reasoning that even where tied sales are in accordance with commercial usage or there is a natural link between the two products in question, they may still constitute an Article 102 TFEU infringement, unless they can be objectively justified.

Bundling was at the core of the *Microsoft* case. The analysis of the General Court in this case was thorough and developed and, as mentioned above, economic evidence was intensely discussed. In terms of analytical framework, the Court assessed the following factors in order to determine the existence of an infringement⁸¹: (i) The original product and the tied product must be two separate products; (ii) Dominance must be found in the market for the tying product; (iii) Consumers must be unable to choose to obtain the tying product without the tied product; (iv) There must be a finding of foreclosure of competition.

This assessment necessitated the Court to review in depth, and in the concrete circumstances of the case, issues such as:

- The various factors based among others on the nature and the technical feature of the products concerned whether there is separate consumer demand. In this respect,

⁸⁰ A.-L. Sibony, *Le juge et le raisonnement économique*,... pp. 333-354.

⁸¹ *Microsoft*, paras. 842 et seq.

technology products will almost always result in an independent demand because of the distinction between hardware and software.

- To what extent the existence of transaction costs when switching products, taking consumers time and expense to switch from one media player to another, may make illusory the possibility to install competitors' media players.
- In order to find foreclosure, to examine the actual effects which the bundling had already had on the streaming media player market and also the way in which that market was likely to evolve. In that context, the Court alluded to (indirect) network effects, and it discussed the notion, the characteristics and the functioning of two-sided markets (or "platforms").

C. Rebates

The assessment of rebates and discount schemes is, undoubtedly, together with predatory pricing the most productive and also the most controversial area of competition law analysis⁸².

The current state of the Court's doctrine is summarised in the 2017 Intel judgment of the Court of Justice⁸³ at para 137:

" In that regard, the Court has already held that an undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 102 TFEU, whether the obligation is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer's obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position." (see judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, 85/76, EU:C:1979:36, paragraph 89)".

In *Hoffmann-La Roche*, the Court decided, going beyond formal tying obligations, that, where a dominant undertaking applies, either under the terms of agreement concluded with these

⁸² Among the abundant literature see i.a. N. Petit, "Intel, Leveraging rebates and the goals of Article 102 TFEU", *European Competition Journal*, 2015, Vol. 11, No 1, pp. 26-68.

⁸³ Case C-413/14P, *Intel*.

purchasers or unilaterally, a system of fidelity (or loyalty) rebate, that is to say discounts conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position, such practice amounts to an abuse of dominance. As discussed above, such conduct is deemed incompatible with the objective of undistorted competition within the [internal] market, because – unless there are exceptional circumstances which may make an agreement between undertakings permissible – they are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market. The Court ruled on that basis that fidelity rebates are by their nature illegal. It refrained from an economic analysis of the probability of foreclosure and whether, indeed, there existed a genuine prospect of “as efficient” firms being able to enter the market.

In *Michelin I*, the Court examined a progressive rebate scheme that, although different from loyalty rebates of the type assessed in *Hoffmann-La Roche*, was found to be capable of having the same effects. The Court admitted that pure quantity discounts (linked solely to volume) are unobjectionable if they yield countervailing advantages “based on an economic service”. However, it characterised the scheme as a loyalty rebate, which by offering customers financial advantages tends to prevent them from obtaining their supplies from competing manufacturers. In order to find the abuse, it analysed the likely effects of such rebates on the behaviour of dealers, in view of the pressure exercised on them, and the correlative difficulty for competitors to match those conditions and to access the market. Although the *Michelin I* case illustrates that the Court was willing to undertake a demand-side effects-based analysis to discern the type of discount at issue, it largely analyses the phenomenon on a form-based approach, although informed by an understanding of the reactions of economic operators, and essentially driven by the theory that rebates that are not based on an economic service are by definition abusive.

In *Michelin II*, the Court refined its doctrine, in this case about a loyalty-inducing incremental rebate system. Although the Commission had not analysed the economic effects of the criticised practices, the General Court upheld the finding that the mere intent of the dominant firm implies anti-competitive behaviour. It also stressed the need for an economic justification of the rebate scheme, in other words, the need for proof that the rebate is based on an economically justified countervailing advantage. In that respect, it raised the standard of proof by considering that invoking economies of scale is too general and insufficient to provide economic reasons to explain specifically the discount rates chosen for the various steps in the rebate system in question⁸⁴.

Not only are economic justifications difficult to provide, but later case law also confirmed that actual effects of the rebates do not need to be demonstrated. Thus, in *British Airways* the

⁸⁴ A. Ezrachi, *EU Competition Law An Analytical Guide to the Leading Cases*, Bloomsbury 2016, 5th ed., p. 250.

Court of Justice rejected the argument that the General Court did not examine the probable effects of the bonus schemes at issue, because it is sufficient to explain the mechanism of the schemes, which on the facts had a fidelity-building effect⁸⁵. Little or no supply-side analysis was conducted.

Similarly, in the *Tomra* case, involving exclusivity agreements, quantity commitments and loyalty-inducing discounts, the EU courts upheld the Commission's finding of abuse, sticking to the formalistic notion of foreclosure and holding that effects need not be proven in rebate cases. According to now well-established language, "it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or that the conduct is capable of having that effect"⁸⁶. In view of the possible efficiencies of the bottle return system, a concrete analysis of the actual repercussions on workable competition would have been welcome.

A small step towards some more economic analysis as taken in *Post Danmark II* (a preliminary ruling case), which was about retroactive rebates in the market for direct mail advertising, in a case litigated against the Danish Competition Council. The Court of Justice was requested to clarify the analytic criteria for assessing the legality of rebates. It held, on the basis of settled case law, that the effects of an abusive practice need not be demonstrated nor be concrete for an abuse to be found. However, it also held that the "as-efficient-competitor test" can play a complementary role in rebate cases⁸⁷.

The case was particular, since *Post Danmark* enjoyed a statutory monopoly, and the emergence of an "as efficient" competitor would be impossible. However, without establishing the AEC test as a benchmark, it suggests that this test is a useful tool "among others" to assess the abusive nature of a rebate.

The *Intel* case provided the Court with an opportunity to reinforce – to some extent – the requirement of economic analysis of the market circumstances before concluding too mechanically that an abuse existed in rebate cases.

Referring to *Post Danmark I* (which was about price predation), the Court reaffirmed that "not every exclusionary practice is necessarily detrimental to competition" and that Article 102 TFEU does not seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market⁸⁸. Therefore, since the existence of an abuse may depend on the resolution of the AEC test, this test is at least implicitly elevated to a necessary analytical standard. The Court was keen not to deviate from its settled case law as built up since *Hoffmann-La Roche*. However, that case law was "further clarified": "in the

⁸⁵ *British Airways*, para. 98.

⁸⁶ *Tomra*, para. 68.

⁸⁷ *Post Danmark II*, paras. 51 et seq.

⁸⁸ *Intel*, para. 134.

case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.” (...) “the Commission is not only required to analyse, first, the extent of the undertaking’s dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.” It also calls for an assessment of whether a system of rebates may be objectively justified. More precisely: “It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer”, adding that such “balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission’s decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking”⁸⁹.

The immediate consequences of the judgment may be limited in that particular case, because the Commission had indeed conducted the AEC analysis, and it was the General Court that was blamed for not having taken Intel’s arguments for the AEC test carried out by the Commission into account.

Nevertheless, the more general considerations that precede the application of the legal principles to the specific case strongly suggest that abuse cases will henceforth have to be decided, and judged, with much more economic and concrete analysis, such as a price–cost analysis aiming to demonstrate if a competitor would be able to enter the market while the dominant undertaking was applying the alleged exclusionary conduct. However, the insistence on the need to analyse the “intrinsic capacity to foreclose” and on the requirement to conduct a “balancing test” demonstrates that the ruling applies well beyond the case of the AEC test⁹⁰.

D. Predatory Pricing

In this important area of regulatory intervention, the EU courts rather soon developed the economic assessment test or standard used to determine whether certain pricing practices are “predatory” and are therefore abuses of dominant position⁹¹.

⁸⁹ *Intel*, paras 138-142.

⁹⁰ See the Opinion of Advocate General M. Wathelet of 21 February 2018 in case C-123/16P *Orange Polska S.A. v. Commission*, at paras 98-101.

⁹¹ D. Petzold, “It Is All Predatory Pricing: Margin Squeeze Abuse and the Concept of Opportunity Costs in EU Competition Law”, *Journal of European Competition Law and Practice*, 2015, Vol. 6, No 5, pp. 346-350.

Since AKZO in 1991, it is established that pricing by an undertaking in a dominant position below the average variable costs of the product (i.e., those which vary depending on the quantity produced) are abusive⁹². That is because, in the view of the Court, a dominant undertaking has no interest in applying such prices except in order to eliminate competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (i.e., those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced. Thus, such pricing inherently means that a dominant undertaking seeks to eliminate a competitor, and such behaviour is abusive.

The next question, which will be fiercely discussed in the subsequent case law, is whether the prospect of loss recoupment, is a condition to find abusive predation.

At the same time, the Court affirmed the rule that prices below average total costs – fixed costs plus variable costs, but above average variable costs – must be regarded as abusive (only) if they are part of a plan to eliminate an (as efficient) competitor. One of the few cases where, after AKZO, such plan was examined and found to have existed, is *France Télécom*⁹³. In such circumstances the Court exercises a traditional control of the interpretation and significance of documentary evidence.

The *Tetra Pak* case clarified (on appeal) that, where prices are below AVC, no recoupment analysis need be performed, because below-AVC predatory pricing cases must always be held to be abusive.

This was confirmed in the *France Télécom* judgments of 2007 and 2009. First, while the General Court admitted that price alignment by a dominant undertaking with those of its competitors is not in itself abusive or objectionable, it might become so where it is aimed not only at protecting its interests but also at strengthening and abusing its dominant position (which will be assumed in the case when recovery of costs is not possible).

The Court of Justice clarified that proof of the possibility of recoupment of losses suffered by an undertaking in a dominant position and of prices lower than a certain level of costs does not constitute a necessary precondition to establishing that such a pricing policy is abusive. Again, such proof can be dispensed with in circumstances where the eliminatory intent of the undertaking at issue can be presumed in view of that undertaking's application of prices lower than average variable costs.

The *Post Danmark I* preliminary ruling case faced the Court of Justice with a situation where the undertaking, dominant in the market for distributing unaddressed mail, but which also held a legal monopoly in the distribution of addressed mail, offered preferential prices to the

⁹² *AKZO*, para. 71.

⁹³ *France Télécom (GC)*, paras. 195 et seq.

clients of its nearest competitor in the market for unaddressed mail. Such prices did not allow for the recovery of average total costs but did cover average incremental costs⁹⁴. Indeed, the cost-comparison carried out by the Danish competition authorities was based not on the well-known concept of “variable costs” but on another concept termed as “incremental costs”. This concept was accepted as the correct tool to conduct a price comparison in circumstances where there are considerable costs related both to the activities within the ambit of the universal service obligation and to the postal operator’s activity of distributing unaddressed mail. It was recognised that “common” costs are due, in particular, to the fact that, at the material time, the undertaking was using the same infrastructure and the same staff both for the activity of distributing unaddressed mail and for its monopoly of distributing addressed mail. The consequence was that to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for an equally efficient competitor to compete with those prices without suffering losses that are unsustainable in the long term. There was factual evidence to that effect in the case at hand. Consequently, such policy may not be regarded as exclusionary, and no abuse can be found.

It is worth noting that at paragraphs 63-66 of the Commission’s 2009 Guidance on enforcement priorities in applying [Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings⁹⁵, the Commission takes average avoidable cost (AAC) as a starting point for assessing whether the dominant undertaking is incurring avoidable losses. Pricing below AAC would be usually viewed by the Commission as an indication of a predatory strategy. The Court does not explicitly quote the Commission’s Guidelines, but the application of the AAC test implies that the Guidelines (published the year before the judgment) influenced the way in which the Court carried out the assessment of the pricing scheme. The Court and the Commission are on the same page when it comes to the assessment of the “long run average incremental cost (LRAIC)”. In *Post Danmark I*, the incremental costs were said to be those costs destined to disappear in the short or medium term (three to five years) but it was not specified whether these costs were short- or long-run incremental costs.⁹⁶ This case is a good example of interaction between the Commission’s policy statements and the Court’s case law: the Commission’s notices largely “codify” the past case law and systematise the concepts (announcing how they will be applied by the Commission), while in turn the Court will use such notices (which of course are in no way binding on it⁹⁷) as a source of analytical concepts (to which economists have contributed) and for inspiration towards further refinement of the law.

⁹⁴ *Post Danmark I*, para. 9.

⁹⁵ OJ 2009 C 45/7.

⁹⁶ E. Rouseva and M. Marquis, “Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU”, *Journal of European Competition Law and Practice*, 2012 pp. 1-19.

⁹⁷ *Post Danmark II*, para. 52.

E. Margin squeeze

“Margin squeeze” conduct occurs where an undertaking which is dominant in one market (typically the telecommunications market of broadband access to local fixed networks) charges its competitors for unbundled access at wholesale level more than it does its own subscribers at retail level. But according to what reasoning will the abuse be established? Does the abusive nature of a margin squeeze arise only from the abusive nature of the dominant undertaking’s retail prices for end-user access services, or does such abuse occur when the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its (at least as efficient) competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services to the end-user.

In *Deutsche Telekom*, the Court of Justice agreed that the anticompetitive effect which the Commission is required to demonstrate, as regards pricing practices of a dominant undertaking resulting in a margin squeeze of its equally efficient competitors, relates to the possible barriers which the dominant undertaking’s pricing practices could have created for the growth of products on the retail market in end-user access services and, therefore, on the degree of competition in that market. In order to assess abusive conduct, the Commission had used the method of the “unfairness” of the spread between wholesale prices and retail prices. The Court, once more, based its assessment on the exclusionary effects of the practice on competitors who are at least as efficient as the dominant undertaking itself by squeezing their margins. It ruled that such practice is “capable of” making market entry more difficult or impossible for those competitors, and thus of strengthening its dominant position on that market to the detriment of consumers’ interests.

In *TeliaSonera* (a preliminary ruling case)⁹⁸, the Court held that in order for a price squeeze to be abusive, it must have the ability to exclude competitors who are at least as efficient. Actual exclusion is not necessary. An important question to be asked is whether the wholesale product is indispensable for the sale of retail product. If this is the case, a dominant position in the first market clearly has an effect in the latter. This judgment, just as the previous case law, treats the margin squeeze not as a refusal to supply (which cannot in itself establish an abuse of dominance⁹⁹) but as a standalone abuse.

The Court added that if such a margin remains positive, it must then be demonstrated that the application of that pricing practice was, by reason for example of reduced profitability, likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned. It also recalled that an undertaking remains at

⁹⁸ Case C-52/09, *TeliaSonera*.

⁹⁹ See the *Pacific Bell Telephone Co v linkLine Communications, Inc.* 29 S Ct 1109 (2009) case.

liberty to demonstrate that its pricing practice, albeit producing an exclusionary effect, is “economically justified”. However, the burden of proof lies on the dominant undertaking establishing efficiency gains that counterbalance the negative effect, and, more precisely, if the exclusionary effect of that practice bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that practice must be regarded as abusive.

F. Excessive Pricing

Although explicitly mentioned under Article 102 (1) sub (a) TFEU, “exploitative abuses” remain somewhat the “parent pauvre” of the Court’s case law. This is notwithstanding the prominent role of the concern of supra-competitive pricing in competition law at large, either “ex post” as the object or effect of restrictive agreements or conduct under Article 101 (1) TFEU, or “ex ante” as a benchmark to assess the compatibility of concentrations.

In the General Motors case of 1975¹⁰⁰, the Court reviewed the Commission’s finding of an abuse of dominant position for charging excessive prices for producing certain documentation which was required by drivers of GM cars in Belgium.

The Court acknowledged that excessive prices “in relation to the economic value of the service” can have the effect of “curbing parallel imports” or “by leading to unfair trade” (an unsubstantiated concept). However, it sided with the applicant for merely circumstantial reasons: the Court held that even though the pricing was excessive, there was no abuse by GMC because it accepted GMC’s defence that the inspections concerned during this period represented an unusual activity, and that very soon GM brought its rates into line with the “real economic cost” of the operation. In view of the simplicity of the facts, the assessment of the charges in comparison to costs and the economic value of the service presented no difficulty.

The United Brands case of 1978¹⁰¹ concerned the accusation that United Brands not only had charges that were discriminatory but also excessive prices for its branded bananas. The Court established that charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be an abuse. It specified that an excess could be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin. In the absence of an analysis of UBC’s costs structure, it had to be determined whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either “unfair in itself” or when compared with competing products. To this purpose, the Court acknowledged that

¹⁰⁰ Case 26/75, *General Motors v Commission* [1975] ECR 1367 (“*General Motors*”).

¹⁰¹ Case 27/76, *United Brands*.

“economic theorists” have come up with several ways “for determining whether the price of a product is unfair”.

The Commission had based its view that prices are excessive on an analysis of the difference between the prices charged in the various Member States. However, the largest percentage of difference was flawed on the facts. The Court found that a difference of about 7% cannot automatically be regarded as excessive and consequently unfair. While the Court accepted that the Commission’s comparison between prices charged by UBC in various Member States¹⁰² can in principle provide the basis for a finding of excessive pricing¹⁰³, the Commission had failed to conduct a proper comparison of prices while taking all circumstances into account.

In *British Leyland* (1986)¹⁰⁴, the Court of Justice considered, in a situation presenting some analogy with the *General Motors* case, the pricing behaviour of an undertaking enjoying a legal monopoly, for the provision of an ancillary service. The Court related the price charged by the dominant company to some indicator of the “economic value” of the service in question. Again, the Court satisfied itself with a simple factual analysis, based on the explanations of the parties and common sense rather than on economic reasoning. It found that the issuance of a conformity certificate was a very simple administrative process and that, on the basis of the costs incurred, it cannot therefore justify the charging of different fees for the issue of certificates of conformity according to whether the vehicles are right-hand drive or left-hand drive. However, the decisive factor was that BL’s conduct could only be construed as a manifestation of a deliberate intention to create barriers to re-importations, which come into competition with its approved distributors.

In order to find an abuse, the difference between the cost incurred and the price charged must be excessive and the price imposed must be either unfair in itself or unfair when compared with competing products. In *AKKA/LAA* (a preliminary ruling case)¹⁰⁵, the Court of Justice recognised that there are other methods by which it can be determined whether a price is excessive. It held that a comparison of prices applied in the Member State concerned

¹⁰² However, the geographic approach can entail a flaw; it implicitly assumes that the price in the low-price country is a benchmark for the competitive price in the country where the alleged abuse took place (R. O’Donoghue and J. Padilla, *The Law and Economics of Article 102 TFEU*, Hart 2013, p. 754). In Case 30/87 *Bodson v Pompes funèbres des régions libérées* [1988] ECR 2507, which concerned funeral services in areas of France where there were monopoly concessions granted by local authorities, the Court relied on a comparison with prices in areas where there were no such concessions.

¹⁰³ In Case 395/87 *Ministère Public v Jean-Louis Tournier* [1989] ECR 2521, the Court of Justice indicated that when a dominant undertaking charges higher fees for its services in one Member State than in others, then “where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States.” (para 38). Similarly in Joined Cases 110/88, 241/88 and 242/88, *Lucazeau and Others*, EU:C:1989:326, para. 25.

¹⁰⁴ Case 226/84, *British Leyland v Commission* [1986] ECR 3263.

¹⁰⁵ Case C-177/16, *AKKA-LAA*.

with those applied in other Member States must be considered valid when an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States, and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. The Court added in more detail that in order to characterise a price as “unfair”, this price can be compared to those applicable in neighbouring Member States as well as other Member States, as long as the purchasing power parity (PPP) index is adjusted and provided that the reference Member States have been selected in accordance with objective, appropriate and verifiable criteria. However, the Court acknowledged that there is “no single adequate method”¹⁰⁶.

¹⁰⁶ AKKA-LAA, para. 49.

Conclusion

This brief survey allows to conclude that, despite the limitations that are inherent to the system of the control of legality, the European Union Courts duly review economic facts and evidence, and increasingly so over many decades of case law history. The Union jurisdictions are largely familiar with economic concepts and methods of reasoning usually applied in competition law cases. They also have shaped many economic concepts into legal standards, which have penetrated competition law and have become part of the settled case law which must be taken into account in later cases. In exercising their jurisdiction the Union Courts apply the rule of law and they are inspired by the objectives of the treaties. This approach aims at bringing stability and at ensuring some degree of legal certainty, to the extent the Union Courts do not seem to be directly influenced by the sometimes controversial thinking of economic schools as they may vary over time and according to the world regions concerned. Neither are the Union Courts inclined to take into account fluctuating political views about the purposes of competition. In that respect the case law is based on the broad consensus on the basic values of competition in the internal market, and it will ignore controversy at the margin. This careful approach can be seen by some as new rigidity. However the case law is constantly evolving, bringing refinements and further distinctions, depending on the underlying economic phenomena and market changes. The current trend shows increased requirements on the Commission to fully discharge its duties of investigation and careful decision making. The usual tools of the control on manifest errors, on the reasoning and on compliance with the rights of defence allow the Union Courts to scrutinise closely the correct assessment of economic facts and data, the soundness of the economic reasoning and the correct application of economic concepts as accepted in the Union courts' case law.

These principles and ways of working of the EU Courts must be borne in mind when economists analyse EU Courts' judgments or when indeed they assist in arguing cases before these jurisdictions. First, sound and robust econometric studies as well as economic surveys are welcomed in order to establish in an objective way the factual parameters of a case. Such tools are mainly, if not only, used at the stage of the Commission proceedings, but they will, if disputed, be scrutinised by the EU Courts. Second, whilst economic reasoning, concepts and theories can always innovate, refine and adapt to the circumstances of a case or to market evolutions, account must be taken of those economic concepts that have been accepted in the case law and are henceforth referred to as legal norms, or at least are used as benchmarks in the legal reasoning. In that case, rapid changes are unlikely, and distinguishing exercises will be required in order to convince the Union judges.

June 11, 2018