

THE FUTURE OF THE COURT OF JUSTICE IN EU COMPETITION LAW

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NEW ROLE AND RESPONSIBILITIES

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Introduction

Most of the literature on the role of the Court of Justice (“the Court” or the “CJEU”) in European Union (“EU”) competition law reflects on the past.¹ With few exceptions, those studies praise the CJEU for its pivotal contribution to establishing the conceptual foundations of EU competition law.² Less, however, has been written on the current role of the Court, and surely even less on its future.

To offer a modest, yet hopefully original gift to the Court for its 60th anniversary, this short article looks into the crystal ball. It first seeks to predict the shape of things to come, and argues that despite an inexorable quantitative trend of reduced Court intervention in competition cases, its qualitative influence as the ultimate rule-maker in EU competition law should further burst into prominence (I).

Second, it opines that with the Court’s increasingly important rule-making role, comes the heightened responsibility of setting the “*right*” competition law standard. However, given the subjective vagaries of assessing what a “*right*” competition law standard is, this article advances that the Court’s responsibility should be construed objectively, in terms of setting “*consistent*” competition law standards (II).³

I. The Court’s Future Role – Rule-Making in EU Competition Law

The science of making predictions is complex. Oracles, mediums, scientists, investors and competition authorities alike often search into the recent past to forecast the future. Drawing

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¹ GOYDER is one of the best textbooks to deal with the history of EU competition law, and the influence of the Court. See D. G. GOYDER, *EC Competition Law*, 4th ed., Oxford University Press, Oxford, 2003.

² GERBER talks of “*Intellectual leadership*”. See D. GERBER, “The Transformation of European Community Competition Law?”, (1994) 35 *Harvard International Law Journal*, p. 127.

³ The article focuses on Article 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”), and on the Merger Regulation. It does not deal with State aid law. We refer here to the TFEU as a shortcut to the previous versions of the EEC and EC Treaties.

inspiration from this methodology, two scenarios may unfold in so far as the Court's role in the EU competition ecosystem is concerned.

A. *A Marginalized Court?*

A first scenario predicts the marginalization of the Court. This trend takes root into the creation of a General Court ("GC", formerly CFI) in 1989.⁴ Since then, the amount of competition cases landing before the Court has waned.⁵ Appeals on points of law under Article 256(1) TFEU have been overall rare. Cases even as legally innovative (and criticized) as *Microsoft v. Commission* have remained stuck at GC level.⁶

In line with this, three sets of institutional developments may further insulate the Court from competition cases. First, the idea of creating a specialized competition court under Article 257 TFEU is gaining traction.⁷ If this were ever to happen, the Court would lose its remaining jurisdiction on appeals on points of law in competition cases.⁸ And a similar effect may arise of other, yet less realistic, institutional proposals, such as a move towards a full US-like adjudication system in competition cases, along the lines proposed by Professor SCHWARZE and J. TEMPLE LANG.⁹ In this variant, the Commission would bring charges of competition infringements before the GC, which would take the first legally binding decision. Of course, in this system, the Court would regain an appeals jurisdiction over GC's

⁴ To deal notably with factual issues in competition cases. See B. VESTERDORF, "Judicial review and Competition law – reflections on the role of the Community courts in the EC System of competition law enforcement", (2005) 1(2) *Competition Policy International*.

⁵ As compared to the number of cases the CJ would have dealt with if it was still in charge of first instance judicial review. In 2010, the GC received indeed 79 new competition cases, whilst the Court received only 13 competition appeals in the same year.

⁶ See GC, Case T-201/04, *Microsoft Corp. v Commission*, ECR [2007] II-3601.

⁷ See M. MEROLA et D. WAELBROECK (ed.) *Towards an Optimal Enforcement of Competition Rules in Europe, Time for a Review of Regulation 1/2003?*, GCLC Annual Conference Series, 1, Bruylant, 2010, p. 251. See also, for a concrete proposal, Confederation of the British Industry, "The Need for an EU Competition Court", 15 June 2006, available at <http://www.cbi.org.uk>.

⁸ The sole possibility of intervention of the Court is defined at Article 256(2) TFEU: "*Decisions given by the General Court [...] may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected*".

⁹ See the quotes of N. WAHL, p.274, in M. MEROLA and J. DERENNE (ed.) *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conference Series, 2, Bruylant, 2012. J. TEMPLE LANG, "Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003", in C. BAUDENBACHER (ed.), *Current Developments in European and International Competition Law*, 17th St Gallen International Competition Law Forum, 2011, pp. 219-256; J. SCHWARZE, speaking at the workshop "Accès à la justice" at the celebration of 20 years of the Court of First Instances of the European Communities, 2009, available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-10/schwarze.pdf>. See also D. WAELBROECK and D. FOSSELDARD, « Should the Decision-Making Power in EC Antitrust Procedures be left to an Independent Judge? – The Impact of the European Convention on Human Rights on EC Antitrust Procedures », (1994) 14 *Yearbook of European Law*, pp.111-142.

judgments. But as the United States (“US”) experience suggests, this system reduces the number of competition cases in the first place (the agency rarely goes to Court), and thus the subsequent workload of the appeals courts system.

Second, the Court’s marginalization in EU competition law may also be nurtured by “*bottom-up*” jurisdictional transfers. In this context, with the contemplated accession of the EU to the European Convention of Human Rights (“ECHR”) and its own court’s system, the Court may lose some grip on fundamental rights issues.¹⁰

Finally, the unbridled development of negotiated procedures in EU competition law extinguishes opportunities for litigation before the General Court and, *a fortiori*, before the upper EU Court in last instance.¹¹ The “*success*” of leniency applications and (to a lesser extent though) of settlements in cartel cases, as well the rise of Article 9 commitments as the “*normal procedure*” in non-cartel cases leave little scope for appeal. Addressees of decisions adopted under these procedures are in practice less likely to challenge them before the GC, and even less so before the Court. And in light of the wide margin of discretion recognized to the Commission by the Court in *Alrosa*, appeals by third parties (in particular complainants) are somewhat illusory.¹²

All in all, this augurs a gloomy future for the Court. But this scenario has a major flaw. It is based on far-fetched and wholly unrealistic assumptions. First, it is doubtful that competition law constitutes a priority area for the creation of a specialised court, all the more so given the decreasing backlog of competition cases due to negotiated arrangements. As a matter of fact, most discussions on the creation of a specialized court concern the field of intellectual property (“IP”).

Moreover, the Court itself has already trumped a possible feudal subordination to the Strasbourg Court. In its judgments in *KME Germany v. Commission* and *Chalkor v. Commission*, the Court noted that the protection conferred by Article 47 of the Charter of Fundamental Rights of the EU “*implements in European Union law the protection afforded*

¹⁰ See C. LESKINEN, “An Evaluation of the Rights of Defense during Antitrust Inspections in the light of the Case-Law of the ECtHR: Would the Accession of the European Union to the ECHR bring about a significant Change?”, Working Paper IE Law School 10-04, 29 April 2010. See, *contra*, F. ZIVY and I. LUC, « L’équité procédurale devant l’Autorité de la concurrence », (2010) 4 *Concurrences*, pp. 85-100.

¹¹ See on this and on the following points, the interesting findings of E. BARBIER DE LA SERRE, “Competition Law Cases before the EU Courts: is the Well Running Dry”, in M. MEROLA and J. DERENNE (ed.), *The Role of the Court of Justice of the European Union in Competition Law Cases*, *op. cit.*, pp.98 and 99.

¹² See CJEU, Case C-441/07 P, *European Commission v Alrosa Company Ltd*, ECR [2010] I-5949.

by Article 6(1) of the ECHR”, and that “it is necessary, therefore, to refer only to Article 47”.¹³

B. A Rule-Making Court?

The second scenario makes a more rosy, and credible prediction. It starts from the premise that with the transfer towards the GC of granular *decision-reviewing* duties,¹⁴ the CJEU has progressively morphed into a *rule-making* court, dealing with principled institutional, procedural and substantive competition law issues through the preliminary reference channel under Article 263 TFEU and upon appeals on points of law pursuant to Article 256 TFEU. By rule-making, we mean judge-made law, or the design of general legal standards where black letter law is unclear, ambiguous and/or incomplete. Judgments like *Magill*,¹⁵ *Javico*,¹⁶ *Kali + Salz II*,¹⁷ *Tetra Laval*,¹⁸ *Impala*,¹⁹ *Glaxo*,²⁰ *Syfait*,²¹ *T-Mobile*,²² *TeliaSonera*,²³ *Tomra*,²⁴ etc., which all define, or refine, legal standards constitute striking illustrations of this.

Looking ahead, this second scenario prophesizes that the CJEU’s orbital position as the ultimate rule-maker in the competition galaxy will gain even more brightness. To be sure, the point here is not so much that the number of cases brought to the CJEU in relation to principled issues will increase.²⁵ Rather, the nub of the argument is qualitative in nature. The substance of the competition law issues that remain to be settled by the CJEU has perhaps never been that fundamental.²⁶ EU competition law lies indeed at several junctures. First, a debate over the *goals* of EU competition law (*e.g.*, consumer welfare, efficiency, industrial

¹³ See CJEU, Case C-386/10 P, *Chalkor AE Epexergasias Metallon v European Commission*, not yet reported, §§51 and 52.

¹⁴ Covering both first instance annulment proceedings under article 263 TFEU and unlimited jurisdiction proceedings against fines and penalties under article 261 TFEU.

¹⁵ Setting the standard on refusal to deal in the presence of IP rights.

¹⁶ Setting the standard for the appraisal of the effect on trade condition, when third countries are concerned.

¹⁷ Setting the standard on collective dominance and the failing firm defense in merger cases.

¹⁸ Setting the standard of judicial review to be applied by the General Court.

¹⁹ Refining the standard for the appraisal of existing collective dominant positions.

²⁰ Recalling the standard for the appraisal on restrictions on parallel trade under Article 101(1) and 101(3) TFEU.

²¹ Setting a standard for the appraisal on restrictions on parallel trade under Article 102 TFEU.

²² Refining the notion of a concerted practice.

²³ Setting the standard for the appraisal of margin squeezes under Article 102 TFEU.

²⁴ Recalling, and refining the standard for the appraisal of rebates, and other exclusivity inducing schemes under Article 102 TFEU.

²⁵ We believe it may, considering the wide range of principled issues that remain unsettled. But as a matter of fact, the quantitative statistics on the number of competition cases dealt with by the CJEU reveal no such tendency, quite to the contrary. See Statistics of Judicial Activity, p. 96. In 2006, the CJEU closed 30 cases, 17 in 2007, 23 in 2008, 28 in 2009, and 13 in 2010.

²⁶ In passing, this is what makes the discipline of EU competition law fascinating.

policy, redistribution, etc.) has unraveled, and is currently raging. The amount of scholarship devoted to this issue in recent years bears testimony to the view that the goals of EU competition law remain unclear.²⁷

Second, the *substantive and evidentiary standards* applied in competition law are in a state of limbo. The injection, under the impetus of the EU Commission, of a “*more economic*” approach since 1999 has not followed a homogeneous development across the various areas of competition enforcement (*i.e.*, under Article 101 TFEU, 102 TFEU and the EU Merger Regulation).²⁸ In addition, and perhaps more importantly, the venom of divide has contaminated the Commission. On the one hand, the Directorate General for Competition of the Commission (“DG COMP”) has planted in a variety of instruments a whole host of economics-driven standards for the assessment of anticompetitive conduct (in decisions, Guidelines, Communications, etc.).²⁹ In essence, those standards go beyond the black-letter law of the Treaty, and manifest DG COMP’s willingness to voluntarily discharge a higher burden of proof in competition cases. On the other hand, the Legal Service, which represents the Commission before the EU Courts, keeps on promoting “*textualistic*” – and arguably lower – evidentiary standards, that shield the Commission from risks of judicial annulment. And, as cases come and go, the GC sometimes upholds or invalidates either type of standard. For instance, in the *Glaxo* dual pricing case, the GC endorsed the more economic approach for the assessment of agreements that restrict parallel trade.³⁰ Yet it seemed to disregard it in

²⁷ See M. STUCKE, “What is Competition?”, in D. ZIMMER (ed.), *The Goals of Competition Law*, Edward Elgar, 2012; M. STUCKE, “Reconsidering Competition”, (2011) 81 *Mississippi Law Journal*, p. 107 ; See also O. ODUDU, *The boundaries of EC competition law: the scope of article 81*, Oxford University Press, Oxford, 2006; C. TOWNLEY, *Article 81 EC and Public Policy*, Hart Publishing, Oxford, 2009; C. PRIETO, « Pouvoir de marché et liberté des entreprises: les fondements de la politique de concurrence », (2006) *Dalloz*, p. 1603.

²⁸ See R. VAN DEN BERGH and P. CAMESASCA, *European Competition Law and Economics. A Comparative Perspective*, Sweet & Maxwell, London, 2006, pp.105-150; J. BASEDOW and W. WURMNEST, *Structure and Effects in EU Competition Law*, Kluwer Law International, 2011; D. GERBER, “Anthropology, History and the “More Economic Approach” in European Competition Law - A Review Essay”, (2010) 41 *International Review of Intellectual Property and Competition Law*, p. 441; D. GERADIN, A. LAYNE-FARRAR and N. PETIT, *EU Competition Law and Economics*, Oxford University Press, Oxford, 2012; J. DREXL, W. KERBER, R. PODSZUN, *Competition Policy and the Economic Approach, Foundations and Limitations*, Edward Elgar Publishing, 2011; L. ORTIZ BLANCO and A. LAMADRID DE PABLO, “EU Competition Law Enforcement Elements for a Discussion on Effectiveness and Uniformity”, Fordham 38th Conference on International Antitrust Law and Policy, September 2011, *mimeo*.

²⁹ The divergences may also be attributable at a more granular level, within DG COMP (for instance, at the level of Directorates, Units and possibly also with the Cabinet, and the Chief Economist Team).

³⁰ See Commission Decision of 8 May 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty, IV/36.957/F3 *Glaxo Wellcome* (notification), IV/36.997/F3 *Aseprofar and Fedifar* (complaint), IV/37.121/F3 *Spain Pharma* (complaint), IV/37.138/F3 *BAI* (complaint), IV/37.380/F3 *EAEPC* (complaint), *OJ L 302, 17.11.2001, pp. 1-43*; GC, Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission*, ECR [2006] II-2969; CJEU, Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission*, ECR [2009] I-9291.

other judgments such as *Tomra*, *Telefonica*, *British Airways*, etc. And in some cases, the GC parted ways both with the Commission and with prior case-law. For instance, in *Microsoft v. Commission* the GC somewhat diluted the *Magill* and *IMS Health* tests established by the CJEU with a view to assessing refusals to supply under Article 102 TFEU.

With this background, in many areas several standards which remain untested before the CJEU compete for the assessment of anticompetitive practices. Pending a last resort pronouncement of the CJEU, it is unclear which one of those standards shall apply. This issue is particularly important in the field of abuse of dominance and merger control.³¹

Third, the *institutional structure* of EU competition law shows signs of weaknesses. As decentralized competition enforcement thrives across the EU-27, the text of Regulation 1/2003 reveals ambiguities and lacunas. Short of explicit answers, national courts turn to the CJEU to request assistance through the preliminary reference procedure of Article 263 TFEU (for instance, in the *X v. BV*,³² *VEBIC*,³³ *Tele2 Polska*,³⁴ and *Pfleiderer* cases).³⁵ In most, if not all those cases, the issue boils down to a complex trade-off between the general principles of procedural autonomy and effectiveness of EU law which the Court, and it only, enjoys a monopoly to settle.

Fourth, with rising fines akin to quasi-criminal sanctions, the EU administrative *procedure* for competition cases is in the line for fire.³⁶ Lawyers increasingly challenge the compatibility of the EU procedural system with Article 47 of the Charter of Fundamental Rights of the EU.³⁷ Many components of the EU procedural system have been deferred to the CJEU – *e.g.*,

³¹ A precision is here in order as regards the EUMR. To the exception of collective dominance (in *France v. Commission* and *Bertelsmann AG v. Impala*), the failing firm defense (in *France v. Commission*) and leverage issues (in *Tetra Laval v. Commission*), no substantive EUMR standards have ever been discussed before the Court. Questions such as the admissibility of expert economic evidence before the Commission, unilateral effects, efficiency defenses, or the applicable standard of review in Phase I examinations remain thus to be deferred to the Court.

³² See CJEU, Case C-429/07, *Inspecteur van de Belastingdienst v X BV*, ECR [2009] I-4833.

³³ See CJEU, Case C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkeren (VEBIC) VZW*, not yet reported.

³⁴ See CJEU, Case C-375/09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA*, not yet reported.

³⁵ See CJEU, Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, not yet reported.

³⁶ See Opinion of Mr Advocate General BOT delivered on 26 October 2010 in Case C-352/09 P, *ThyssenKrupp Nirosta GmbH v European Commission*, not yet reported.

³⁷ As well as Article 6 ECHR.

parental liability doctrine,³⁸ intensity of judicial review,³⁹ duration of the administrative procedure –⁴⁰ and cases will keep abounding.

For all these reasons, the 60 years old CJEU still faces the challenge of settling a wide array of novel, interesting competition law issues. And this is likely to reinforce its position as the predominant rule-maker in EU competition law.

All in all, we view this second scenario as more credible than the first one, if only because it is a scenario “*à droit constant*”, which is not contingent on the creation of new EU judicial organs.

II. The Court’s Future Responsibility – Setting “Consistent” EU Competition Law Standards

A. Conceptual and Definitional Remarks

The rise of the Court as the ultimate rule-maker in EU competition law comes with a challenge. Put simply, the Court must set the “*right*” competition law standards.⁴¹

Unfortunately, however, there is no commanding benchmark to help the Court separate wheat from chaff. Rather there is a wealth of – possibly conflicting – perspectives, on what makes “*good*” and “*bad*” law.⁴² As a crude proxy, economists praise legal standards that promote economic welfare.⁴³ In contrast, lawyers favor standards that ensure legal certainty.⁴⁴

But economists and lawyers often disagree amongst themselves. Competition economists are for instance split on whether competition law should promote “*total*” or “*consumer*”

³⁸ See CJEU, Case C-407/08 P, *Knauf Gips KG v European Commission*, ECR [2010] I-6375.

³⁹ See CJEU, Case C-386/10 P, *Chalkor AE Epexergasias Metallon v European Commission*, *supra* and CJEU, Case C-389/10 P, *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, not yet reported.

⁴⁰ See CJEU, Case C-385/07 P, *Der Grüne Punkt - Duales System Deutschland GmbH v Commission*, ECR [2009] I-6155.

⁴¹ This is all the more important since the judgments handed down by the CJEU cannot be appealed. In recent years, competition lawyers, economists, and – possibly more than others – academics have been prompt to pass judgment on the adequacy of the legal standards selected by the Court. Influenced by US-type antitrust scholarship, EU competition law journals, reviews, and books are now replete with vocal, passionate criticisms of the case-law, which are a far cry from the positivist, low-key civil law tradition of scholarship.

⁴² See, for instance, using the expression, E. BARBIER DE LA SERRE, “Competition Law Cases before the EU Courts: is the Well Running Dry”, in M. MEROLA and J. DERENNE (ed.), *The Role of the Court of Justice of the European Union in Competition Law Cases*, *op. cit.*

⁴³ See D. GERADIN and N. PETIT, “Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment”, in M. MEROLA and J. DERENNE (ed.), *The Role of the Court of Justice of the European Union in Competition Law Cases*, *op. cit.*, p. 21.

⁴⁴ *Ibidem*.

welfare.⁴⁵ Similarly, competition lawyers are divided on whether general “*forms-based*” rules or case-by-case “*effects-based*” assessments promote legal certainty.

Finally, the opinions of each and everyone often hinge on social, professional, ideological, psychological and other personal biases. More specifically, one cannot exclude that lawyers and economic consultants stand for legal standards that are not adverse to their clients’ interests.

Given the wealth of available alternative benchmarks, on which grounds should the Court select the “*right*” competition law standard? The author of these lines is certainly under-qualified to address this intractable question. Yet, it is submitted that, for the Court to meet the challenge of setting the “*right*” competition law standards – and shut out the somewhat undeserved, yet frequent criticisms of certain practitioners – it should seek, as a bottom-line, to ensure “*consistency*” in rule-making. Consistency can be generally defined as devising coherent standards for related factual, economic and legal settings.⁴⁶

Our belief that consistency must be the minimum common denominator of any “*right*” competition law standard is grounded on the view that it is a dispassionate notion. Unlike many other proposed benchmarks (*e.g.*, efficiency, welfare, fairness, economic freedom), it leaves little space for ideology, conflicts of interests, and other biases.⁴⁷ In addition, from a decision-making perspective, the principle of consistency is respectful of the Court’s discretionary power. In many cases, several consistent legal standards will compete for the regulation of a given factual, economic or legal situation. In such settings, it will remain up to the CJEU with the assistance of the parties, to set what it deems the most adequate standard.⁴⁸

In a spirit of assistance, the following sections offer some fresh thoughts on three possible facets of “*consistency*” which may arguably help the Court face the challenge of setting adequate competition law standards.⁴⁹ The analysis is creative in nature, given the dearth of

⁴⁵ See R. VAN DEN BERGH and P. CAMESASCA, *European Competition Law and Economics: A Comparative Perspective*, *op.cit.*

⁴⁶ Consistency is close to the notions of conformity and compatibility. It also implies devising different standards for unrelated factual and legal settings.

⁴⁷ But other benchmarks may also fulfill this condition. One could think, for instance, of devising “*ergonomic*”, or “*business-friendly*” competition law standard (its practicability), *i.e.* standards that are easy to comply with. A benchmark of this kind could be tested by assessing how much compliance costs it inflicts on companies.

⁴⁸ Put differently, the concept of consistency leaves scope for debate. It does not necessarily dictate a given legal standard, but plays as a useful filter which narrows down the range of options available to the judge.

⁴⁹ This in no way suggests that the Court does not test, in current judicial practice, the “*consistency*” of its competition law standards. As will be seen below, it certainly does so, but not explicitly, through its own

guidance in general EU law on consistency in rule-making.⁵⁰ It uses the competition case-law of the Court to offer illustrations of consistencies and inconsistencies in rule-making.

B. “Transversal Consistency”, or Consistency across Competition Rules

A first best rule-making practice is to ensure consistency across the various domains of EU competition law. This can be referred to as “*transversal consistency*”. Despite their distinct scope of application,⁵¹ Article 101 TFEU, Article 102 TFEU and the EUMR aim at one and the same thing, *i.e.*, “*ensuring that competition is not distorted*”⁵² through the exploitation of significant market power (also labeled “*power over price*”), or the foreclosure of competitors (also labeled “*power to exclude*”).⁵³ Since those provisions share a unity of purpose and,⁵⁴ a

methods, or under the authority of other related, yet distinct principles, such as the principle of legal certainty, or the principle of uniformity of EU law.

⁵⁰ The notion of consistency has been used sporadically in EU competition law. It is used in Recital 21 of Regulation 1/2003, which ambitions to ensure consistency in the articulation of European and national competition laws, in line with the *Masterfoods* case-law. Recital 21 of the Regulation is worded as follows: “Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission”. This recital, and more generally Article 16, are offshoots of the *Masterfoods* case-law. See CJEU, Case C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, ECR [2000] I-11369. In the *Masterfoods* judgment, for instance, the Court held that national courts “cannot” take decisions “*running counter*” to previous Commission decisions on similar agreements or practices (see §52). Interestingly, this solution was based on the principle of legal certainty. For an explicit link with the notion of consistency, see P. CRAIG and G. DE BURCA, *The Evolution of EU Law*, 2nd ed., Oxford University Press, Oxford, 2011, p.733. The concept of consistency has been also enforced in the area of State aid under Article 107, to assess the legality of certain types of fiscal advantages. See Commission notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384/3, 10.12.1998. Finally it has sporadically been dealt with by the Court, primarily in relation to the judicial review carried out by the GC. See, for instance, CJEU, Case C-386/10 P, *Chalkor AE Epexergasias Metallon v European Commission*, *supra*, §48; CJEU, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00, *Aalborg Portland A/S a.o. v Commission of the European Communities*, ECR [2004] I-123, §133.

⁵¹ Those provisions have a different scope of application. Article 101 TFEU applies to the restrictions of competition adopted by collusive firms, Article 102 TFEU to the restrictions of competition of dominant firms, and the EUMR to the restrictions of competition of prospective merged firms.

⁵² See Protocol n°27 on the Internal market and competition, OJ C 115, 9.5.2008, pp. 309: “*The High Contracting Parties, considering that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted, have agreed that to this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union. This protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union*”. The existence of distinct provisions simply seeks to make sure that no form of conduct with anticompetitive effects goes unpunished.

⁵³ See T. KRATTENMAKER, R. LANDE and S. SALOP, “Monopoly Power and Market Power in Antitrust Law”, (1987) 76 *Georgetown Law Journal*, p. 241.

⁵⁴ The Court actually recognized this in *Continental Can* in so far as Article 101 and 102 are concerned. See CJEU, Case C-6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, ECR [1973] 215, §25: “*Articles 85 and 86 seek to achieve the same aim on different levels, viz . the maintenance of effective competition within the common market. The restraint of competition which is prohibited if it is the result of behaviour falling under article 85, cannot become permissible by the fact that such behaviour succeeds under the influence of a dominant undertaking and results in the merger of the undertakings concerned*”.

certain degree of homogeneity and convergence is warranted in the analysis of anticompetitive agreements, unilateral practices and concentrations.⁵⁵

In practice, the Court can test and promote transversal consistency when asked to determine *whether* a novel type of practice ought (or not) to be prohibited under one of the EU competition rules. For instance, given that under Article 101 TFEU, agreements that restrict parallel trade are deemed to restrict competition, it was consistent, in *Sot. Lélos kai Sia EE et al. v GlaxoSmithKline AEVE*, and despite the silence of Article 102 TFEU, to consider that dominant firms' unilateral limitations of supplies to parallel traders fell within the purview of that provision. The Court noted that “*there can be no escape from [...] Article 102 TFEU*”, for the practices of a dominant firm “*which are aimed at avoiding all parallel exports*”.⁵⁶ The notion of transversal consistency is useful here to eliminate enforcement gaps in EU competition law.⁵⁷ It ensures that no conduct with anticompetitive effects goes unpunished, simply by virtue of formal attributes.

Second, the concept of transversal consistency is also relevant in relation to the *tests* applicable to assess firms' conduct. The idea here is that strategies which wield similar types of competition concerns should, in principle, be subject to streamlined verification standards. This particular variant of transversal consistency could have significant consequences on several existing case-law standards. For instance, it is well-known that exchanges of information agreements amongst oligopolists facilitate tacit coordination.⁵⁸ Like mergers amongst oligopolists, they are a form of “*facilitating practice*”.⁵⁹ However, unlike under the EUMR where the risk of tacit coordination is verified by the proof of three stringent cumulative conditions identified in *Bertelsmann AG v. Impala*,⁶⁰ the case-law standard

⁵⁵ See L. ORTIZ BLANCO, *Market Power in EU Antitrust Law*, Hart Publishing, Oxford, 2012. The author for instance observes that there is no valid reason to differentiate market power thresholds in the various areas of EU competition law (p.282).

⁵⁶ See CJEU, Joined Cases C-468/06 to C-478/06, *Sot. Lélos kai Sia EE and Others V GlaxoSmithKline AEVE Farmakeftikon Proionton, formerly Glaxowellcome AEVE*, ECR [2008] I-7139. There is a limit to consistency though in this case, because the Court, unlike in Article 101 TFEU, tolerated an exception to restrictions of parallel export, thus not equating it with a restriction by object (§71: “*it is nonetheless permissible for that company to counter in a reasonable and proportionate way the threat to its own commercial interests potentially posed by the activities of an undertaking which wishes to be supplied in the first Member State with significant quantities of products that are essentially destined for parallel export*”).

⁵⁷ And thus promotes the effectiveness of competition policy.

⁵⁸ Regardless of whether they are stand-alone exchanges of information, or the result of other types of agreements, such as production, commercialization, purchasing, standardisation joint ventures, etc.

⁵⁹ See N. PETIT, *Oligopoles, collusion tacite et droit communautaire de la concurrence*, Bruylant, 2008.

⁶⁰ See CJEU, Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)*, ECR [2008] I-4951, §251. Those conditions are derived from economic theory. See N. PETIT, *Oligopoles, collusion tacite et droit communautaire de la concurrence*, *op.cit.*

applied under Article 101 TFEU refers loosely to the proof that the “*degree of uncertainty on the market in question*” is reduced or removed.⁶¹ This is clearly a source of unfortunate incoherence, which surely would deserve to be disambiguated on grounds of transversal consistency.

Discrepancies also straddle the areas of Article 101 and 102 TFEU. For instance, the judgment rendered in *Tomra v. Commission* under Article 102 TFEU is inconsistent with previous case-law standards under Article 101 TFEU.⁶² In this case, which concerned several exclusivity agreements, quantity commitments and individualised retroactive rebate schemes entered into by a dominant firm, the Court dictated that “*competitors should be able to compete on the merits for the entire market and not just for a part of it*”.⁶³ Taken literally, this suggests that a dominant firm may be found guilty of abuse as soon as it ties any share of market demand with exclusivity arrangements, regardless of the magnitude of the said arrangements (e.g., an exclusivity agreement that covers 1% of market demand, and that in turn leaves 99% of market demand open to rivals, could be held unlawful). This is apparently incongruent with other Courts’ judgments under Article 101 TFEU, such as the *Delimitis* case, where the market coverage of exclusive agreements was deemed key criteria to assess risks of anticompetitive foreclosure.⁶⁴

Finally, the principle of transversal consistency suggests to craft similar *exoneration* standards across Article 101 TFEU, Article 102 TFEU and the EUMR. After all, why should anticompetitive practices that yield pro-competitive effects of equal nature and magnitude be treated differently, simply because they take a different form? As noted by E. ROUSSEVA,⁶⁵ the issue becomes problematic with regard to practices that can be examined under both

However, the Court noted that “*in the appropriate circumstances, [this risk can] be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position*”.

⁶¹ See CJEU, Case C-7/95 P, *John Deere Ltd v Commission*, ECR [1998] I-3111; CJEU, Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECR [2009] I-4529; CJEU, Case C-194/99 P, *Thyssen Stahl AG v Commission*, ECR [2003] I-10821.

⁶² See CJEU, C-549/10 P, *Tomra Systems ASA and Others v Commission*, not yet reported.

⁶³ *Ibidem*, §42.

⁶⁴ See CJEU, Case C-234/89, *Stergios Delimitis v. Henninger Bräu AG*, ECR [1991] I-935, where the Court held that an exclusive agreement can only be deemed to restrict competition, if it (i) exerted a “*cumulative effect*” with “*similar agreements*”; and (ii) if it made “*a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context*”.

⁶⁵ See E. ROUSSEVA, “The Concept of ‘Objective Justification’ of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?”, (2006) 2(2) *The Competition Law Review*, p.32.

Article 101 and 102 TFEU (e.g., vertical agreements).⁶⁶ Depending on the provision under which the case is envisioned, a single branding contract may benefit from an exemption under Article 101(3) TFEU on the grounds that it is pro-competitive, yet be found abusive under Article 102 TFEU.⁶⁷ This inconsistency risks undermining the “*effet utile*” of Article 101(3) TFEU, in prohibiting welfare enhancing practices (a so-called “Type I error”, or over fixing). In addition, it may encourage competition authorities, courts, and complainants to circumvent the exoneration of pro-competitive conduct, by promoting innovative, yet untested interpretations of Article 102 TFEU.⁶⁸

Against this background, the principle of transversal consistency impregnates the Court judgment in *Post Danmark*. In this ruling, the Court introduced an informal possibility of exemption within Article 102 TFEU, tailored along the wording of Article 101(3) TFEU and aligned with the spirit of Recital 29 of the EUMR. The Court held in particular that a dominant firm can escape a finding of abuse, if it proves:

“that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition”.⁶⁹

Of course, this paragraph is a far cry from introducing an Article 102(3) TFEU, which would exempt otherwise abusive conduct. The analysis takes place within Article 102 TFEU, and thus bears more resemblance to the “*rule of reason*” methodology applied in US antitrust law, or with the “*efficiency defense*” applied under the EUMR.⁷⁰ This notwithstanding, it renders abuse of dominance law more “*transversally consistent*” with other domains of competition law, and in turn contributes to legal certainty.

C. “*Internal Consistency*”, or *Consistency within Competition Rules*

⁶⁶ Be it alternatively or cumulatively.

⁶⁷ See E. ROUSSEVA, “The Concept of ‘Objective Justification’ of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?”, *op.cit.*

⁶⁸ The *Compagnie Maritime Belge* cases can be traced back to this type of avoidance strategy. See, on this, N. PETIT, *Oligopoles, collusion tacite et droit communautaire de la concurrence*, *op.cit.*

⁶⁹ See CJEU, Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, not yet reported, §42.

⁷⁰ See, along those lines, Opinion of Mr Advocate General JACOBS delivered on 28 October 2004 in Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE*, ECR [2005] I-4609, §72.

A second best rule making practice is to promote consistency within each domain of EU competition law. This notion can be labeled “*internal consistency*”. It has three ramifications. First, under this concept, new case-law standards adopted under a specific competition rule (Article 101 TFEU, Article 102 TFEU or the EUMR) should be consistent, compatible and coherent with prior case-law standards adopted under the same competition rule.

Second, if the Court departs from settled case-law, a consistent rule-making approach is to expressly (i) distinguish the later solution from previous judgments;⁷¹ or (ii) overrule prior judgments.⁷² On this issue, a reminder is in order. As is well known, the Court is not hostage to prior pronouncements.⁷³ It does not apply the doctrine of precedent, or *stare decisis*, and is thus not technically bound by its earlier judgments.⁷⁴ Yet, this should not provide a *carte blanche* for crafting conflicting/evolving standards in silence. Whilst this might amuse academics (and confuse students), lawyers, economists and officials alike need to clearly know when legal standards change.

Third, when the Court defines or refines legal rules, it should refrain from quoting old precedents which say wholly distinct things as source of precedential authority.⁷⁵ This is

⁷¹ The distinguishing method is frequently used in EU law. See L. COUTRON, “Style des arrêts de la Cour de justice et normativité de la jurisprudence communautaire”, (2009) 45(4) *Revue Trimestrielle de Droit européen*, pp. 643-676.

⁷² Examples of explicit reversal of prior case law by the Court are rare. See, however, CJEU, Case C-10/89, *SA CNL-SUCAL NV v HAG GF AG* (“*Hag II*”), ECR [1990] I-3711, §10, where the Court noted “*Bearing in mind the points outlined in the order for reference and in the discussions before the Court concerning the relevance of the Court’s judgment in Case 192/73 Van Zuylen v HAG [1974] ECR 731 to the reply to the question asked by the national court, it should be stated at the outset that the Court believes it necessary to reconsider the interpretation given in that judgment in the light of the case-law which has developed with regard to the relationship between industrial and commercial property and the general rules of the Treaty, particularly in the sphere of the free movement of goods*”. See also CJEU, Joined cases C-267/91 and C-268/91, *Criminal Proceedings v Keck and Mithouard*, ECR[1993] I-6097, §16 : “*By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (Case C-8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States*”.

⁷³ A doctrine of this kind would generate a risk of “ossification” of legal standards.

⁷⁴ See Opinion of Mr Advocate General LA PERGOLA delivered on 12 February 1998 in Case C-262/96, *Sema Sürül v Bundesanstalt für Arbeit*, ECR [1999] I-2685, §36: “*The rule stare decisis has not been incorporated in the Community judicial system. The Court does not of course fail to ensure that its case-law displays continuity and that its judgments are logically compatible and not contradictory with each other. However, the Court is not technically bound by its earlier judgments*”.

⁷⁵ See L. COUTRON, *op.cit.*, pp.673-674.

indeed akin to revisiting, in disguise, settled case-law. And this is, in turn, likely to degrade legal certainty.⁷⁶

Those three ramifications of internal consistency find illustrations in the competition case-law of the Court. To start, the ruling of the Court in the *Football Association Premier League Ltd.* (also known as the “*FAPL*” or “*Greek decoders*” case) shows how the Court ensures “*internal consistency*” when faced with novel competition law issues. Here, the Court was questioned on the compatibility with Article 101 TFEU of several licensing agreements which sought to restrict national TV broadcasters’ exports of decoders towards other Member States. The Court answered that the impugned practices were akin to restrictions of competition by object,⁷⁷ which could not be salvaged under Article 101(3) TFEU.⁷⁸

The judgment has shocked the broadcasting industry, given its potential to undermine the lucrative national exclusivity licensing model for sports rights.⁷⁹ But on close analysis, the *FAPL* standard has nothing particularly original. It is based on a thick pile of judicial pronouncements, starting with *Consten & Grundig* and *Nungesser*, which consistently equated agreements that organize absolute territorial protection and export bans with restrictions of competition by object, that are in turn ineligible for exemption.⁸⁰ In sum, on grounds of “*internal consistency*”, the Court was right to select this competition law standard.⁸¹

⁷⁶ As noted by the European Court of Human Rights, where there is neither a formal doctrine of precedent, “*it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases*” (emphasis added). See *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I

⁷⁷ See CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)*, not yet reported, §139.

⁷⁸ *Ibidem*, §141.

⁷⁹ See P. WERNER and C. VÖLK, “A game of two cases - The Greek decoders litigation has got a lot of people worried”, (2011) 10(4) *Competition Law Insight*, pp.18-20; M-J. CLIFTON, “The Publican's Dilemma: the Legality of Showing the Premiership Using an Imported Satellite Decoder Card”, (2011) 2 *European Law Reporter*, pp.38-46.

⁸⁰ See CJEU, Joined cases C-56 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, ECR [1966] 299. See also CJEU, Case 258/78, *L.C. Nungesser KG and Kurt Eisele v Commission*, ECR [1982] 2015, §61.

⁸¹ A recent judgment seems, however, to disrespect this first ramification of the principle of “*internal consistency*”. In *Pierre Fabre Dermocosmétiques* the Court held that objective justifications ought to be examined under Article 101(1) TFEU. See CJEU, Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence and Ministre de l’Économie, de l’Industrie et de l’Emploi*, not yet reported, §41. This judgment is not fully congruent with previous case-law, where the Court had surmised – in *Montecatini*, for instance – that “*rule of reason*”-inspired assessments had no place within Article 101(1) TFEU. See CJEU, Case C-235/92 P, *Montecatini SpA v Commission of the European Communities*, ECR [1999] I-4539,

In contrast, the judgment of the Court in *Konkurrensverket v TeliaSonera Sverige AB* casts light on the intrinsic difficulty that the Court may face when dealing with the second ramification of “*internal consistency*” (*i.e.*, distinguishing/overruling precedents). In this case, the Court had to clarify the test applied to abusive margin squeezes under Article 102 TFEU.⁸² In a margin squeeze scenario, a vertically integrated firm excludes downstream rivals by raising the wholesale price of the inputs it sells to them (for instance, access to a telephone network); and/or by decreasing downstream retail prices (for instance, end-users fixed lines’ subscriptions).

In this ruling, the Court decided to subject margin squeeze cases to a test distinct, and laxer, from the test applicable in refusal to supply cases, where the vertically integrated firm excludes rivals by withholding supplies of inputs. In refusal to supply cases, three stringent cumulative conditions – notably that the input at hand is “*indispensable*” to rivals – must indeed be proven to find abuse.⁸³

To introduce a new, laxer legal standard, the Court rightly sought to distinguish margin squeezes cases from – constructive – refusals to supply cases.⁸⁴ It first implied, at §25 of its judgment, that a margin squeeze belongs to a distinct family of abuses, *i.e.* those that impose “*unfair prices*” on customers within the meaning of Article 102(a) TFEU.⁸⁵ Subsequently, the Court went on to say, even more explicitly that:

“It cannot be inferred from paragraphs 48 and 49 of [the Bronner] judgment that the conditions to be met in order to establish that a refusal to supply is abusive must necessarily also apply when assessing the abusive nature of conduct which consists in supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser. Such conduct may, in itself, constitute an independent form of abuse distinct from that of refusal to supply (emphasis added)”.

Since margin squeeze and refusal to supply cases are two distinct types of cases, there is no obstacle, according to the Court, to apply different evidentiary standards to them (and in particular, to exonerate the Commission from proving that the input is indispensable in margin squeeze cases).

§133. Under this case-law indeed, objective justifications, pro-competitive effects or other efficiency benefits ought to be examined under Article 101(3) TFEU, not Article 101(1) TFEU.

⁸² See CJEU, Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, not yet reported.

⁸³ *Ibidem*, §70.

⁸⁴ *Id.*, §56 and seq.

⁸⁵ *Id.*, §25: “As regards the abusive nature of pricing practices such as those in the main proceedings, it must be noted that subparagraph (a) of the second paragraph of Article 102 TFEU expressly prohibits a dominant undertaking from directly or indirectly imposing unfair prices”.

At first glance, the reasoning of the Court fulfills the requirement of “*internal consistency*”. Yet, on close examination, doubts arise as to whether the Court could really distinguish the two types of cases. After all, can a firm charge rivals “*unfair*” prices within the meaning of Article 102(a) TFEU, if it does not possess something that is “*indispensable*” to them, within the meaning of the case-law on refusal to supply? Moreover, from an “*outcome*” perspective, the judgment seems, in and of itself, inconsistent.⁸⁶ If a firm can lawfully eliminate rivals by withholding supplies, how can it be guilty of abuse when it supplies them at high prices? In the language of driving metaphors, this is akin to prohibiting speeding above 120 km/h, yet tolerating it above 150km/h... And dominant firms should be advised to forego supplies to competitors, rather than to share their inputs with them. All this clearly throws doubts on whether this legal standard is a consistent one.

Finally, the third ramification of the principle of “*internal consistency*” may also have been occasionally neglected in the competition case-law. Some judgments that introduce novel legal standards indeed cite to inappropriate precedents in support of them.⁸⁷ The judgment of the Court in *Pierre Fabre Dermocosmétiques* is a case in point. The Court here asserts the novel principle that selective distribution systems “*are to be considered, in the absence of objective justification, as ‘restriction by object’*” under Article 101(1) TFEU.⁸⁸ And in support of this contention, the Court quotes, in a previous sentence, its precedent in *AEG-Telefunken v Commission*. However, the judgment in *AEG-Telefunken v. Commission* did not use the notion of “*objective justification*” as a concept evincing the application of Article 101(1) TFEU, but rather talked of “*legitimate requirements*”.⁸⁹ Such pronouncements, which

⁸⁶ Other forms of “*outcome*” inconsistencies have appeared in the case-law related to Regulation 1/2003. For instance, the *VEBIC* and *Tele2 Polska* judgments, which concern the powers of National Competition Authorities (“NCAs”), are not fully in line with one another. Surely, those cases share the common feature of giving precedence to the principle of effectiveness over procedural autonomy (in this sense, they are also a little incongruent with another ruling, in *Pfleiderer*, which clearly favours procedural autonomy over effectiveness). However, in *VEBIC*, the Grand Chamber of the Court of Justice held that the effectiveness of EU competition law dictated to entrust NCAs with the ability to appear before the review courts (see CJEU, Case C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkeres (VEBIC) VZW*, *supra*, §61 and 64), thereby adding to the wording of Article 5 of Regulation 1/2003, which sets out a list of prerogatives that all NCAs must be entrusted with. In contrast, however, in *Tele2 Polska*, the Court took a somewhat more restrictive approach of the powers of NCAs under Article 5 of Regulation 1/2003. In this case, the CJEU considered that NCAs were not entitled to adopt positive (inapplicability) decisions, including possibly Article 101(3) TFEU decisions, under Regulation 1/2003.

⁸⁷ See, for a similar view in other areas of EU law, L. COUTRON, *op.cit.*, p.673.

⁸⁸ See CJEU, Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence and Ministre de l’Économie, de l’Industrie et de l’Emploi*, *supra*, §33.

⁸⁹ See CJEU, Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, ECR [1983] 3151, §33.

look clearly inconsistent, generate more questions than answers.⁹⁰ They would deserve at least a word of explanation.

D. “Scientific Consistency”, or Consistency across Competition Law and Economics

As a third best judicial practice, consistency in rule making ought finally to be achieved across the twin disciplines of competition law and economics. In layman’s terms, the Court should check that proposed competition law standards “*make sense*” from an economic standpoint. At the extreme, the Court may even draw inspiration from competition economics to devise legal standards.

Interestingly, while many lawyers have voiced antipathy towards the use of economics in competition enforcement activities (*i.e.* in cases), most of them generally acknowledge their relevance for the design of general legal rules. As Mrs. ORTIZ BLANCO and LAMADRID observe: “*the design of legal rules must necessarily be the fruit of the efforts of a hybrid community in which lawyers and economists should understand each other’s disciplines*”.⁹¹

Of course, there are many economic theories, including conflicting ones.⁹² Moreover, the predictions of economic models on the competitive effects of business practices often depend on narrow factual assumptions.⁹³ Hence, the Court may face an embarrassment of riches, given the luxuriance of alternative economic standards.⁹⁴

In our opinion, however, those objections are indecisive.⁹⁵ Contrary to what the *vox populi* believes, competition economists do not disagree on everything. There are several core,

⁹⁰ Such as, “is the Court wrong?”. In addition, they may lead to the progressive disappearance of solid case-law precedents, through the snow-ball effect linked to the repetition of the new precedent, and the progressive disappearance of older case-law citations.

⁹¹ See L. ORTIZ BLANCO and A. LAMADRID, “Expert Economic Evidence and Effects-Based Assessments in Competition Law Cases”, in M. MEROLA and J. DERENNE (ed.), *The Role of the Court of Justice of the European Union in Competition Law Cases*, *op. cit.*, p.308.

⁹² Some even say that there are as many economic theories as economists themselves. In the area of predatory pricing, for instance, economists remain divided on whether proof of recoupment is necessary to establish an unlawful abuse.

⁹³ For instance, a 100% market share may well be tantamount to a monopoly in a basic industrial sector, yet confer no market power on its holder in a dynamic industry characterized by network externalities, first mover advantages, and low barriers to entry.

⁹⁴ And this choice may be tainted by a degree of ideology.

⁹⁵ Another objection is that if the Court may define and select proposed legal standard on the basis of economic considerations, it should also be able to do so on the basis of other non-economic disciplines, policies, values and goals (*e.g.*, moral, ethics, equity, redistribution, etc.). Needless to recall, however, that in the early 1950s, the adoption of a competition policy was a key component of the achievement of the European Steel and Coal Community, and later of the European Economic Communities, whose primary objectives were, in turn, economic in nature. Consequently, economic considerations have certainly a role to play, possibly in tandem with other considerations, in the design of competition law standards.

general principles of competition economics that seem sufficiently consensual, and that are not contingent on specific assumptions (economists call them “*robust*” principles). To take only a few examples of them, one would point out to the view that cartels are wholly inefficient, that scale (or size) is not necessarily adverse to welfare, that prices below marginal costs are irrational, that firms respond to incentives, that profits generate entry, etc.⁹⁶

In concrete terms, “*scientific consistency*” can help the Court in three aspects of rule-making. First, given that many competition law concepts are open-textured, the Court is frequently solicited to *define* the meaning of Treaty provisions (e.g., the notions of “*undertaking*”, “*abuse*”, “*concerted practice*”, etc.) and secondary legislation provisions (e.g., the notion of a “*hardcore restriction*”). And often, we lawyers, have the reptilian reflex of inventing *sui generis* concepts, whose primary effect is to create new definitional uncertainties. In such settings, the Court can – and should not hesitate to – craft legal *definitions* that borrow to the language of competition economics, when legal jargon is all but useful.

Interestingly, the existing case-law of the Court brings telling illustrations of this. For instance, the Court was used to define “*collective dominance*” with *sui generis* terms such as “*correlative factors*”,⁹⁷ “*collective entity*” and “*connecting factors*”.⁹⁸ As a result, it remained long unclear whether pure oligopolistic tacit collusion was covered under Article 102 TFEU.⁹⁹

⁹⁶ Those principles may well suffer from derogations. But legal principles also have exceptions. So this objection is no basis to discard the use of economics in the design of legal rules.

⁹⁷ See CJEU, Case C-68/94, *République française et Société commerciale des potasses et de l'azote (SCPA) et entreprise minière et chimique (EMC) v. Commission*, ECR [1998] I-1375, §211. L. PAPADIAS, “Some Thoughts on Collective Dominance from a Lawyer's Perspective” in P. BUIGUES and P. REY (ed.), *The Economics of Antitrust and Regulation in Telecommunications*, Edward Elgar, Cheltenham, 2004, p.120.

⁹⁸ See CJEU, C-395/96 and C-396/96 P, *Compagnie Maritime Belge transports and others v. Commission*, ECR [2000] I-1365. See also CJEU, Case C-497/99 P, *Irish Sugar plc v Commission*, ECR [2001] I-5333, §44.

⁹⁹ The Court's reluctance to employ the language of economics triggered a plethora amount of scholarship. In addition, it gave rise to an important degree of legal uncertainty. The doctrine of collective dominance was invoked in all directions, as a shortcut to regulate all sorts of market structures and practices. First, in the *Irish Sugar* case, the Commission crafted a somewhat innovative doctrine of “*vertical*” collective dominance, that the Court confirmed. In this case, the Commission was attempting to put an end to a series of abuses entered into by a supplier and its distributor. See also CJEU, Case C-497/99 P, *Irish Sugar plc v Commission*, *supra*. Second, in *Almelo* and *La Crespelle*, the EU courts applied the concept of collective dominance to circumvent another legal obstacle. In those cases, several firms of regional/local importance each enjoyed a dominant position on a number of distinct and narrow geographic markets. Taken one by one, the dominant position of each firm did not seem to affect “*the internal market or substantial part of it*”, as requested under Article 102 TFEU. However, in close similarity with the cumulative effects doctrine under Article 101 TFEU, the Court considered that it was possible to aggregate individual dominant positions on different markets under the concept of collective dominance, so that a substantial part of the common market was affected. See CJEU, Case C-393/92, *Gemeente Almelo and others v. Energiebedrijf IJsselmij*, ECR [1994] I-1477; CJEU, Case C-383/93, *Centre d'insémination de la Crespelle v. Coopérative de la Mayenne*, ECR [1994] I-5077. See P. NIHOUL et P. RODFORD, *EC Electronic Communications Law*, Oxford University Press, Oxford, 2004, §3.327. Third, the Commission and the EU Courts found that agreements between maritime companies that were not subject to Article 101 TFEU, could be caught under Article 102 TFEU, under the notion of collective dominance. See C-

In the *Bertelsmann AG v. Impala* ruling, the Court eventually accepted to talk the language of economics, by equating collective dominance with the economic notion of “*tacit coordination*” in “*oligopoly*” markets.¹⁰⁰ In so doing, it dispelled all outstanding uncertainties.¹⁰¹ From a scientific consistency standpoint, this is a welcome judgment.

In contrast, several competition law concepts that have voyaged through the decades could benefit from a definitional “*lifting*”. The antiquated notion of a “*dominant position*” belongs to the list of priority candidates.¹⁰² The case-law defines it in terms of “*independence*” from competitors, customers and consumers.¹⁰³ But from an economic standpoint, no firm “*except maybe a monopolist protected by insurmountable barriers to entry and facing a completely inelastic demand*” has such independence.¹⁰⁴ In addition, the requirement of independence is not consistent with the application of Article 102 TFEU to jointly dominant firms in a state of oligopolistic “*interdependence*”.¹⁰⁵

Another client for a definitional revision is the vexing notion of anticompetitive “*object*” under Article 101 TFEU. In a string of judgments, the Court has moved away from characterizing “*object*” as “*intent*”, “*aim*” or “*purpose*”.¹⁰⁶ It has allegedly expanded this

395/96 and C-396/96 P, *Compagnie Maritime Belge transports and others v. Commission, supra*. Finally, a number of plaintiffs have also tried to invoke the concept of collective dominance in order to challenge national laws on the basis of Article 102 TFEU and Article 4(3) TEU. In all those cases, the CJEU dismissed the claims. See CJEU, Case C-96/94, *Centro Servizi Spediporto v. Spedizioni Marittima del Golfo*, ECR [1995] I-2883, §34; CJEU, Case C-140/94, *DIP and others v. Comune di Bassano del Grappa and others*, ECR [1995] I-3257, §27; CJEU, Case C-70/95, *Sodemare and others v. Regione Lombardia*, ECR [1997] I-3395.

¹⁰⁰ See CJEU, Case C-413/06 P, *Bertelsmann AG v. Impala, supra*.

¹⁰¹ A plethora of articles running in all directions has been written on that issue. The author of those lines even devoted a chapter of his Phd to this problem.

¹⁰² Economists favor the more tractable concept of “*substantial market power*” or “*significant market power*”. This notion is actually the one used by the EU Commission in its Guidance Paper on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, pp. 7-20, § 14. It is also widespread in the field of electronic communications regulation.

¹⁰³ See CJEU, Case C-27/76, *United Brands Company et United Brands Continentaal BV contre Commission*, ECR [1978] 207, §65 : “*the dominant position referred to in this article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*”.

¹⁰⁴ See R. O'DONOGHUE and J. PADILLA, *The Law and Economics of Article 82 EC*, Hart Publishing, Oxford, 2006, p.108. See also C. AHLBORN, V. DENICOLÒ, D. GERADIN and J. PADILLA, “DG Comp's Discussion Paper on Article 82: Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries”, Working Paper, March 2006, available at SSRN: <http://ssrn.com/abstract=894466> or <http://dx.doi.org/10.2139/ssrn.894466>.

¹⁰⁵ See CJEU, Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)*, *supra*, §120, talking of interdependence.

¹⁰⁶ Earlier case-law indeed seemed to interpret object as more intent, aims objective, or purpose-related. See for instance, CJEU, Joined cases C-29/83 and 30/83, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission*, ECR [1984] 1679, §26; See also, Joined Cases C-96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, *IAZ International Belgium and Others v Commission*, ECR [1983] 3369, §25.

notion to an indeterminate range of practices whose categorization as a restriction by “*object*” requires an “*individual assessment*” of “*the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part*” (e.g., selective distribution, exchange of information agreements, etc.).¹⁰⁷

This case law has disconcerted many lawyers.¹⁰⁸ Here again, however, economics can soothe lawyers’ concerns. From an economic standpoint, a restriction by object should be defined as conduct, which in the abstract, can be presumed to trigger anticompetitive effects with a high likelihood (for instance, a cartel).¹⁰⁹ Accumulated enforcement experience and economic theory shall provide guidance on which practices can be presumed to hobble competition. In contrast, all practices whose proclivity to trigger anticompetitive effects is indeterminate should fall out of the “*object*” box, and be subject to a concrete, full-blown effects-based assessment (for instance, an exclusivity contract).¹¹⁰

The second level where “*scientific consistency*” is important concerns the *creation* of evidentiary standards. Proposed case-law tests for the prohibition or exoneration of business practices under the competition rules should be consistent with – and possibly draw inspiration from – basic competition economics.¹¹¹

The Court’s case-law offers a wealth of illustrations of this, and it is beyond the ambition of this paper to discuss them all. To talk of prohibition standards first, perhaps one of the best examples of “*scientific consistency*” belongs to the field of predatory pricing.¹¹² In *AKZO*,

¹⁰⁷ See CJEU, Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd*, ECR [2008] I-8637, §16; CJEU, Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission*, *supra*, §58; CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)*, *supra*, §135; CJEU, Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, *supra*, §27.

¹⁰⁸ See D. GERARD, “The effects-based approach under Article 101 TFEU and its paradoxes: modernisation at war with itself?” in J. BOURGEOIS and D. WAELBROECK (ed), *The Effects Based-Approach in EU Competition Law*, Proceedings of the 2011 Annual Conference of the GCLC.

¹⁰⁹ See D. NEVEN, “Whether and how to evaluate effects”, Speech at Crai Conference, Brussels, 9 December 2009, available at http://ec.europa.eu/dgs/competition/economist/crai_122009.pdf (and/or a high magnitude).

¹¹⁰ Put differently, economists view the *summa divisio* object/effect as probabilistic in nature.

¹¹¹ Interestingly, in setting limitative conditions where otherwise lose infringements would easily be established, economics promote legal certainty by limiting arbitrariness.

¹¹² Excessive (or unfair) pricing cases under Article 102 (a) TFEU provide also a good illustration of the use of economics in setting legal standards. Under Article 102(a), it is abusive to “*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*”. This is generally referred to as “*excessive pricing*”. In *United Brands*, the Court proposed to consider a price “*excessive*” when “*it has no reasonable relation to the economic value of the product supplied*”. See CJEU, Case C-27/76, *United Brands Company et United Brands Continentaal BV contre Commission*, ECR [1978] 207, §250-252. Importantly, the ECJ adopted

and later in *Tetra Pak II*, the Court devised legal standards aligned on the so-called “*Areeda-Turner*” price-costs test.¹¹³ It held that prices below average variable costs (“AVC”) must always be considered abusive.¹¹⁴ In more recent times, the Court in *Post Danmark* substituted the AVC benchmark with the average incremental costs (“AIC”) benchmark, presumably to reflect advances in economic theory.¹¹⁵ According to economists, AIC is better than AVC, “because it most accurately reflects the cost of making the predatory sales”.¹¹⁶

Likewise, competition economics have also been influential in relation to exoneration standards. In the 1980s, a controversy arose on whether a “*concerted practice*” under Article 101 TFEU could simply be established on the basis of observed parallel conduct on a relevant market (for instance, price increases). In its seminal judgment in *Woodpulp II*, the Court held that “*parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct*”.¹¹⁷ This statement was based on the findings of economist E. CHAMBERLIN, who had shown in 1929 that in certain oligopolistic markets, conscious parallelism may arise, short of any collusive arrangement amongst oligopolists.¹¹⁸ On this basis, the Court crafted an “*oligopoly defense*”, to shield oligopolists from antitrust exposure when parallel conduct is dictated by structural market features.

Finally, the rule of “*scientific consistency*” can play a useful role with a view to adapting, adjusting or modifying established competition law standards. A great deal of the modern

the following two-steps approach for determining whether a price is excessive. Specifically, one would have to: “[*Examine w*]hether the difference between the costs actually incurred and the price actually charged is excessive”; and; “[*I*]f the answer to this question is in the affirmative, [*determine*] whether a price has been imposed which is either unfair in itself or when compared to competing products”. Whilst some of the words in those statements deserve surely to be criticized for their lack of accuracy (“*excessive*”, “*abstract*”, etc.), the use of a price-costs benchmark to filter out abuse from lawful conduct is in line with mainstream economics.

¹¹³ And went beyond the standards proposed by the Commission.

¹¹⁴ And that prices above average variable costs (but below average total costs) could only be so if an intention to eliminate competition can be shown. Areeda and Turner had proposed to hold predatory prices unlawful below marginal costs, but given that in practice, those prices are difficult to calculate, they offered to substitute average variable costs. See P. AREEDA and D. F. TURNER, “Predatory Pricing and Related Practices under Section 2 of the Sherman Act”, (1975) 88(4) *Harvard Law Review*, pp. 697-733.

¹¹⁵ See CJEU, Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, *supra*, §§37-38. The Court did not change the cost standard on its own motion, but under a suggestion from the referring Court in the pending case, which referred to average incremental costs. Yet, in its judgment, the Court could have instead decided to maintain its former AVC standard.

¹¹⁶ See M. MOTTA, *Competition Policy – Theory and Practice*, Cambridge University Press, 2004, at p.448 (citing to a paper by BOLTON et al.).

¹¹⁷ See CJEU, Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *A Åhlström Osakeyhtiö a. o. v. Commission*, ECR [1993] I-1307, §71.

¹¹⁸ Another reason why *Woodpulp II* is important, is because it is the last case in which the Court hired its own economic expert to assist it. Of course, the parties often commission their own experts. But those are not “*independent*” experts.

competition economics literature indeed seeks to assess whether existing legal standards outlaw welfare-enhancing practices (Type 1 errors, or over fixing), or fail to apprehend welfare-decreasing practices (Type 2 errors, or under fixing). This literature can help the Court refine competition law standards.

So far, the Court has seemed quite attentive to risks of type I and type II errors. The judicial output under Article 102 TFEU provides examples of this. On the one hand, the case-law is marked by the slow generalisation, in relation to all types of potentially abusive practices, of a new cause of defense based on the ability for dominant firms to get off the hook by proving the existence of “*objective economic justifications*”.¹¹⁹ It is today clear that otherwise abusive refusals to supply,¹²⁰ excessive prices,¹²¹ margin squeezes,¹²² price cuts,¹²³ and rebates,¹²⁴ may be redeemed if, on balance, they exert positive effects on welfare.

On the other hand, the Court has revised legal standards that risked exonerating welfare-reducing practices. In *Magill* and *IMS Health*, for instance, it developed an “*exceptional circumstances*” doctrine, to force dominant firms to grant licences on their IP rights, if this raised an obstacle to the apparition of a new product.¹²⁵ In *Compagnie Maritime Belge*, the Court also observed that in “*specific circumstances*” above costs price cuts could be deemed abusive.¹²⁶ In *Tetra Pak II*, the Court noted that price cuts by a non-dominant firm could be tantamount to abuse in “*special circumstances*”.¹²⁷ Finally, in *TeliaSonera*, the Court

¹¹⁹ See CJEU, Case C-95/04 P, *British Airways plc v Commission*, ECR [2007] I-2331. Other concepts, such as “*legitimate commercial interests*” or “*objective necessity*” have also been used in the case-law. Surely, the crux of the issue is how the Commission and inferior courts will apply this exculpatory standard (on this issue, there are “*mixed signals*”, see L. ORTIZ BLANCO and P. IBANEZ, COLOMO, “Evolving priorities and rising standards: Spanish law on abuses of market power in the light of the 2008 Guidance Paper on Article 82 EC”, in LF PACE (ed.), *European Competition Law: The Impact of the Commission’s Guidance on Article 102*, Edward Elgar, 2011, pp.72-73.

¹²⁰ See CJEU, Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE*, ECR [2005], I-4609; CJEU, Joined cases C-6 and 7/73, *ICI S.p.A. and Commercial Solvents Corporation v Commission*, ECR [1974] 223 ; CJEU, Joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* (“*Magill*”), ECR [1995] I-743.

¹²¹ See CJEU, Case C-52/07, *Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa*, ECR [2008] I-9275.

¹²² See CJEU, Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, *supra*.

¹²³ See CJEU, Case C-209/10, *Post Danmark A/S v Konkurrenserådet*, *supra*.

¹²⁴ See CJEU, Case C-95/04 P, *British Airways plc v Commission*, *supra*.

¹²⁵ See CJEU, Joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* (“*Magill*”), *supra*, §50 et CJEU, Case C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, ECR [2004] I-5039, §35.

¹²⁶ See CJEU, C-395/96 and C-396/96 P, *Compagnie Maritime Belge transports and others v. Commission*, *supra*, §§114 and 117.

¹²⁷ See CJEU, Case C-333/94 P, *Tetra Pak International SA v Commission* (“*Tetra Pak II*”), ECR [1996] I-5951, §27 (see, making this point, L. ORTIZ BLANCO and P. IBANEZ COLOMO, *op. cit.*, p.79).

introduced three exceptions to the “*general rule*” that low prices are only abusive if they do not cover the dominant firm’s own costs.¹²⁸

IV. Conclusion

In his memoirs, J. MONNET recalled that on the entire territory of the Community, he had never heard anyone criticize a judgment of the Court.¹²⁹ MONNET, however, had not anticipated that with rising penalties imposed on businesses for competition infringements, the naysayers would become increasingly vocal.

As explained previously, however, many of those who lambast the Court’s competition case-law are biased by self-serving interests. In our opinion, consistency in rule-making provides a better, objective benchmark to assess the Court’s competition output.

In the future, if the Court wants to live up to the remarkable quality of its case law in EU competition cases, it should seek, as a best judicial practice, to craft consistent competition law standards. Of course, our three best practices for consistent rule-making may not always be “*ergonomic*”. They will not always point out to a silver-bullet solution, and will rather leave the Court with a variety of options. Moreover, they may even be inconsistent with one another.

But, it is eventually the Court’s duty to arbitrate such difficult situations. And in this mission, the Court is not alone. After all, the Commission, the parties, the Member States and the national courts all have a voice to express in the rule-making process.¹³⁰

¹²⁸ In three circumstances, the – possibly higher – costs of less efficient competing firms can be used as benchmarks. See CJEU, Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, *supra*, §41: “*reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy*”; and §45: “*That said, it cannot be ruled out that the costs and prices of competitors may be relevant to the examination of the pricing practice at issue in the main proceedings. That might in particular be the case where the cost structure of the dominant undertaking is not precisely identifiable for objective reasons, or where the service supplied to competitors consists in the mere use of an infrastructure the production cost of which has already been written off, so that access to such an infrastructure no longer represents a cost for the dominant undertaking which is economically comparable to the cost which its competitors have to incur to have access to it, or again where the particular market conditions of competition dictate it, by reason, for example, of the fact that the level of the dominant undertaking’s costs is specifically attributable to the competitively advantageous situation in which its dominant position places it*”. This last hypothesis suggests that less efficient competitors might be protected under Article 102 TFEU.

¹²⁹ Author’s translation of « *je n’ai jamais entendu dire qu’un arrêt de la Cour ait été contesté [...] sur l’ensemble du territoire de la Communauté* ». See J. MONNET, *Mémoires*, Fayard, 1998.

¹³⁰ Moreover, the Court may well seek the assistance of experts, including economists, as it did in *Woodpulp*. See CJEU, C-129/85 *Ahlström Osakeyhtiö and Others v. Commission*, [1993] ECR I-1307.

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