

The judgment of the EU General Court in *Intel* and the so-called 'more economic approach' to abuse of dominance

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This paper discusses the judgment of the EU General Court of 12 June 2014 in the Intel case. It argues that the EU case-law on the use of exclusivity rebate systems by undertakings occupying a dominant position is economically sound, and that the criticism directed at this case-law is ill-founded.

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I. INTRODUCTION

A. The *Intel* judgment and the EU case-law on exclusivity rebates by dominant undertakings

In its judgment of 12 June 2014 ("the *Intel* judgment"),¹ the General Court of the European Union dismissed in its entirety the action brought by Intel, the microchip manufacturer, against the decision of the European Commission of 13 May 2009 imposing a fine of €1.06 billion on Intel for having abused its dominant position on the market for x86 central processing units (CPUs), in infringement of Article 102 TFEU ("the Commission's decision").²

According to the Commission's decision, Intel abused its dominant position on the worldwide market for x86 CPUs from October 2002 to October 2007, by implementing a strategy aimed at foreclosing from the market its only serious competitor, Advanced Micro Devices, Inc. (AMD).

The Commission found that Intel was in a dominant position on the ground that it held a market share of roughly 70%, or more, and that it was extremely difficult for competitors to enter the market and to expand as a result of the unrecoverable nature of investments to be made in research and development, intellectual property and production facilities.

¹ Judgment of 12 June 2014 in Case T-286/09 *Intel v European Commission*. An appeal by Intel against this judgment is currently pending before the Court of Justice: Case C-413/14 P *Intel v European Commission*.

² Decision C(2009) 3726 final of 13 May 2009 relating to a procedure under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3/37.990 – Intel).

Given its strong dominant position, Intel was an unavoidable supplier of x86 CPUs since customers had no choice other than to obtain part of their requirements from Intel.

According to the Commission's decision, the abuse was characterised by several measures adopted by Intel vis-à-vis certain of its own customers (computer manufacturers) and the European retailer of microelectronic devices, Media-Saturn.

In particular, Intel granted rebates to four major computer manufacturers (Dell, Lenovo, HP and NEC) on the condition that they purchased from Intel all or almost all of their x86 CPUs. Similarly, Intel awarded payments to Media-Saturn, which were conditioned on its selling exclusively computers containing Intel's x86 CPUs. According to the Commission's decision, those rebates and payments induced the loyalty of the four manufacturers listed above and of Media-Saturn and thus significantly diminished the ability of Intel's competitors to compete on the merits of their x86 CPUs. Intel's anti-competitive conduct thereby resulted in a reduction of consumer choice and in lower incentives to innovate.³

In the *Intel* judgment, the General Court upheld the Commission's decision.

On the basis of a comprehensive review of the contested facts, the General Court found that the rebates granted to Dell, HP, NEC and Lenovo were "exclusivity rebates", that is, "rebates the grant of which is conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position".⁴

The General Court reaffirmed the settled case-law of the EU Courts, going back to the judgment of the Court of Justice of 1979 in *Hoffmann –La Roche*,⁵ according to which, in the absence of an objective justification,⁶ "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 in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate".⁷

The finding that the use of exclusivity rebates by a company in a dominant position constitutes an abuse of dominance within the meaning of Article 102 TFEU does not depend on an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect, because exclusivity rebates by a company in a dominant position are

³ Moreover, Intel awarded three computer manufacturers (HP, Acer and Lenovo) payments which were conditional upon their postponing or cancelling the launch of AMD CPU-based products and/or putting restrictions on the distribution of those products. These practices, described as 'naked restrictions', and their analysis in the *Intel* judgment and in the Commission's decision, are not further considered in this paper.

⁴ Definition in paragraph 76 of the *Intel* judgment, as note 1 above.

⁵ Judgment of 13 February 1979 in Case 85/76 *Hoffmann-La Roche*.

⁶ See below, text accompanying note 14.

⁷ *Intel* judgment, as note 1 above, paragraph 72.

considered by their very nature capable of restricting competition.⁸ There is no need either to show actual effects of the exclusivity rebates on competition or a causal link between such effects and the exclusivity rebates.⁹ Intel's argument that, during the period in which it applied the contested exclusivity rebates, AMD reported uniquely rapid growth rates, was thus rejected as irrelevant.¹⁰ A fortiori, there is no requirement to prove either direct damage to consumers or a causal link between such damage and the exclusivity rebates at issue.¹¹

There was thus also no need for the Commission to conduct an economic analysis of the capability of the rebates to foreclose a hypothetical competitor as efficient as Intel ("as-efficient-competitor test").¹²

The size of the rebate, the short duration of the supply contracts, the smallness of the parts of the market which are concerned by the exclusivity rebates, or the claim that the rebates represented a response to requests and to customers' buying power are not relevant arguments to justify the use of exclusivity rebates by an undertaking in a dominant position.¹³

However, the use of exclusivity rebates by a company in a dominant position does not constitute an abuse within the meaning of Article 102 TFEU if the dominant undertaking can "justify the use [of such rebates], in particular by showing that its conduct is objectively necessary or that the potential foreclosure effect that it brings about may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers".¹⁴ Intel did however not put forward any argument in that regard.¹⁵

Finally, the General Court, exercising its unlimited jurisdiction, concluded that the fine imposed on Intel was appropriate.¹⁶

⁸ *Intel* judgment, as note 1 above, paragraphs 80-93.

⁹ *Intel* judgment, as note 1 above, paragraphs 102-104.

¹⁰ *Intel* judgment, as note 1 above, paragraphs 185-186.

¹¹ *Intel* judgment, as note 1 above, paragraph 105.

¹² *Intel* judgment, as note 1 above, paragraph 140-166; see text accompanying notes 22 to 32 below.

¹³ *Intel* judgment, as note 1 above, paragraphs 107-139.

¹⁴ *Intel* judgment, as note 1 above, paragraph 94.

¹⁵ *Intel* judgment, as note 1 above, paragraph 94.

¹⁶ *Intel* judgment, as note 1 above, paragraphs 1639-1647.

B. The so-called 'more economic approach'

The *Intel* case had been considered a test case for the so-called 'more economic approach' or 'effects-based approach' to abuse of dominance.¹⁷

The Commission adopted its decision in the *Intel* case shortly after it had published, at the end of 2008/beginning of 2009, its Guidance on its enforcement priorities in applying Article 102 TFEU to exclusionary abusive conduct ("the Priorities Paper").¹⁸ This Priorities Paper was the end-product of a review process announced by the then Competition Commissioner, Neelie Kroes, in a speech in New York in 2005,¹⁹ and was presented as a 'more economic' and 'effects-based' approach to Article 102 TFEU.²⁰

According to the Priorities Paper, the Commission will normally only intervene against exclusionary conduct by dominant undertakings if, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to foreclosure leading to harm to consumers.²¹

¹⁷ See, for instance, H. Zenger, 'Intel and the future of Article 102 (CRA Competition Memo, 17 June 2014), at 1, and 'Rebates and Competition Law: An Overview of EU and National Law', in F. Jenny (ed), *EU Competition Case Law Digest* (Institute of Competition Law, 2014), available at <http://ssrn.com/abstract=2429138>.

¹⁸ Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C45/7. Article 82 of the EC Treaty was the then name of what is now Article 102 TFEU. While the publication of the Priorities Paper in the Official Journal took place only on 24 February 2009, the Commission had already published the Priorities Paper on its website on 3 December 2008; see press release IP/08/1877, 'Antitrust: consumer welfare at heart of Commission fight against abuses by dominant undertakings' (3 December 2008).

¹⁹ Neelie Kroes, 'Preliminary Thoughts on Policy Review of Article 82', Speech at the Fordham Corporate Law Institute, New York, 23 September 2005 (SPEECH/05/537); the speech was followed by a public consultation on a DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse (December 2005); see press release IP/05/1626, 'Competition: Commission publishes discussion paper on abuse of dominance' (19 December 2005); the speech had been preceded by a report commissioned from a group of economists: Report by the EAGCP, 'An economic approach to Article 82' (July 2005); see also D.A. Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford University Press, 2011) at 205, and G. Monti, *EC Competition Law* (Cambridge University Press, 2007) at 393.

²⁰ See also, apart from the documents mentioned in the two immediately preceding footnotes, the commentaries by the then Director-General and the then Director for Policy of the European Commission's Directorate-General for Competition: P. Lowe, 'The European Commission Formulates its Enforcement priorities as Regards Exclusionary Conduct by Dominant Undertakings', GCP, www.globalcompetitionpolicy.org (February 2009), and C. Esteva Mosso, 'The More Economic Approach Paradigm – an Effects-Based Approach to EU Competition Policy' in J. Basedow and W. Wurmnest (eds), *Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid* (Kluwer Law International, 2011), 11.

²¹ Priorities Paper, as note 18 above, paragraphs 19 and 20.

With regard to what the Priorities Paper calls "price-based exclusionary conduct", a category that appears to include exclusivity rebates,²² the Commission "will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking" (as-efficient-competitor test).²³ "In order to determine whether even a hypothetical competitor as efficient as the dominant undertaking would be likely to be foreclosed by the conduct in question, the Commission will examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below-cost pricing".²⁴ "If the data clearly suggest that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will, in principle, infer that the dominant undertaking's pricing conduct is not likely to have an adverse impact on effective competition, and will therefore be unlikely to intervene".²⁵

The Priorities Paper clearly states that it is not meant to provide a test for assessing whether or not exclusionary conduct violates Article 102 TFEU (legality test), but only a test to be used by the Commission to determine, in the context of its priority setting,²⁶ whether or not a case would be a priority case (prioritisation test).²⁷

Nevertheless, many commentators had expressed the hope that the test set out in the Priorities Paper could serve as inspiration for the EU Courts to change the case-law.²⁸

In its *Intel* decision, the Commission explained that, because the Priorities Paper sets out the Commission's priorities for the future, it did not apply to the *Intel* case, in which proceedings had already been initiated before the adoption of the Priorities Paper.²⁹ Nevertheless the Commission took the view that its decision was "in line with the orientations set out in the Priorities Paper",³⁰ and it included in its decision, in addition to the legal analysis applying the case-law of the EU Courts, a 150-pages long "as efficient competitor analysis",³¹ leading to the conclusion "that the Intel payments are capable of

²² Priorities Paper, as note 18 above, paragraph 41.

²³ Priorities Paper, as note 18 above, paragraph 23.

²⁴ Priorities Paper, as note 18 above, paragraph 25.

²⁵ Priorities Paper, as note 18 above, paragraph 27.

²⁶ See my paper 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement' (2011) 34 *World Competition* 353.

²⁷ Priorities Paper, as note 18 above, paragraphs 2 and 3.

²⁸ See, for instance, references in note 17 above and in note 34 below, and B. Allan, 'Rule-making in the context of Article 102 TFEU' (2014) *Competition Law Journal* 7 at 20-21.

²⁹ *Intel* decision, as note 2 above, paragraph 916.

³⁰ *Intel* decision, as note 2 above, paragraph 916.

³¹ *Intel* decision, as note 2 above, paragraphs 1002 to 1575.

having or are likely to have anticompetitive foreclosure effects, since even an as efficient competitor would be prevented from supplying [Dell, HP, NEC and Lenovo]'s x86 CPU requirements or ensuring that [Media-Saturn] sells PCs based on its x86 CPUs".³²

Not surprisingly then, the fact that the General Court in the *Intel* judgment confirmed the established case-law, and thus considered the as-efficient-competitor test irrelevant,³³ has been a major disappointment for those who had hoped that the EU Courts would change their case-law and adopt the test set out in the Priorities Paper as a new test for assessing the legality of exclusionary conduct under Article 102 TFEU.³⁴

C. A note on terminology

In this paper, when I refer to the "proponents of the so-called 'more economic approach'", I mean those commentators who want the EU Courts to change the case-law on abuse of dominance in general and the use of exclusivity rebates by dominant undertakings in particular and to adopt the test set out in the Priorities Paper³⁵ as a new test for assessing the legality of exclusivity rebates under Article 102 TFEU. Equally, when I refer to "the so-called 'more economic approach'", I mean the alternative legality test advocated by those commentators.

As explained above,³⁶ the Priorities Paper itself clearly states that the test set out in it is not intended to constitute a statement of the law (legality test), but is merely to be used for prioritisation purposes (prioritisation test).

³² *Intel* decision, as note 2 above, paragraph 1575.

³³ See above, text accompanying notes 6 to 12.

³⁴ See, for instance, P. Ibáñez Colomo, 'Intel v Commission and the problem with wrong economic assumptions', Chillin' Competition blog, www.chillingcompetition.com (16 June 2014), and J.S. Venit, 'Case T-286/09 *Intel v Commission* – The Judgment of the General Court: All Steps Backward and No Steps Forward' (August 2014) *European Competition Journal* 203.

³⁵ As note 18 above.

³⁶ Text accompanying notes 26 and 27.

II. THE PROPER USE OF ECONOMICS IN THE INTERPRETATION OF ARTICLE 102 TFEU

A. Lawyers *versus* economists and quantity *versus* quality of economics

Proponents of the so-called 'more economic approach' - a self-ascribed label – tend to present the choice between the EU case-law and the alternative they advocate, as a choice between, on the one hand, an approach that is not or is less based on economics and, on the other hand, an approach that is or is more based on economics.

Viewed from this angle, the suspicion easily arises that those who defend the EU case-law, as I will be doing in this paper, must be lawyers that are economically illiterate and who may be defending their turf against economists or economically literate lawyers.

To dispel any thought in that direction which the reader may have, I would like to declare at the outset that I have been educated both as an economist and as a lawyer, and that I personally tend to agree with Justice Brandeis's statement that "a lawyer who has not studied economics and sociology is very apt to become a public enemy".³⁷

If Brandeis's statement rings true for the law in general, the importance of economic thinking is all the more obvious for competition law.

Indeed, the relevance of economics for competition law is so obvious that it is hard to believe that ever an interpretation or application of competition law could arise that was not based on economic thinking.

The authors of the 1957 Treaty establishing the European Economic Community (*emphasis added*), when writing the then Article 86 EEC, later renamed Article 82 EC and now Article 102 TFEU, must surely have had economic thoughts.³⁸ Similarly, the officials at the European Commission and the judges at the Court of Justice who proposed and created the case-law in the *Hoffmann-La Roche* case³⁹ and other early cases, and the academic writers who influenced them, must have had economic thoughts. Indeed, then as now, competition law very much attracted the interest of economists and economically literate lawyers.⁴⁰ No doubt the EU case-law, as confirmed in the *Intel* judgment, thus also reflects economic thinking.⁴¹

³⁷ L.D. Brandeis, 'The Living Law' (1915-1916) 10 *Illinois Law Review* 461. Arguably psychology, history and moral philosophy should be added to the list.

³⁸ See the literature referred to in note 40 below.

³⁹ See note 5 above.

⁴⁰ See, *inter alia*, K.K. Patel and H. Schweitzer (eds), *The Historical Foundations of EU Competition Law* (Oxford, 2013); H. Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC', in C.D. Ehlermann and M. Marquis (eds), *European Competition*

As to the quantitative comparison suggested by the 'more economic approach' label, it would also appear obvious that the proper use of economics in the interpretation of Article 102 TFEU is not a matter of quantity,⁴² but a matter of quality, i.e. whether the economic thinking is sound and fit for the purpose for which it is used.⁴³

B. Different economic theories of competition

However much some economists may try to pretend otherwise by wrapping their thoughts in mathematical formulas,⁴⁴ economics is not an exact science, like physics or chemistry, but a social science, like sociology, history or moral philosophy.

Like the other social sciences, economics accommodates a variety of possible approaches and schools of thought, which offer different perspectives on the object of study and which, because of the social nature of the object of study, are inevitably always value

Law Annual 2007: A Reformed Approach to Article 82 EC (Hart, 2008) 119; P. Behrens, 'The "Consumer Choice" Paradigm in German Ordoliberalism and its Impact upon EU Competition Law', Europa-Kolleg Hamburg Institute for European Integration, Discussion Paper No 1/14 (March 2014); E.-J. Mestmäcker, 'The development of German and European competition law with special reference to the EU Commission's Article 82 Guidance of 2008', in L.F. Pace (ed), *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar, 2011) 25.

⁴¹ On the general idea that the law embodies the experience and wisdom of past generations, see F. Hayek, *Law, Legislation and Liberty* (Routledge, 1982), Volume 1, 'Rules and Order', and O.W. Holmes, *The Common Law* (Little Brown, 1881), at 1.

⁴² As explained below (text accompanying notes 147 and 148), there is one way in which the quantitative comparison does make sense, namely the impact on the demand for the services of the economics profession in the application of Article 102 TFEU. In this respect, however, less is better than more, because, from the perspective of the common good, lower enforcement costs are preferable; see further text accompanying notes 133 to 138 below.

⁴³ See below, text accompanying notes 44 to 140.

⁴⁴ Many economists and philosophers of science have criticised the immoderate use of mathematics in economics as creating an appearance of scientificity while covering a vacuity of thought and unacknowledged value judgments; see, among others, T. Piketty, *Capital in the Twenty-First Century* (Harvard, 2014) at 32 and 574; R.H. Nelson, *Economics as Religion: From Samuelson to Chicago and Beyond* (Penn State Press, 2001) at 228-229; D. N. McCloskey, *The Rhetoric of Economics* (University of Wisconsin Press, 1985); T. Lawson, *Economics and Reality* (Routledge, 1997) and *Reorienting Economics* (Routledge, 2003); V. Bigo, as note 61 below; R. Skidelsky, *John Maynard Keynes 1883-1946 Economist, Philosopher, Statesman* (MacMillan, 2003) at 287; R. Skidelsky, *Keynes – The Return of the Master* (Allen Lane, 2009) at 152; see also Ronald Coase, winner of 1991 Nobel Prize in Economics: "In my youth it was said that what was too silly to be said may be sung. In modern economics it may be put in mathematics" (R.H. Coase, *The Firm, the Market and the Law* (University of Chicago Press, 1988), at 185), and D.H. Ginsburg and E.M. Fraser, 'The Role of Economic Analysis in Competition Law' (2010), available at <http://ssrn.com/abstract=1610189>, at 28, reporting that "during his long tenure as the editor of *The Journal of Law and Economics* (1964-82), [Ronald Coase] would not publish articles that relied upon mathematical notation (except, perhaps, in an appendix) on the ground that an author who could not express himself in English probably did not know what he was talking about".

laden.⁴⁵ The adherence by an economist to one or another approach or school, or the relative popularity of one or another approach or school in a certain group of economists or at a certain point in time is not the result of a process of falsification, the other approaches having been proved wrong. It rather reflects a preference for a way of looking at things that is found congenial or instrumentally useful for some task at hand, or, when the approach becomes conventional wisdom, loyalty to the tribe, possibly reinforced through peer review and other mechanisms of professional discipline.⁴⁶

The proponents of the so-called 'more economic approach' to abuse of dominance rely on one type of economic theory or approach to competition and competition law, namely the (post-)Chicago (consumer) welfarist approach.⁴⁷

A quick look at some writings of Nobel Prize winning economists shows that this approach is far from inevitable:

In his famous 1968 lecture 'Competition as a Discovery Procedure', Friedrich Hayek, joint recipient of the 1974 Nobel Prize in Economics, proposed "to consider competition as a procedure for the discovery of such facts as, without resort to it, would not be known by anyone, or at least would not be utilised".⁴⁸ "If anyone really knew all about what economic theory calls the *data*, competition would indeed be a very wasteful method of securing adjustment to these facts".⁴⁹

One consequence of this is that "competition is valuable *only* because, and so far as, its results are unpredictable and on the whole different from those which anyone has, or could have, deliberately aimed at".⁵⁰

Closely connected with this is a methodological consequence: "The necessary consequence of the reason why we use competition is that, *in those cases in which it is*

⁴⁵ See H.-J. Chang, *Economics: The User's Guide* (Pelican, 2014), at 3-5, 111-164 and 451-460; R.E. Backhouse, *The Puzzle of Modern Economics: Science or Ideology?* (Cambridge University Press, 2010); J. Schlefer, *The Assumptions Economists Make* (Belknap Harvard, 2012); and E. Fox, in C.D. Ehlermann and L.L. Laudati, *European Competition Law Annual 1997: The Objectives of Competition Policy* (Hart, 1998), Panel Discussion on Competition Policy Objectives, at 11-12.

⁴⁶ On how economists choose the theories they espouse, see R.H. Coase, *Essays on Economics and Economists* (University of Chicago Press, 1994), at 15-33; on conventional wisdom, see J.K. Galbraith, *The Affluent Society* (40th Anniversary Edition; Houghton Mifflin, 1998), Chapter 2; on peer review, see B.S. Frey, 'Publishing as prostitution? – Choosing between one's own ideas and academic success' (2003) 116 *Public Choice* 205 and F.S. Lee, X. Pham and G. Gu, 'The UK Research Assessment Exercise and the narrowing of UK economics' (2013) 37 *Cambridge Journal of Economics* 693.

⁴⁷ See note 72 below.

⁴⁸ F.A. Hayek, 'Competition as a Discovery Procedure', in *New Studies in Philosophy, Politics, Economics and the History of Ideas* (University of Chicago Press, 1978), 179 at 179; see also F.A. Hayek, 'The Use of Knowledge in Society' (1945) 35 *American Economic Review* 519.

⁴⁹ 'Competition as a Discovery Procedure', as note 48 above, at 179.

⁵⁰ 'Competition as a Discovery Procedure', as note 48 above, at 180.

interesting, the validity of the theory can never be tested empirically. We can test it on conceptual models, and we might conceivably test it in artificially created real situations, where the facts which competition is intended to discover are already known to the observer. But in such cases it is of no practical value, so that to carry out the experiment would hardly be worth the expense. If we do not know the facts we hope to discover by means of competition, we can never ascertain how effective it has been in discovering those facts that might be discovered. All we can hope to find out is that, on the whole, societies which rely for this purpose on competition have achieved their aims more successfully than others. This is a conclusion which the history of civilisation seems eminently to have confirmed".⁵¹

Hayek's insight questions at the most fundamental level the wisdom of the (post-)Chicago (consumer) welfarist approach, which values the competitive process only because and to the extent that it delivers positive results in terms of consumer welfare and which would make the applicability of the competition rules dependent on a case-by-case analysis of the effects of the conduct on consumer welfare.⁵²

In his 1993 paper 'Markets and Freedoms: Achievements and Limitations of the Market Mechanism in Promoting Individual Freedoms', Amartya Sen, recipient of the 1998 Nobel Prize in Economics, "reformulate[d] the problem of evaluation of the competitive market mechanism in terms of its accomplishments in promoting individual freedoms, as opposed to the conventional framework of welfarist assessment".⁵³ As Sen points out, many economists have examined the competitive market mechanism from the perspective of individual freedom, including Adam Smith and many later thinkers.⁵⁴ Freedom has at least two valuable aspects, which Sen calls 'the opportunity aspect' and 'the process aspect'.⁵⁵ The opportunity aspect includes not only the value of maximal achievement, but also the range of choice.⁵⁶ The process aspect includes decisional autonomy of the choices to be made and immunity from interference by others.⁵⁷

Viewed in this light, it becomes clear that the (post-)Chicago (consumer) welfarist approach to competition takes a unduly narrow view of the benefits of undistorted competition, by considering only the value of maximal achievement (consumer welfare or efficiency), while neglecting the process values of undistorted competition (including

⁵¹ 'Competition as a Discovery Procedure', as note 48 above, at 180.

⁵² See below, text accompanying notes 77 and 140; see also H. Schweitzer, 'The Role of Consumer Welfare in EU Competition Law', in J. Drexl and R.M. Hilty (eds), *Technology and Competition: Contributions in Honour of Hanns Ullrich* (Larcier, 2009), 511 at 520-521.

⁵³ A. Sen, 'Markets and Freedoms: Achievements and Limitations of the Market Mechanism in Promoting Individual Freedoms' (1993) 45 *Oxford Economic Papers* 519, at 536.

⁵⁴ *Idem*, at 521-523.

⁵⁵ *Idem*, at 522.

⁵⁶ *Idem*, at 522-523.

⁵⁷ *Idem*, at 523-525.

the right to compete on the merits, and equality of opportunity between economic operators).⁵⁸

C. The need for interpretation of Article 102 TFEU and the limits to such interpretation

The text of Article 102 TFEU does not provide an immediate answer to the question whether or to what extent or under what conditions or circumstances the use of exclusivity rebate systems by undertakings in a dominant position constitutes a prohibited abuse.

Indeed, the prohibition of abuse of a dominant position laid down in Article 102 TFEU is, to a significant extent, vague or open-textured,⁵⁹ and thus requires interpretation so as to specify its precise legal content to be applied in specific cases.⁶⁰

This raises two questions: Whose task is it to provide the authoritative interpretation of Article 102 TFEU? And what are the limits to the possible interpretations that can be chosen?

One could imagine societies or legal systems where the task of providing the authoritative interpretation of the law is entrusted to some group or profession of religious or other scholars or wise men,⁶¹ to whose dicta law enforcement officials and judges must defer.

⁵⁸ See below, text accompanying notes 80 to 83; see also A. Edlin and J. Farrell, 'Freedom to Trade and the Competitive Process', forthcoming in R.D. Blair and D.D. Sokol, *Oxford Handbook of International Antitrust Economics* (Oxford University Press, 2014).

While the (post-)Chicago (consumer) welfarist approach does not necessarily exclude consideration of the range of choice (variety and consumer choice), in practice this aspect is also often neglected in favour of an exclusive focus on price and cost; see for instance below, text accompanying note 129, as to the use of the as-efficient-competitor test.

⁵⁹ See generally, on vagueness in the law, H.L.A. Hart, *The Concept of Law* (2nd edition, Oxford University Press, 1994), Chapter VII; T.A.O. Endicott, *Vagueness in Law* (Oxford University Press, 2000); V.K. Bhatia, J. Engberg, M. Gotti and D. Heller (eds), *Vagueness in Normative Texts* (Peter Lang, 2005); V. Fon and F. Parisi, 'On the optimal specificity of legal rules' (2007) 3 *Journal of Institutional Economics* 147; and F. Parisi and V. Fon, *The Economics of Lawmaking* (Oxford University Press, 2009), Part I, Chapter 2.

⁶⁰ See also Judgment of the General Court of 27 June 2012 in Case T-167/08 *Microsoft*, paragraph 91.

⁶¹ On the gender of economics, see M.A. Ferber, 'The Study of Economics: A Feminist Critique', *The American Economic Review*, Vol. 85, No. 2, Papers and Proceedings of the Hundredth and Seventh Annual Meeting of the American Economic Association Washington, DC, January 6-8, 1995 (May, 1995), 357, and V. Bigo, 'Explaining Modern Economics (as a Microcosm of Society)' (2008) 32 *Cambridge Journal of Economics* 527; on the link between economics and religion, see R.H. Nelson, *Economics as Religion: From Samuelson to Chicago and Beyond* (Penn State Press, 2001).

In the EU legal system, which is founded on the rule of law,⁶² it is the task of the Court of Justice to provide the authoritative interpretation of Article 102 TFEU.⁶³

The European Commission has the task to ensure the application of the Treaties and to oversee the application of Union law, but it does so under the control of the Court of Justice,⁶⁴ whose interpretation of Article 102 TFEU is binding upon the Commission.

As Advocate General Kokott has pointed out, "the Commission [has] to act within the framework prescribed for it by [Article 102 TFEU] as interpreted by the Court of Justice".⁶⁵

This does not mean that the European Commission cannot propose interpretations of Article 102 TFEU to the Court.⁶⁶ Indeed, many of the judgments in which the EU Courts have clarified the interpretation of Article 102 TFEU, such as the *Hoffmann–La Roche* judgment,⁶⁷ concerned appeals against Commission decisions, and the Commission may thus have been more or less successful in convincing the Courts to adopt the interpretation which it proposed. Similarly, in cases arising through a preliminary reference from a national court, the Commission, which makes systematic use of its right to submit observations to the Court of Justice,⁶⁸ may be more or less successful in convincing the Court to adopt the interpretation of Article 102 TFEU which it proposes.

Finally, the European Commission has a broad discretion to select the cases that it investigates and in which it continues the proceedings up to the stage of a final decision.⁶⁹ However, according to the case-law of the Court of Justice, "when deciding the order of priority for dealing with the complaints brought before it, the Commission may not regard as excluded in principle from its purview certain situations which come under the task entrusted to it by the Treaty".⁷⁰

⁶² Article 2 TEU.

⁶³ Article 19(1) TEU. The Council also has some legislative powers under Article 103 TFEU.

⁶⁴ Article 17(1) TEU.

⁶⁵ Opinions of Advocate General Kokott of 23 February 2006 in Case C-95/04 P *British Airways*, paragraph 28, and of 14 April 2011 in Case C-109/10 P *Solvay*, paragraph 21.

⁶⁶ See also B. Allan, 'Rule-Making in the Context of Article 102 TFEU' (2014) *Competition Law Journal* 7 at 14-15: "the rule-making process may be viewed as, primarily, a dialogue in which the Commission proposes and the Court ultimately disposes".

⁶⁷ See note 5 above.

⁶⁸ Article 23 of the Statute of the Court of Justice, Protocol No 3 annexed to the Lisbon Treaty.

⁶⁹ For a detailed analysis, see my paper 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement' (2011) 34 *World Competition* 353.

⁷⁰ Judgment of the Court of Justice of 4 March 1999 in Case C-119/97 P *Ufex*, paragraphs 92 and 93; see also Judgment of the General Court of 8 July 2008 in Case T-99/04 *Treuhand*, paragraph 163; D.J. Galligan, *Discretionary Powers – A Legal Study of Official Discretion* (Oxford University Press, 1986), at 281-284; and F.W. Bulst, 'Mehr Licht – Zur Anwendung des Art. 82 EG auf

As to the second question, concerning the limits to the possible interpretations of Article 102 TFEU that can be adopted, the Court of Justice does not have complete freedom to adopt any interpretation of Article 102 TFEU, nor the European Commission to propose any interpretation. Indeed, even if the prohibition of abuse of a dominant position laid down in Article 102 TFEU is to a significant extent vague, and thus leaves scope for different interpretations, Article 102 TFEU and the EU Treaties as a whole contain a number of rules, principles and statements of purpose that are binding upon the Court of Justice and the European Commission,⁷¹ and that could only be altered by changing the Treaties.

Any proposed interpretation of Article 102 TFEU that is not compatible with these inherent features of Article 102 TFEU can thus not be adopted, unless the EU Treaties were to be changed. Two of these inherent features of Article 102 TFEU are of particular relevance for the discussion at hand: the objective of Article 102 TFEU, and the way in which Article 102 TFEU must be applied and enforced.

D. The objective of Article 102 TFEU

For several decades there has been a rich debate in the US American literature on the objective or objectives of US antitrust law, and this debate has had an impact on the interpretation of the Sherman Act by the US Courts and by the Department of Justice and the Federal Trade Commission.⁷² Indeed, the Sherman Act does not specify the objective of the antitrust prohibitions which it contains. The US Supreme Court can thus ultimately choose this objective on the basis of its own policy preferences.

The situation in the EU is radically different: The EU Treaties clearly specify the objective of the EU competition rules. Hence there is no room for the Court of Justice or the European Commission (or the competition authorities and courts of the EU Member States, when applying EU competition law,⁷³ or the Council, when exercising its legislative powers under Article 103 TFEU) to make a different choice.

Behinderungsmissbräuche' (2009) 73 *Rabel Journal of Comparative and International Private Law* 703 at 716-718.

⁷¹ As well as on the Council, when exercising its legislative powers under Article 103 TFEU.

⁷² See B. Orbach, 'How Antitrust Lost Its Goal' (2013) 81 *Fordham Law Review* 2253, and M.E. Stucke, 'Reconsidering Antitrust Goals' (2012) 53 *Boston College Law Review* 551.

⁷³ See Article 3 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1. Statistically, most of the application of Article 102 TFEU takes place at the level of the EU Member States; see Commission Staff Working Paper 'Ten Years of Antitrust Enforcement under Regulation 1/2003' (SWD(2014)230/2, 9 July 2014) and my paper 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) 4 *Journal of European Competition Law & Practice* 293.

Indeed, it is clear from Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon,⁷⁴ that the objective of Article 102 TFEU (and of the other EU competition rules) is **a system of undistorted competition, as part of the internal market established by the EU.**⁷⁵

From an economic perspective, it makes a lot of sense to have a system of undistorted competition as the objective of Article 102 TFEU and the other competition rules. Indeed, the focus on the system of competition rather than on this or that specific effect of competition reflects Friedrich Hayek's fundamental insight, presented above,⁷⁶ that the value of competition lies precisely in that it allows results to be obtained that could not have been aimed at by a central planner or through a case-by-case economic analysis by a competition authority.⁷⁷

In any event, a system of undistorted competition as part of the internal market is the objective of Article 102 TFEU as determined by the EU Treaties. Whatever views this or that economist or other person or many or most of them may have as to what the objective of Article 102 TFEU should be⁷⁸ is irrelevant, unless a debate were to be opened on changing the EU Treaties.

Article 102 TFEU and the other EU competition rules thus protect the competitive process as such.⁷⁹ In doing so, the EU competition rules no doubt have positive effects on consumer welfare and on efficiency, but the EU Treaties do not allow these effects to be substituted for the objective of a system of undistorted competition, to the exclusion of the other benefits of undistorted competition (recognised by many economists, from Adam Smith to Amartya Sen, as mentioned above⁸⁰), such as variety and consumer choice, the right to compete on the merits, and equality of opportunity between economic operators.⁸¹

⁷⁴ [2010] OJ C 83/309.

⁷⁵ See Judgments of the Court of Justice of 17 February 2011 in Case C-52/09 *TeliaSonera*, paragraphs 20-22, and of 17 November 2011 in Case C-496/09 *Commission v Italy*, paragraph 60; see also Article 3(3) TEU and Articles 119 and 120 TFEU. Before the Lisbon Treaty, the same was clear from initially Article 3(g) EEC, later Article 3(1)(g) EC.

⁷⁶ Text accompanying notes 48 to 52.

⁷⁷ See also text accompanying note 140 below.

⁷⁸ See for instance J. Padilla, in C.D. Ehlermann and M. Marquis, *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart, 2008), at 7, stating that the "Brussels consensus" is that the goal of Article 102 TFEU should be aggregate consumer welfare.

⁷⁹ See Opinion of Advocate General Kokott of 23 February 2006 in Case C-95/04 P *British Airways*, paragraphs 68-69, and Judgments of the Court of Justice of 15 March 2007 in Case C-95/04 P *British Airways*, paragraphs 106-107, and of 6 October 2009 in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline*, paragraph 63.

⁸⁰ Text accompanying notes 53 to 58.

⁸¹ See Order of the President of the Court of Justice of 11 April 2002 in Case C-481/01 P(R), *NDC Health v Commission*, paragraph 84.

Indeed, the right to compete on the merits and equality of opportunity between economic operators are particularly important aspects of the objective of a system of undistorted competition as part of the internal market, because they reflect the fundamental idea that economic operators from any EU Member State should have equal and undistorted access to the market throughout the EU internal market.⁸²

A right to free competition also appears to be included in Article 16 of the Charter of Fundamental Rights of the EU.⁸³

Any economic approach that is based on the assumption that the objective to be pursued is something other than a system of undistorted competition as part of the internal market is not fit for the purpose of interpreting Article 102 TFEU.

E. The way in which Article 102 TFEU must be applied and enforced

According to Article 102 TFEU and Article 1(3) of Regulation 1/2003, the abuse of a dominant position within the meaning of Article 102 TFEU is prohibited, no prior decision to that effect being required.

Undertakings occupying a dominant position must themselves assess, with the help of their counsel, whether their envisaged practices violate Article 102 TFEU.⁸⁴

Article 102 TFEU creates direct rights for any person harmed by an abuse of a dominant position, for instance a customer or a competitor, which can be directly invoked in litigation in national courts, either in defence against a contractual claim or an intellectual property infringement claim by the dominant undertaking or offensively to obtain an injunction stopping or preventing the abuse or to obtain compensation for harm that has already occurred.⁸⁵

⁸² See Intergovernmental Committee of the Messina Conference, Report by the Heads of Delegation to the Foreign Ministers ("Spaak Report"), 21 April 1956, Title II Chapter 1 – Competition Rules; H. Schweitzer, as note 52 above; and E.-J. Mestmäcker, as note 40 above, at 27 and 45.

⁸³ See Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/17, at 23; and P. Oliver, 'What Purpose Does Article 16 of the Charter Serve?', in U. Bernitz, X. Groussot and F. Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International, 2013), 281 at 286-287.

⁸⁴ On self-assessment, see my book *Principles of European Antitrust Enforcement* (Hart, 2005), Section 1.2.3.

⁸⁵ Judgment of the Court of Justice of 30 January 1974 in Case 127/73, *BRT v SABAM*, paragraph 16, and Article 6 and recital 7 of Regulation 1/2003, as note 73 above. Statistically, actions for injunctive relief are the most important form of private enforcement of Article 102 TFEU; see S. Peyer, 'Myths and Untold Stories – Private Antitrust Enforcement in Germany', University of East Anglia Centre for Competition Policy Working Paper 10-12 (July 2010) and B. Rodger (ed), *Competition Law: Comparative Private Enforcement and Collective Redress across the EU* (Kluwer Law International, 2014), Part I, Chapter 4.

Article 103(2)(a) TFEU and Articles 5 and 23(2)(a) of Regulation 1/2003 provide that compliance with the prohibition laid down in Article 102 TFEU must be ensured in particular through fines, to be imposed by the competition authorities of the EU Member States and by the European Commission.

This enforcement system for Article 102 TFEU is radically different from, for instance, the system of prior notification and authorisation under the EU Merger Regulation.⁸⁶

Any proposed interpretation of Article 102 TFEU must be compatible with the way in which Article 102 TFEU has to be applied and enforced.

The requirement in Article 103(2)(a) TFEU that compliance with Article 102 TFEU must be enforced through the imposition of fines, combined with the principle of *nullum crimen sine lege*, enshrined in Article 49 of the Charter of Fundamental Rights of the EU and Article 7 of the European Convention on Human Rights, implies that Article 102 TFEU must be interpreted in a way which allows dominant undertakings contemplating a business practice to assess, in advance, at reasonable cost and with reasonable certainty, whether or not the envisaged practice violates Article 102 TFEU.⁸⁷

Similarly, the principle that Article 102 TFEU creates direct rights that victims can invoke before the national courts implies that Article 102 TFEU must not be interpreted in ways that make it unnecessarily difficult for customers, competitors or other market participants confronted with a practice implemented or announced by a dominant undertaking to assert their rights under Article 102 TFEU.⁸⁸

Any economic approach that does not allow for enforcement through fines or that unnecessarily creates obstacles for private enforcement is not fit for the purpose of interpreting Article 102 TFEU.

⁸⁶ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] OJ L 24/1. For an economic analysis of why different enforcement systems are appropriate for Articles 102 and 101 TFEU, on the one hand, and for merger control, on the other hand, see my paper 'Notification, Clearance and Exemption in EC Competition Law: An Economic Analysis' (1999) 24 *European Law Review* 139, and my book *The Optimal Enforcement of EC Antitrust Law – Essays in Law and Economics* (Kluwer Law International, 2002), Chapters 5 and 6.

⁸⁷ See also Judgment of the Court of Justice of 14 October 2010 in Case C-280/08 P *Deutsche Telekom*, paragraph 202; L. Ortiz Blanco and A. Lamadrid de Pablo, 'Expert Economic Evidence and Effects-Based Assessments in Competition Law Cases', in M. Merola and J. Drenne, *The Role of the Court of Justice of the European Union in Competition Law Cases* (Bruylant, 2012), 305; L. Ortiz Blanco and P. Ibáñez 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 L.F. Pace (ed.), *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar, 2011), 63 at 77-78; B. Allan, as note 66 above, at 8-9; B. Vesterdorf, 'Article 102 TFEU and sanctions: appropriate when?' (2011) 32 *European Competition Law Review* 573; Editorial Comments, 'Towards a more judicial approach? EU antitrust fines under the scrutiny of fundamental rights' (2011) 48 *Common Market Law Review* 1405 at 1415; and my paper 'The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker' (2014) 37 *World Competition* 5 at 6-11.

⁸⁸ See also Opinion of Advocate-General Kokott of 23 February 2006 in Case C-95/04 P *British Airways*, paragraph 70; see further text accompanying notes 133 and 138 below.

F. The need to integrate economic and legal analysis

As argued above,⁸⁹ the interpretation of Article 102 TFEU necessarily requires economic thinking. As set out above,⁹⁰ economics, as a social science, accommodates a variety of possible approaches and schools of thought, which are inevitably always value-laden. As also explained above,⁹¹ while Article 102 TFEU is to some extent vague or open-ended, and thus leaves room for several possible interpretations, the range of admissible interpretations is not unlimited, because the EU Treaties contain a number of rules, principles and statements of purpose that cannot be deviated from, unless the Treaties were to be changed. Moreover, while the European Commission may propose interpretations of Article 102 TFEU, it is ultimately for the Court of Justice to determine which interpretation is to be retained.

An important implication of all this is that it does not make sense to separate economic analysis and legal analysis in the interpretation of Article 102 TFEU. Both intellectually and institutionally, economic and legal analysis should be integrated.⁹²

Legal analysis cannot be separated from economic analysis because interpreting Article 102 TFEU necessarily involves economic thinking. Lawyers should thus themselves engage in economic thinking.⁹³

Economic analysis that wants to be relevant cannot be separated from legal analysis either, because any economic analysis that departed from the rules, principles and statements of purpose laid down with binding force in the EU Treaties would not be fit for the purpose of interpreting Article 102 TFEU.⁹⁴

⁸⁹ Text accompanying notes 37 to 41.

⁹⁰ Text accompanying notes 44 to 58.

⁹¹ Text accompanying notes 59 to 88.

⁹² While this paper only deals with the interpretation of Article 102 TFEU, the same is probably true for all areas of the law; see Hayek, as note 41 above, at 4-5. Moreover, especially if staffed by temporary agents rather than permanent officials, separate units of economists inside competition authorities are vulnerable to capture by the special interests of the economics profession and of the dominant companies; see text accompanying notes 141 to 153 below; see also L.M. Froeb, P.A. Paulter and L.-H. Röller, 'The Economics of Organizing Economists' (2009) 76 *Antitrust Law Journal* 569; J. Kay, 'Better a distant judge than a pliant regulator – Why overseers are so often captured by their industries', *Financial Times*, 2 November 2010 (pointing out that "the most common form of capture is honest and may be characterised as intellectual capture"); and H.-J. Chang, as note 93 below, at 307.

⁹³ As has been pointed out by H.-J. Chang (*Economics: The User's Guide* (Pelican, 2014), at 3): "95 per cent of economics is common sense – made to look difficult, with the use of jargons and mathematics"; see also note 44 above.

⁹⁴ See text accompanying notes 71 to 88 above and text accompanying notes 109 to 110, 133 and 138, and 139 to 140 below.

III. THE EU CASE-LAW ON EXCLUSIVITY REBATES BY DOMINANT UNDERTAKINGS COMPARED TO THE ALTERNATIVE SO-CALLED 'MORE ECONOMIC APPROACH'

A. The argument that the case-law is 'form-based'

1. *All human thinking involves categorization*

It is often said that the EU case-law on abuse of dominance is 'form-based', with the strong suggestion that this is something undesirable.⁹⁵

It is far from clear what exactly is meant by the case-law being 'form-based'.⁹⁶

If it means that the EU case-law *per se* prohibits the use of exclusivity rebates or other practices by dominant undertakings, it is based on a misreading of that case-law, because the case-law always provides for the possibility of objective justification.⁹⁷

⁹⁵ See for instance J. Padilla, as note 78 above.

⁹⁶ The origin of the 'form-based' terminology appears to be in the 1990s debate on the reform of the block exemption regulations for vertical agreements under initially Article 85(3) EEC and then Article 81(3) EC, now Article 101(3) TFEU; see R. Whish, 'Regulation 2790/99: The Commission's "New Style" Block Exemption for Vertical Agreements' (2000) 37 *Common Market Law Review* 887 and C. Esteve Mosso, as note 20 above. The block exemption regulations in force between 1967 and 2000 were (rightly) criticised for being formalistic and not based on sound economics, because they did not contain market share caps (with the result that for instance exclusive purchasing agreements were exempted irrespective of the market power of the undertakings concerned; see my book *The Optimal Enforcement of EC Antitrust Law* (Kluwer Law International, 2002), at 127) and because they used 'white lists' of exempted clauses that in practice had a 'straight-jacketing' effect. Regulation 2790/99 changed this situation by introducing a 30 % market share cap and by using a 'black list' of restrictions leading to exclusion from the benefit of the block exemption. The context in which the 'form-based' terminology emerged in the 1990s is thus very different from the current discussion on the case-law on abuse of dominance. It should in particular be noted that in the 1990s the more economic approach meant treating undertakings with market power more strictly than undertakings without market power, by excluding the former from the benefit of the block exemptions, whereas the so-called 'more economic approach' in the current debate on Article 102 TFEU tends towards ignoring the difference between dominant and non-dominant undertakings; see notes 112 and 113 below.

⁹⁷ On the possibility of objective justification, see text accompanying notes 115 to 118 below. On the question whether it is right to place upon the dominant undertaking the responsibility of showing an objective justification, see the discussion on optimal risk allocation in text accompanying notes 122 to 124 below.

If it means that the case-law classifies business practices in certain categories, such as 'exclusivity rebates' or 'exclusivity',⁹⁸ and provides a corresponding test of legality, it is difficult to see what could be wrong with that.

All human thinking and human language uses categories.⁹⁹ There is no way this could be avoided. It is not possible to conceive a workable interpretation of Article 102 TFEU that would not make some use of categories.

What matters is that the categories used are economically and legally sound, and that they are clear, foreseeable and administrable.¹⁰⁰ Under this test, the EU case-law does very well, and certainly much better than the alternative advocated by the proponents of the so-called 'more economic approach'.

2. *The EU case-law is based on sound categorization*

The category of exclusivity, as used by the EU case-law, is a category that is easily recognisable for dominant undertakings themselves, as well as for their customers. It is also conceptually clear for other victims and for competition authorities and courts, even if it may be difficult to obtain evidence in cases where the dominant undertaking tries to conceal the practice, as Intel did.¹⁰¹ It is also economically and legally sound, in that exclusivity constitutes a distinct source of harm to the competitive process.¹⁰²

3. *The so-called 'more economic approach' is based on unsound categorization*

Instead of categorizing exclusivity rebates as a form of exclusivity, the proponents of the so-called 'more economic approach' would rather categorize exclusivity rebates as "price-based exclusionary conduct",¹⁰³ together with predatory pricing. This alternative categorization is clearly inferior.

⁹⁸ The EU case-law treats exclusivity rebates by dominant undertakings as part of the more general category of exclusivity by dominant undertakings (whether or not in consideration of the grant of a rebate); see text accompanying note 7 above.

⁹⁹ See D. Hofstadter and E. Sander, *Surfaces and Essences: Analogy as the Fuel and Fire of Thinking* (Basic Books, 2013).

¹⁰⁰ See also M. Adam and F. Maier-Rigaud, 'The Law and Economics of Article 82 EC and the Commission Guidance Paper on Exclusionary Conduct' (2009) *Zeitschrift für Wettbewerbsrecht* 131 at 138-139.

¹⁰¹ See *Intel* judgment, as note 1 above, paragraphs 1540-1551.

¹⁰² See further text accompanying notes 109 to 120 below.

¹⁰³ See above, text accompanying notes 21 to 22 and 35 to 36.

Indeed, putting exclusivity rebates in the same category as predatory pricing is unsound.¹⁰⁴

In the case of predatory pricing, any harm to the competitive process can only derive from the low prices, whereas low prices are normally pro-competitive. In the case of exclusivity rebates, on the other hand, there is not only a price but also exclusivity, which is a distinct source of harm to the competitive process.¹⁰⁵

As to the price, it would be naive to assume (as the proponents of the so-called 'more economic approach' seem to do) that the price offered in exchange for the exclusivity would necessarily be a low price or would necessarily be lower than the price that the dominant undertaking would charge in the absence of the exclusivity rebate system.

Because the dominant undertaking, by virtue of being dominant, has power over price, its prices, including the prices reduced by the exclusivity rebate, could be far above cost.

Moreover, because the dominant undertaking's market power increases as a result of the exclusivity being accepted by many of its customers, the dominant undertaking may be able to increase its prices, thus cancelling out the rebate. For instance, without the exclusivity rebate system, the dominant undertaking may have charged a price of 100, but thanks to the exclusivity rebate system and the resulting increase in market power it may be able to charge 120, with an exclusivity rebate of 20. In economic reality, there is then not an exclusivity rebate but rather a non-exclusivity penalty.¹⁰⁶

The dominant undertaking may even be able to raise its prices to such an extent that the customers receiving the exclusivity rebate end up paying a higher price than they would have paid in the absence of the exclusivity rebate system. Without the exclusivity rebate system, the dominant undertaking may have charged a price of 100, but thanks to the exclusivity rebate system and the resulting increase in market power it may be able to charge 130, with an exclusivity rebate of 20.

As Nicholas Economides has pointed out,¹⁰⁷ the exclusivity rebate system thus creates a prisoners' dilemma for the customers: Each customer is better off by choosing the exclusivity option, but the result is that all customers end up being worse off.

¹⁰⁴ See also Joshua D. Wright (Commissioner, Federal Trade Commission), 'Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts' (Remarks at the Bates White 10th Annual Antitrust Conference, Washington, DC, June 3, 2013), and S.P. Gates, 'Antitrust by Analogy: Developing Rules for Loyalty Rebates and Bundled Discounts' (2013) 79 *Antitrust Law Journal* 99.

¹⁰⁵ See further text accompanying notes 109 to 120 below; see also A. Edlin and J. Farrell, 'Freedom to Trade and the Competitive Process', forthcoming in R.D. Blair and D.D. Sokol, *Oxford Handbook of International Antitrust Economics* (Oxford University Press, 2014).

¹⁰⁶ See N. Economides, 'Tying, bundling and loyalty requirement rebates' in E.R. Elhauge, *Research Handbook on the Economics of Antitrust Law* (Edward Elgar, 2012) 121 at 130-131.

¹⁰⁷ See N. Economides, as note 106 above, at 132.

B. The argument that the case-law is not 'effects-based'

1. Effects of what and on what?

The argument that the case-law is 'form-based' is usually combined with the argument that it is not 'effects-based', contrary to the so-called 'more economic approach', which is said to be 'effects-based'.¹⁰⁸

Again it is far from clear what is meant by this argument.

Talk about effects raises the question the effects *of what* and *on what* are meant.

As to the former (effects *of what*), it is important not to confuse the effects of the business practice (for instance, exclusivity rebates) to be assessed under Article 102 TFEU with the effects of the choice of one or another interpretation of Article 102 TFEU.

2. The proper way to assess the effects of a business practice under Article 102 TFEU

a. Negative effects

As to the negative effects of the business practice (for instance, exclusivity rebates) to be assessed under Article 102 TFEU, what are the relevant negative effects depends on what is the objective of Article 102 TFEU.

As explained above,¹⁰⁹ the objective of Article 102 TFEU (and of the other EU competition rules) is a system of undistorted competition, as part of the internal market established by the EU.

The EU case-law is properly effects-based, in that it considers practices on the basis of their effects on this objective. In the absence of an objective justification, the use of exclusivity rebates by a dominant undertaking is prohibited, because, as the General Court explained in the *Intel* judgment, "the capability of tying customers to the undertaking in a dominant position is inherent in exclusivity rebates" and "the grant of an exclusivity rebate by an unavoidable trading partner makes it structurally more difficult for a competitor to submit an offer at an attractive price and thus gain access to the market. The grant of exclusivity rebates enables the undertaking in a dominant position to use its economic power on the non-contestable share of the demand of the

¹⁰⁸ See for instance J. Padilla, as note 78 above; see also note 96 above.

¹⁰⁹ Text accompanying notes 72 to 83 above.

customer as leverage to secure also the contestable share, thus making access to the market more difficult for a competitor".¹¹⁰

It is thus because of the distortive effects on the competitive process that, in the absence of an objective justification, the use of exclusivity rebates by dominant undertakings is prohibited under Article 102 TFEU.

Unless the EU Treaties were to be modified, so as to replace the objective of Article 102 TFEU as currently laid down in the Treaties by some other objective, the approach of the EU Courts is the proper effects-based approach.

b. Pro-competitive justifications

The argument most commonly used by the proponents of the so-called 'more economic approach' against the approach of the EU Courts is that "there are perfectly valid pro-competitive justifications for exclusive dealing and loyalty rebates. [...] Suffice it to check any textbook on industrial organisation or the economics of competition law. [...]".¹¹¹

This argument is unsound, for three reasons:

First, it fails to distinguish between the use of exclusivity rebates by dominant undertakings and by non-dominant undertakings. The nature and effects of what may look like the same practice can be very different depending on whether the undertaking adopting the practice is dominant or not.¹¹² Moreover, by providing for Article 102 TFEU in addition to Article 101 TFEU, the EU Treaties have chosen to treat dominant undertakings differently from non-dominant undertakings.¹¹³

Second, even if one accepts the premise that the use of exclusivity rebates by a dominant undertaking has some pro-competitive benefits, it does not follow that a prohibition of exclusivity rebates would result in the loss of these pro-competitive benefits. The pro-

¹¹⁰ *Intel* judgment, as note 1 above, paragraphs 86 and 93.

¹¹¹ P. Ibáñez Colomo, as note 34 above; see also H. Zenger, 'Rebates and Competition Law: An Overview of EU and National Law', as note 17 above, at 5: "the vast majority of real world loyalty rebates are applied without anti-competitive intent or effect, as is evidenced by the fact that such rebates are a common form of discounting even in highly fragmented markets, where unilateral exclusion would hardly be a plausible business objective. Just like other forms of rebates, loyalty rebates are pervasively used to compete for incremental sales, rather than to pursue exclusionary aims".

¹¹² See text accompanying notes 109 and 110 above and text accompanying notes 114 to 120 and 130 to 132 below, and *Intel* judgment, as note 1 above, paragraph 89.

¹¹³ See also Judgment of the Court of Justice of 9 November 1983 in Case 322/81 *Michelin*, paragraph 57: "A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, it has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market."

competitive benefits would only be lost if and to the extent that these benefits cannot be obtained without the use of exclusivity rebates.

If increasing the quantity supplied to a customer results in lower costs for the dominant undertaking, it can pass on such scale economies to the customer through quantity rebates, which benefit from a presumption of legality under Article 102 TFEU.¹¹⁴ If the dominant undertaking otherwise wants to lower its prices, it can surely do so without using exclusivity rebates. Similarly, if the dominant undertaking wants to improve the quality of its products or the service it provides to its customers, it is hard to see why it could not do this without using exclusivity rebates.

Indeed the proponents of the so-called 'more economic approach' have never provided any example of a pro-competitive benefit which a dominant undertaking could not deliver otherwise than through the use of exclusivity rebates.

Third, the case-law does not *per se* prohibit the use of exclusivity rebates by dominant undertakings.¹¹⁵

Indeed, as the General Court confirmed in *Intel*,¹¹⁶ "it is open to the dominant undertaking to justify the use of an exclusivity rebate system, in particular by showing that its conduct is objectively necessary or that the potential foreclosure effect that it brings about may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers [...]. However, in the case in point, [Intel] has put forward no argument in that regard."

If the exclusivity rebates applied by Intel had indeed the pro-competitive benefits about which the proponents of the so-called 'more economic approach' are concerned, Intel could have justified its practice and escaped condemnation under Article 102 TFEU. The fact that Intel did not put forward any argument to this effect should give pause for thought.

It should be noted that the possibility for a dominant undertaking to objectively justify its use of exclusivity rebates has always existed, since the first judgment of the Court of Justice in 1979 in *Hoffmann-La Roche*.¹¹⁷ Since that time, the EU case-law on the use of exclusivity rebates by dominant undertakings has been applied in a number of cases, by the European Commission and by the competition authorities of the EU Member States.

In all these cases, the dominant undertaking concerned thus had the opportunity to demonstrate the pro-competitive benefits of its use of exclusivity rebates. As far as I

¹¹⁴ *Intel* judgment, as note 1 above, paragraph 75.

¹¹⁵ Indeed, contrary to US antitrust law, EU antitrust law does not contain any *per se* prohibitions. Article 101 TFEU always allows for the possibility of justification under Article 101(3) TFEU, and the application of Article 102 TFEU is also always subject to the possibility of objective justification.

¹¹⁶ *Intel* judgment, as note 1 above, paragraph 75.

¹¹⁷ As note 5 above, paragraph 90.

know, in none of these cases have such benefits been put forward and demonstrated. Again this should give pause for thought.¹¹⁸

A sound economic analysis should aspire to be based not only on theoretical, aprioristic arguments about the possible benefits of exclusivity rebates, or on generalisations from the observed use of exclusivity rebates by non-dominant undertakings,¹¹⁹ but should also pay attention to the available empirical evidence about the use of such rebates by dominant undertakings.¹²⁰ One of the merits of the EU case-law is that it generates such empirical evidence, as it allows dominant companies to justify their use of exclusivity rebates on grounds of countervailing pro-competitive benefits. The fact that dominant companies, like Intel, do not provide such justification is telling.

3. All relevant effects of the choice of interpretation should be considered, including enforcement costs and risk allocation

The effects of the business practice are not the only relevant effects.

When choosing between one or another interpretation of Article 102 TFEU (for instance, between the existing EU case-law and the so-called 'more economic approach'), all relevant effects of the choice of interpretation should be taken into account, including enforcement costs, and the degree of legal uncertainty and the corresponding allocation of risk.

The costs of applying and enforcing Article 102 TFEU include the costs (in terms of management time, and cost of legal and economic counsel) for the dominant undertakings that need to assess the legality of their (intended) practices, and for the customers and competitors that need to assess whether a dominant undertaking's practices are legal, and the resources used by competition authorities and courts. These costs can vary widely depending on which interpretation of Article 102 TFEU is chosen. An interpretation or approach could be said to be 'more economic' if it minimizes these costs. In this sense, the EU case-law is undoubtedly much more economic than the so-called 'more economic approach'.¹²¹

Another important (and again also economic) effect of the choice of one or another interpretation of Article 102 TFEU is the degree of legal uncertainty and the

¹¹⁸ On the question whether it is right to place upon the dominant undertaking the responsibility of showing an objective justification, see the discussion on optimal risk allocation in text accompanying notes 122 to 124 below.

¹¹⁹ See (text accompanying) note 111 above.

¹²⁰ On the more general problem of the aprioristic rather than empirical nature of the (post-)Chicago (consumer) welfarist approach to antitrust, see D. Arnold and F.P. Maier-Rigaud, 'The enduring relevance of the model Platonism critique for economics and public policy' (2012) 8 *Journal of Institutional Economics* 289.

¹²¹ See below, text accompanying notes 133 to 138, as to the large cost of applying the as-efficient-competitor test.

corresponding allocation of risk. Again this can vary widely depending on which interpretation of Article 102 TFEU is chosen. Some interpretations entail a much higher degree of legal uncertainty than others.¹²² As to the allocation of the corresponding risk, basic economic principles would suggest that the risk should be borne by those who have more control over the generation of the risk, those who have better access to the relevant information to assess and manage the risk, and/or those who have the stronger capacity to bear the risk.¹²³ In this respect also, the EU case law appears economically sound, in that it provides a clear and easy to apply general prohibition rule, while allocating the responsibility of showing any possible objective justification to the dominant undertaking, which chose the exclusivity rebate system, has the best access to all relevant information, and has a stronger risk-bearing capacity than its smaller competitors affected by the exclusivity rebate system.¹²⁴

C. The as-efficient-competitor test is not fit for the purpose of assessing the legality of exclusivity rebates under Article 102 TFEU

However useful it may be as a prioritisation test,¹²⁵ the as-efficient-competitor test is not fit for the purpose of assessing the legality under Article 102 TFEU of the use of exclusivity rebate systems by undertakings in a dominant position, for the following reasons.

1. The as-efficient-competitor test is based on unsound categorization

The use of the as-efficient-competitor test for assessing exclusivity rebate systems is based on the unsound categorization of exclusivity rebate systems as similar to predatory pricing.

¹²² See also (text accompanying) note 87 above.

¹²³ See further my books *The Optimal Enforcement of EC Antitrust Law – Essays in Law and Economics* (Kluwer Law International, 2002), Section 6.2.2.3, and *Principles of European Antitrust Enforcement* (Hart, 2005), Section 1.2.3.

¹²⁴ It has often been suggested (following F.H. Easterbrook, 'The Limits of Antitrust' (1984) 63 *Texas Law Review* 1) that the burden of showing pro-competitive benefits should not be on the dominant company because in general the costs of antitrust over-enforcement (false positives or, in economists' jargon, Type I errors) would be higher than the costs of antitrust under-enforcement (false negatives or Type II errors). There is however no evidence whatsoever for the existence of this claimed asymmetry in error costs; see also J. Fingleton and A. Nikpay, 'Stimulating or Chilling Competition', in B. Hawk (ed), *Annual Proceedings of the Fordham Corporate Law Institute 2008* (Juris 2009), Chapter 16, and D.S. Evans, 'Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules' (16 February 2009), available at <http://ssrn.com/abstract=1342797>, at 14.

¹²⁵ As explained above (text accompanying notes 21 to 27), the Priorities Paper only refers to this test in the context of the Commission's priority setting. On priority setting, see my paper 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement' (2011) 34 *World Competition* 353.

As already explained above,¹²⁶ exclusivity rebate systems are, in their economic nature and effects, very different from predatory pricing or other forms of unconditional pricing that do not involve any conditions of exclusivity or conditions with similar effect.

In the case of predatory pricing, any harm to the competitive process can only derive from the low prices, whereas low prices are normally pro-competitive. A price-cost test may then be helpful to distinguish between pro-competitive and anti-competitive low prices.¹²⁷

In the case of exclusivity rebates, however, the harm to the competitive process results from the exclusivity, whereas there is no basis for assuming that the price offered in exchange for the exclusivity would necessarily be a low price or would necessarily be lower than the price that the dominant undertaking would charge in the absence of the exclusivity rebate system.¹²⁸

2. The as-efficient-competitor test is based on the assumption that customers only value price

The as-efficient-competitor test is based on the assumption that customers only value price, and not also quality and variety. There is no sound economic basis for such an assumption.¹²⁹

The use of exclusivity rebate systems by dominant undertakings makes it more difficult to access the market not only for competitors that want to compete on price but also for competitors that compete on quality or that offer a different variety than the product offered by the dominant undertaking.

3. It is unsound only to care about equally efficient competitors

In the context of dominance,¹³⁰ it is unsound only to care about competitors that are as efficient as the dominant undertaking.

¹²⁶ Text accompanying notes 103 to 107.

¹²⁷ See also *Intel* judgment, as note 1 above, paragraph 152.

¹²⁸ See text accompanying notes 105 to 107 above.

¹²⁹ The exclusive focus on price may be unproblematic when a price-cost test is used in the case of predatory pricing, because in that case price is the only possible source of harm to the competitive process. However, in the case of exclusivity rebates, exclusivity is the source of harm to the competitive process; see text accompanying notes 103 to 107 and 126 to 128 above.

¹³⁰ See also text accompanying note 112 above.

Indeed, dominant undertakings have power over price and can thus set their prices well above cost level. Even less efficient competitors can thus exert competitive pressure, to the benefit of consumers.¹³¹

This is not some exception applicable in certain circumstances, but the general rule.

4. *The competitive process is not only harmed if competitors are forced to sell at a loss but also if their profitability is reduced*

The as-efficient-competitor test assumes that there is only harm to the competitive process if an equally efficient competitor is forced to sell at a loss, not if the competitor's profits are reduced. There is no sound economic basis for this assumption.

The competitive process is also distorted if the hypothetical equally efficient competitor's profits are merely reduced by the dominant undertaking's use of exclusivity rebates. Indeed, the reduced profitability may induce the competitor, who will consider its opportunity costs, to withdraw from the market on which the exclusivity rebates are applied, or not to enter that market or to enter on a smaller scale.¹³²

5. *Applying the as-efficient-competitor test is liable to consume a large amount of resources*

Applying the as-efficient-competitor test is liable to consume a large amount of resources.

The reason for this is that, while the test may appear simple and clear on the drawing board of an academic seminar, it is very complicated in practice. To be convinced of this, it suffices to read through the 150 pages of the *Intel* decision devoted to the equally-efficient-competitor analysis, all the details of which were heavily contested by Intel before the General Court.¹³³

As mentioned above,¹³⁴ in the case of predatory pricing, a price-cost test may be helpful to distinguish between pro-competitive and anti-competitive low prices. The resources spent on conducting the test may then be justified.

However, for all the reasons mentioned above,¹³⁵ the as-efficient-competitor test is not fit for the purpose of assessing the legality of exclusivity rebates. Spending a large amount

¹³¹ See also A.S. Edlin, 'Stopping Above-Cost Predatory Pricing' (2002) 111 *Yale Law Journal* 941.

¹³² See also *Intel* judgment, as note 1 above, paragraph 150.

¹³³ *Intel* decision, as note 2 above, paragraphs 1002 to 1575.

¹³⁴ Text accompanying note 127.

¹³⁵ Text accompanying notes 126 to 132.

of resources to apply an unnecessary and unhelpful test has several problematic consequences.

A first consequence is that, if the competition authorities (European Commission and competition authorities of the Member States) have to conduct an as-efficient-competitor test every time they want to intervene to stop and punish the abusive use of exclusivity rebate systems by a dominant undertaking, they will be able to deal with far fewer cases, given their limited budgets.¹³⁶ This will severely reduce deterrence.¹³⁷

A second consequence is that it will take competition authorities much more time to complete their investigations and adopt a decision putting an end to an ongoing abuse by a dominant undertaking. Judging by the *Intel* case, the delay may easily be two years. Justice delayed is often justice denied. Promising challengers to the dominant company may be irremediably eliminated or weakened in the meantime.

A third consequence is that private enforcement will be severely hampered. As argued above,¹³⁸ the EU Treaties do not allow interpretations of Article 102 TFEU that unnecessarily create obstacles to private enforcement.

6. *The as-efficient-competitor test is fundamentally at odds with the philosophy underlying the EU Treaties*

Finally, the as-efficient-competitor test is fundamentally at odds with the objective of Article 102 TFEU and the philosophy underlying the EU Treaties.

As explained above,¹³⁹ Article 102 TFEU aims at a system of undistorted competition, as part of the internal market established by the EU. Which competitors end up being successful on the market, and thus truly show themselves to be efficient, is determined by the free play of undistorted competition, consumers being free to choose and all producers being equally free to compete on the merits.

The as-efficient-competitor test is profoundly at odds with this philosophy, because it does not leave it to the free play of undistorted competition to determine which producers prove themselves to be efficient, but instead allows dominant undertakings to exclude competitors from the market on the basis of a decision by competition authorities that

¹³⁶ See also G. Monti, 'Article 82 EC: What Future for the Effects-Based Approach?' (2010) *Journal of European Competition Law & Practice* 2 at 10, and J. Steenbergen, 'Has Competition Analysis Become Too Sophisticated for Its Own Good?', 19th *St. Gallen International Competition Law Forum* (7-8 June 2012), accessible at <http://papers.ssrn.com/abstract=2179905>, at 2.

¹³⁷ On the problem of the number of cases, see generally my paper 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) 4 *Journal of European Competition Law & Practice* 293 at 298-301.

¹³⁸ Text accompanying notes 84 to 88.

¹³⁹ Text accompanying notes 73 to 83.

those competitors are not sufficiently efficient.¹⁴⁰ Like the Gosplan in the Soviet Union, competition authorities thus decide which producers are deemed efficient enough to be allowed onto the market. This is fundamentally at odds with the philosophy underlying the EU Treaties.

IV. CUI BONO ?

The conclusion from all the above is that the EU case-law on the use of exclusivity rebate systems by dominant undertakings is not only legally but also economically sound, whereas the alternative so-called 'more economic approach' is unsound and not fit for the purpose of interpreting Article 102 TFEU.¹⁴¹

This raises the question why the so-called 'more economic approach' enjoys so much support among antitrust practitioners and practice-oriented academics.¹⁴²

Part of the explanation may be that the so-called 'more economic approach' serves powerful special interests, namely those of the dominant companies and of the economics profession.¹⁴³

Compared with the alternative of the so-called 'more economic approach', the beneficiaries of the EU case-law are, apart from the EU general interest, European consumers and the smaller companies that are the actual or potential competitors of dominant companies. These benefits are spread out over many beneficiaries, many of whom may never even become aware of it. They are thus unlikely to defend effectively

¹⁴⁰ See also M. Adam and F. Maier-Rigaud, as note 100 above, at 139: "Following an equally efficient competitor test [...] would amount to the paternalistic assumption that consumers are wrongly buying from less efficient competitors and that dominant firms therefore need to be called in to restore market efficiency".

¹⁴¹ As defined in the introduction of this paper (text accompanying notes 35 and 36), when I refer to "the so-called 'more economic approach'", I mean the alternative legality test advocated by those commentators who want the EU Courts to change the case-law on abuse of dominance in general and the use of exclusivity rebates by dominant undertakings in particular and to adopt the test set out in the Priorities Paper (see note 18 above) as a new test for assessing the legality of exclusivity rebates under Article 102 TFEU. As explained above, (text accompanying notes 26 and 27), the Priorities Paper itself clearly states that the test set out in it is not intended to constitute a statement of the law (legality test), but is merely to be used for prioritisation purposes (prioritisation test).

¹⁴² See J. Padilla, as note 78 above, referring to a "Brussels consensus" to this effect.

¹⁴³ See J. Kay, (text accompanying) note 153 below.

their interests.¹⁴⁴ Indeed, as Dieter Wolf, former President of the *Bundeskartellamt*, has pointed out, competition has no lobby.¹⁴⁵

On the other hand, the loss to the dominant undertakings that are prevented from abusing their dominant position is highly concentrated.¹⁴⁶ Dominant companies can thus be expected to lobby strongly against the EU case-law.

Apart from serving the interests of the dominant companies, the so-called 'more economic approach' also serves the special interests of the economics profession. As pointed out above,¹⁴⁷ applying the as-efficient-competitor test is liable to consume a large amount of resources. While this is undesirable from the perspective of the common good, it is advantageous to the economists whom it provides with business and employment. More generally, the so-called 'more economic approach' increases the demand for the services provided by the economics profession.¹⁴⁸

For antitrust practitioners, dominant companies are the largest and most lucrative clients. Antitrust practitioners thus have an interest in positioning themselves as proponents of the so-called 'more economic approach'.

Many antitrust academics are also practitioners, or may want to become practitioners at a later stage of their career. Large parts of the publication and conference markets are also run by and for practitioners. Many academics may thus face similar incentives as practitioners.

Adhering to a 'modern', more 'scientific' and sophisticated way of thinking, rather than to 'old-fashioned' legal thinking no doubt also raises one's self-esteem.¹⁴⁹

¹⁴⁴ On diffused interests being less able to defend themselves than concentrated interests, see generally M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1965) and *The Rise and Decline of Nations* (Yale University Press, 1982).

¹⁴⁵ D. Wolf, in C.D. Ehlermann and L.L. Laudati, *European Competition Law Annual 1997: The Objectives of Competition Policy* (Hart, 1998), Panel Discussion on Competition Policy Objectives, at 24, adding: "Institutional safeguards are needed to ensure that competition has at least one clear voice. [...] economists have learned to be advocates of the interests of their clients, just as lawyers have learned to do so. Thus, reliance on economic arguments does not protect the process. Independent institutions combined with judicial review by courts is the best way to guarantee objective results. Competition authorities must, of course, be staffed with lawyers and economists. However, as long as competition authorities are not independent, the risk is always present that specific interests will influence their decisions"; see further note 92 above.

¹⁴⁶ As note 144 above.

¹⁴⁷ Text accompanying notes 133 to 138.

¹⁴⁸ See also note 92 above; D.J. Neven, 'Competition economics and antitrust in Europe' (2006) 21 *Economic Policy* 741, available at http://ec.europa.eu/dgs/competition/economist/economic_policy.pdf and R.B. Reich, 'The Antitrust Industry' (1980) 68 *Georgetown Law Journal* 1053.

¹⁴⁹ Compare with R. Van den Bergh, 'Modern Industrial Organisation versus Old-Fashioned European Competition Law' (1996) 2 *European Competition Law Journal* 75; and see (text accompanying) note 44 above as to scientificity.

Younger generations, even if devoid of the cult of modernity, may uncritically adhere to the so-called 'more economic approach' because it has become the conventional wisdom,¹⁵⁰ taught by their professors and confirmed in countless publications. If need be, compliance with the conventional wisdom may be enforced through peer review and other mechanisms of professional discipline.¹⁵¹

In 2005, in response to Commissioner Kroes's speech in New York,¹⁵² the eminent economist and Financial Times columnist John Kay wrote that bringing EU practice more in line with American practice would be undesirable, because "business lobbies [have been able] to emasculate American antitrust law. [...] There is not much wrong with the current status of [Article 102 TFEU] and you should reaffirm it. If it is unclear today that is mainly because your officials, battered by those lobbyists who have enjoyed such success across the Atlantic, have lost confidence in its application".¹⁵³

The General Court and the Commission should be commended for having stood firm and having reaffirmed the EU case-law on abuse of dominance in the *Intel* case.

¹⁵⁰ On conventional wisdom, see generally J.K. Galbraith, *The Affluent Society* (40th Anniversary Edition; Houghton Mifflin, 1998), Chapter 2.

¹⁵¹ See B.D. Frey, 'Publishing as prostitution? – Choosing between one's own ideas and academic success' (2003) 116 *Public Choice* 205; see also F.S. Lee, X. Pham and G. Gu, 'The UK Research Assessment Exercise and the narrowing of UK economics' (2013) 37 *Cambridge Journal of Economics* 693.

¹⁵² See (text accompanying) note 19 above.

¹⁵³ J. Kay, 'European monopoly laws are already fair and stringent', *Financial Times*, 4 October 2005. As Michael Ignatieff has recently argued more generally: "the liberal state is in crisis, basically, because its regulatory, legal, and political institutions have either been captured, or have been laid siege to, by the economic interests they were created to control. [The liberal state] was always supposed to keep the power of big money from suffocating competition and corrupting the political system. This is the task it struggles to perform today and must recover fully if it is to regain the confidence and support of the broad mass of its citizens" (M. Ignatieff, 'Are the authoritarians winning?', *The New York Review of Books*, 10 July 2014, 53 at 55).