Economic Reasoning in the Court of Justice of the EU

A Study on the Use of Economics in Competition Case-Law

Pavlína Hubková

Thesis submitted for assessment with a view to obtaining the degree of
Master in Comparative, European and International Laws (LL.M.)
of the European University Institute

Florence, 30 September 2014

European University Institute
Department of Law

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Summary

Competition law is intrinsically connected with economics and economic theory. This thesis tries to find out how economics is reflected in case law of the Court of Justice of the EU in competition cases. It discusses the role of economics in European competition law and in legal reasoning, and it examines limits and constraints of this role. Besides this, the thesis takes into consideration the role of the CJEU and some aspects of its work which may have influence on the perception of economics. The core of the thesis lies in the assessment of the practice of the CJEU. It focuses on the field of abuse of dominance and examines how the CJEU works with economic arguments, how its approach differs from economic theory and in which way the approach has developed over time.

Acknowledgements

I must sincerely admit that having the opportunity to spend one year at the European University Institute was the best thing that could have happened to me. At first sight, it may seem that the EUI is too beautiful that it prevents any work to be done. However, in fact it offers a unique combination of factors which make it a perfect place for research: an intellectually stimulating environment, a rich library, smart, open-minded and friendly professors, and great colleagues. Therefore I would like to thank the EUI for giving me the opportunity to spend the whole year in such a place and to express my gratitude to all people there who made this year so special.

First of all, I would like to thank Professor Giorgio Monti for his patient supervision of my thesis, rich discussions, valuable comments and guidance.

Discussions and talks with all my friends and colleagues at the EUI helped me to broaden my horizons, to learn new things and to understand better how to do a good research in law. I am very grateful especially for discussions and cooperation with Céline, Hubert, Itsiq, Andy, Barend, Elena, Przemek and Filipe.

I owe my gratitude also to my friends who kindly read and commented some parts of this thesis: Jan Broulík, Tomáš Pavelka, Libor Havelka, Martin Lovecký, Marijn Van Der Sluis, Jonas von Kalben, Adéla Kábrtová, Milan Brouček and Michal Bobek.

Last but not least, I would like to thank all the people at the EUI coffee bars because nothing could have been written without their delicious café macchiato.

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INTRODUCTION

> "*The use of economics greatly increases the likelihood of arriving at a result which is consistent with the aims of the competition rules*."[1]

> "*An understanding of economic principles and their use for a correct interpretation of competition law is therefore an important part of competition law enforcement at the judicial level*."[2]

Competition law is a field of law which is based on or at least connected with economic theory. In the first place, economics enlightens the necessity of competition rules. However, it may also help to shape the way how the rules are interpreted and applied because competition law as such is not able to identify all core elements which are important for analyzing alleged anticompetitive behaviour, nor could it sufficiently interpret the sole rules.

In that sense, economics serves as a useful tool which helps us to deal with both legal and factual questions. The two above mentioned quotations just remind us that the role of economics is indispensable in case of enforcement of competition rules both on the administrative and judicial level.

Currently in the EU, there is an increasing requirement to enforce competition law in the light of economics and to apply the so-called effects based approach that relies on economic analyses. The importance of economics is visible mainly in the work of the European Commission. However, it is the Court of Justice of the EU (hereinafter the "CJEU") which shapes the ultimate competition law standards. Therefore it is vital to know how the CJEU works with economics, in

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[1] Speech of Commissioner Mario Monti, 'The Application of Community Competition Law by the National Courts', *Conference 'Towards the Application of Article 81(3) by National Courts'* (2000) <http://europa.eu/rapid/press-release_SPEECH-00-466_en.htm?locale=de>[access 06-07-2014].

[2] Bo Vesterdorf, 'Economics in Court: Reflections on the Role of Judges in Assessing Economic Theories and Evidence in the Modernised Competition Regime' in Martin Johansson, Nils Wahl and Ulf Bernitz (eds), *Liber amicorum in honour of Sven Norberg: a European for all seasons* (Editions Juridiques Bruylant 2006) 519.

what shapes economics in present in its reasoning and how economic inputs are reflected in its case law.

Therefore the thesis will try to answer the question how economics is reflected in case law of the Court of Justice of the EU in the field of competition law. The thesis will observe, describe, conceptualize and assess the practice of both the Court of Justice and the General Court in translating economics into legal reasoning and implanting economic arguments and terms into law. It will look on the way how both courts work with economics and it will try to sketch a line of evolution of economic reasoning in courts.

The aim is to make a picture and assessment of the reflection of economics in time, and thus the thesis does not focus just on the impact of the "modernization" or "more economic approach", but rather it seeks to show the overall practice which may be influenced by new approaches.

The thesis does not seek to develop a theory of economic reasoning, but it rather focuses on practice. In the beginning, it presents a theoretical overview on the role of economics and methods how economic inputs are pulled into legal reasoning, but the core of the approach is to assess the actual penetration of economics into case law. The theoretical part just tries to clarify the starting points, to define terms which are used in the consequent part and to anchor the normative premises of the approach.

It is worth highlighting that this thesis does not settle economics as the ultimate good to which law, legal reasoning and courts and judges themselves should raise their heads. It neither suggests that more economics in judgments automatically means a better quality of judgments. Rather on the contrary, the very starting point of this thesis is that economics and economic reasoning are tools which should help judges in legal reasoning and which should be used within the limits settled by law and legal methods. Economics is still conceived as a tool which may be used correctly or not, desirably or not, in a criticisable manner, not efficiently, not enough or too much, but it is not the ultimate ruler or the highest goal to which law should serve.

Concerning the structure and overall approach, the thesis is divided into two broader parts: a theoretical part and an assessment of practice.

The theoretical part will delimitate the playing field. It will discuss the role of economics in competition law, especially on the level of the judicial enforcement. Consequently, it will deal with the position of the CJEU, its role and methods. The aim of the theoretical part is to anchor the starting points of the research, to enlighten normative premises and to explain the context.

The part devoted to the assessment of practice focuses on the way how the CJEU actually works with economics. Taking into account the sample of abuse of dominance cases, it will trace down how economics is gradually reflected in its case law and how economic arguments penetrate legal reasoning. The methodology of this part will be explained below.

THEORETICAL BACKGROUND

Explaining the playing ground and characterising the player and its methods

1. Starting points

At the very beginning, it is necessary to delimitate the field for the research and to recall elements which may possibly have influence on the practice of the CJEU and which may affect or even shape the way how economics is reflected in its case law. Therefore the thesis starts with a rather theoretical part that discusses the overall context of economic reasoning of courts in competition law. Within it, it also tries to clarify the normative starting points of the research.

The theoretical part encompasses two broader topics. First, it deals with economics as an object of the study. It defines what economics means in general, how it should be perceived in the context of European competition law, what is its role and position in legal reasoning, and eventually how economic reasoning should be understood in the framework of the thesis.

Second, it examines and analyses the role and position of the CJEU. It focuses on the scope of its tasks, its characteristics, methods it uses and other elements which may have impact on its approach towards economics and economic reasoning in competition cases.

The aim of the theoretical part is to shed some light on the context of economic reasoning, to explain and define some terms which are used within the consequent sections, to reveal the normative basis of the approach taken in this thesis and to recall some important aspects which may have influence on the overall output of the CJEU and which must be taken into consideration when assessing its practice.

2. The role of economics in competition law

This part discusses several important elements regarding economics and clarifies its position as an object of the research. First, economics as a discipline is discussed and defined – with regard to the purpose of this thesis. Second, the role of economics within competition law both on the level of establishment of rules and their interpretation and application is elaborated. It is accompanied by a brief overview on the goals of European competition law as a possible limit to the role of economics. Third, the term "economic reasoning" is defined and its role within competition law is examined. Fourth, the intellectual process of translating economics into law is discussed.

2.1. What does economics mean?

2.1.1. Economics as a science

Economics as a science[3] has gone through a significant evolution, and especially competition economics has been influenced by several, sometimes even competing, streams of thoughts.[4] Traditionally and for practical reasons, economists are divided and classified into different schools of thought according to their scientific starting points, scientific approaches, shared assumptions, standards, accepted theories, normative views or even ideology.[5]

Even so-called mainstream economics, which is accepted by the vast majority of economists, covers nowadays a variety of approaches and views. Moreover,

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[3] The question whether economics is actually a science was asked by Joseph Schumpeter in his famous essay where he claimed that "*since economics uses techniques that are not in use among the general public, and since there are economists to cultivate them, economics is obviously a science within our meaning of the term*." Joseph A Schumpeter, *History of Economic Analysis* (Elizabeth Boody Schumpeter ed, Oxford University Press 1954) 10. Cited in Ioannis Lianos, "'Lost in Translation": Towards a Theory of Economic Transplants' [2009] Current Legal Problems 346, 351.

[4] A thorough overview of the development of economic thinking which influenced competition policy (including a collection of essays written by prominent economists of their respective era) in Daniel A Crane and Herbert Hovenkamp (eds), *The Making of Competition Policy: Legal and Economic Sources* (Oxford University Press 2013).

[5] For the overview of economic schools see e.g. Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *EU Competition Law and Economics* (Oxford University Press 2012) 71–77. In more detail also in Doris Hildebrand, *The Role of Economic Analysis in the EC Competition Rules* (3rd ed, Kluwer Law International 2009) 101–186.

economics is a continuously evolving and ever changing discipline. Therefore it is not possible to consider economics as one homogenous source of arguments.

It is, however, necessary to determine how economics as a discipline is perceived and used for the purposes of this work. This sub-chapter brings a working definition of economics, and furthermore, it discusses its nature and authority within the sphere of law.

2.1.2. Definition of economics

Even if we simplify economics and regard it as one coherent discipline, it is not easy to find its single definition. Each textbook on economics includes at least a slightly different definition. To quote one example, Alfred Marshall's definition from 1890 says that *"[e]conomics is a study of man in the ordinary business of life. It enquires how he gets his income and how he uses it. Thus, it is on the one side, the study of wealth and on the other and more important side, a part of the study of man*."[6] A rather recent example of the definition states that it is the "*social science that studies the choices that individuals, businesses, governments and entire societies make as they cope with scarcity*."[7] However, there are many other definitions which work with several keywords, such as human behaviour, choice and scarcity.[8] It is argued that the subject-matter of economics is too broad to be successfully squeezed into a rather short definition.[9]

For the purpose of this work, two simplified starting points are deliberately stated in order to overcome the heterogeneity and difficulties to define the field. First, from the subject-matter point of view, economics deals with human behaviour and choices in the world where resources are scarce and with reactions of firms and governments to the regularities of human behaviour. Second, from the instrumental point of view, economics represents a diversity of arguments

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[6] Alfred Marshall, *Principles of Political Economy, v. 1* (8th ed (first published in 1890), Macmillan 1920) 1–2.
[7] Robin Bade and Michael Parkin, *Foundations of Microeconomics* (Addison Wesley 2002) 5.
[8] For a thorough overview of the evolution of definitions of economics see Roger E Backhouse and Steven G Medema, 'Retrospectives: On the Definition of Economics' (2009) 23 The Journal of Economic Perspectives 221.
[9] Ibid 222.

and opinions based on observations, different methods, competing theories, assumptions or ideologies.

Therefore, although competition economics has been influenced by a myriad of schools and streams of thought, this thesis works with a simplification which tries to ignore possible biases and ideological constraints. It means that, within this work, economic theory is regarded as one variable comprising of all (sometimes opposing) arguments and ideas.

2.1.3. Nature of economics

Economics as a science may be divided into two branches: one which describes (positive economics) and the other one which suggests (normative economics). Taking it very briefly, as a positive science, economics tries to help us understand the world around, enlighten human behaviour and reveal certain regularities, while the so-called normative economics determines a desirable standard, and suggests solutions and approaches in order to reach the standard.[10]

In the context of competition, positive economics turns smoothly into normative economics and vice versa, and therefore it is not easy to draw a clear demarcation line.[11] It is even argued that competition economics has evolved into a more normative branch mainly in the second half of the 20th century.[12] This evolution is connected predominantly with competing schools of thought in the USA which were based on different assumptions and ideologies.[13] However, it must be noted that even normative economics lacks normativity in the very legal sense because

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[10] In his classical distinction, John Neville Keynes defined the terms as follows: "*a positive science may be defined as a body of systematized knowledge concerning what is; a normative or regulative science as a body of systematized knowledge discussing criteria of what ought to be, and concerned therefore with the ideal as distinguished from the actual; an art as a system of rules for the attainment of a given end*." In John Neville Keynes, *The Scope and Method of Political Economy* (Macmillan 1891) 34–35.

[11] See Giorgio Monti, 'EC Competition Law: The Dominance of Economic Analysis?' in Roger Zäch, Andreas Heinemann and Andreas Kellerhals (eds), *The development of competition law: global perspectives* (Edward Elgar 2010) 5–6. Even Milton Friedman argues that "*[c]onfusion between positive and normative economics is to some extent inevitable*." In Milton Friedman, *Essays in Positive Economics* (University of Chicago Press 1953) 3.

[12] Geradin, Layne-Farrar and Petit (n 5) 70.

[13] Very succinctly: Harvard School focused on the structure of the market, Chicago School emphasised the behavioural approach, while Post-Chicago School (School of New Industrial Economics) had a more dynamic view and focused on different strategic conducts.

it does not contain its own normative authority. The only authority economics holds is the argumentative authority. Moreover, economics has no power to be self-enforced.

For the purpose of this work, it is important to note that economics itself does not include a benchmark to examine what is the "true", "just" and "proper" economics. It can never serve as a revealed truth. Even in the field of competition law and policy, economics as such is not able to set authoritatively what the desirable approach is, what the ideal regulation should look like and how competition rules should be interpreted and applied. Thus, when lawyers (judges) have to deal with economics, there is no authoritative rule about how to use it.

2.2. Economics in competition law

The indispensable role of economics within competition law and policy may be seen from different angles. First, economics serves as a resource of knowledge upon which competition rules are based. In other words, economic theory helps to create competition law. Second, economics offers apparatus, arguments, methods and other tools to be used on the level of competition law enforcement. Both these basic roles are briefly discussed in the following section.[14] However, economics is not the ruler in the field and its role is limited by the broader context of EU competition law which will be reminded in the first place.

2.2.1. Economics in the context of plurality of goals in European competition law

What is the goal of European competition law which constitutes a pivotal point for the interpretation of competition rules? The answer to this question is not easy, nor unambiguous. The debate (at least the doctrinal one) on this issue

[14] Coombs and Padilla interestingly claim that there is a 3-stage role of economics: (1) creation of law, (2) creation of guidelines on the application of the law, and (3) the application of the law to a particular case – see Justine Coombs and Jorge Padilla, 'The Use of Economic Evidence before the Courts of the European Union' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European competition law annual 2009: the evaluation of evidence and its judicial review in competition cases* (Hart 2011) 474.

seems to be unending.[15] Even if there are opinions that the only goal of competition law is economic welfare, the majority view agrees that European competition law is based on the plurality of goals.

In contrast to American antitrust law which was always more tightly linked to economic efficiency goals, in Europe, the focus on efficiency has been (arguably) weakened by other corollary goals and the overall context of European integration. "*Efficiency is the ultimate goal of antitrust*,"[16] is just an extreme (and arguably too simplistic) opinion of Richard Posner that was never fully supported even in the USA[17] and its validity is even lesser in the European Union.

Historically, European competition law served as a complementary tool together with four economic freedoms in the aim to reach market integration rather than as a means to achieve pure economic efficiency. This role therefore represented "*political necessity rather than an economic decision*."[18] Later on, consumer welfare and efficiency started playing a more important role. In 2004, the Commission stipulated in its guidelines that the goal is "*to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources*."[19]

However, the objective of EU competition law still seems to be built on more pillars, among others the following ones: economic efficiency, consumer welfare, faire competitive process, market integration, innovation, competitiveness of the European economy, economic freedom, consumer choice and so on.

Competition law thus may encompass more aspects than only those which economic theory puts into the normative basis. Moreover, as it is reminded by

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[15] See a variety of opinions in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar 2012). And further contributions: Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' in Ioannis Lianos and Damien Geradin (eds), *Handbook on European competition law. Substantive Aspects* (Edward Elgar 2013). Pinar Akman, 'Consumer Welfare and Article 82 EC: Practice and Rhetoric' (2009) 32 World Competition 71. Maher M Dabbah, *International and Comparative Competition Law* (Cambridge University Press 2010) 36–44.

[16] Richard A Posner, *Antitrust Law* (2nd ed, University of Chicago Press 2001) 29.

[17] For a contrasting view see Robert H Lande, 'Consumer Choice as the Ultimate Goal of Antitrust' [2001] 62 U. Pitt. L. Rev. 503.

[18] Roger Van den Bergh and Peter D Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Sweet & Maxwell 2006) 56.

[19] Guidelines on the Application of Article 81(3) of the Treaty, OJ C 101 2004 97, para 13.

Eleanor Fox, "*sometimes goals other than efficiency (in its various forms) may be in tension with efficiency goals, and a society may choose them nonetheless.*"[20]

To conclude this brief overview, it is apparent that due to the plurality of objectives, economic theory and economic considerations can never play the only role within the interpretation and application of competition rules. In these circumstances, economics represents a helpful tool, but not the only decisive one.

2.2.2. Economics as a source of knowledge for creating rules

Competition law is often considered a branch of economic law. In other words, it is supposed to be a legal field which is based on economic considerations. From the economic perspective, competition law is considered "*an instrument for efficiency*".[21]

Indeed, philosophical foundations of competition law lie in economic assumptions. Economics provides reasons why competitive markets bring benefits to the society,[22] and it also offers explanations why and when monopoly situation in the market leads to economic inefficiency.[23] Competition law then builds itself on the normative claim that economic inefficiency is an undesirable phenomenon which hurts society, and therefore competition rules prohibit such a behaviour which causes an inefficient monopoly situation – whether through cartelization, monopolization, or concentration.

Therefore even if competition law does not emphasise efficiency as its sole goal and encompasses other corollary goals that the society wants to achieve,

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[20] Eleanor M Fox, *Cases and Materials on U.S. Antitrust in Global Context* (3rd ed, Thomson/West 2012) 49.
[21] Ibid 48.
[22] Very briefly: The basic theory says that through balancing of the demand and the supply, markets are able to reach efficiency in production as well as to allocate scarce resources efficiently.
[23] For a more detailed overview of economic foundations see, e.g., Posner (n 16) 9–32. Victor J Vanberg, 'Consumer Welfare, Total Welfare and Economic Freedom - on the Normative Foundations of Competition Policy' in Josef Drexl, Wolfgang Kerber and Rupprecht Podszun (eds), *Competition policy and the economic approach: foundations and limitations* (Edward Elgar 2011). David W Barnes, *Economic Foundations of Regulation and Antitrust Law* (West Pub Co 1992). Frank Maier-Rigaud, 'On the Normative Foundations of Competition Law - Efficiency, Political Freedom and the Freedom to Compete' in Daniel Zimmer (ed), *The goals of competition law* (Edward Elgar 2012).

efficiency is still an important source of inspiration for the law-maker to create competition rules.[24] In that sense, economic theory serves as a resource of knowledge and arguments for determination and articulation of the norm, as well as for the establishment and wording of a concrete rule.

2.2.3. Economics as a tool for interpreting and applying rules

Besides this initial role, economics enters into competition law also on the level of the enforcement. At this stage, the founding and normative basis setting role is reflected and transformed into a set of tools for interpreting and applying competition rules. Its helpfulness or even indispensability lies in several forms.[25]

First, economic theory is able to identify and clarify the content of vague and sometimes ambiguous terms and concepts which are usually used in competition law. Economics represents here an interpretative tool. Whether "competition", "restriction" or "market", law does not give an answer to what these terms mean. When interpreting these and other similar terms, economics provides for explications of what meaning should be assigned to them in the light of the normative basis and of the goal(s) of competition law.

Second, economics provides an analytical tool which picks up the aspects necessary to create a legal test by which a concrete practice is assessed or to formulate other supportive arguments necessary for the reasoning In other words, it helps to formulate the legal test (i.e. then it is a legal method derived from economics) and as a consequence to enlighten the link between the rule and the facts (economic appreciation).[26]

Third, economics and its corollary disciplines (statistics, econometrics, behavioural economics, etc.) offer various techniques, methods, algorithms and

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[24] More about the normative foundations from the historical perspective in: Kiran Klaus Patel and Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law* (Oxford University Press 2013); Heike Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European competition law annual 2007: a reformed approach to article 82 EC* (Hart Publishing 2008).

[25] For the basic classification see Van den Bergh and Camesasca (n 18) 4.

[26] See Section 2.4.2 where different forms of economics are defined.

frameworks which are necessary within the assessment of evidence. It serves as a tool for the economic analysis of facts, and that tool may be both quantitative and qualitative.[27]

2.3. Definition of economic reasoning as a part of legal reasoning

Since it is difficult to define economics, a definition of economic reasoning cannot be made easily. Economic reasoning as such presents an economic way of thinking. For the purpose of this thesis, economic reasoning could be understood as using the economic way of thinking in order to make a justification. Such a process picks up arguments according to their economic relevance, links them according to their economic causality and makes justifications based on the relations between the arguments.

Economic reasoning is, in this thesis, considered a part of legal reasoning.[28] Thus it presents a specific use of economic arguments within a traditional legal flow of arguments. If we start with the classical definition elaborated by Neil MacCormick, legal reasoning is a "*process of justification*",[29] and in more detail "*an activity within more or less vague or clear, implicit or explicit, normative canons. We distinguish between good and bad, more sound and less sound, relevant and irrelevant, acceptable or unacceptable arguments in relation to philosophical, economic, sociological, or above all, legal disputation over given foci of dispute*."[30] Based on this statement, a plausible definition of economic reasoning would be as a process of justification which normatively accepts

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[27] For more about the role of economic evidence, especially before courts, see: Luis Ortiz Blanco and Alfonso Lamadrid de Pablo, 'Expert Economic Evidence and Effects-Based Assessments in Competition Law Cases' in Massimo Merola and Jacques Derenne (eds), *The role of the Court of Justice of the European Union in competition law cases* (Bruylant 2012). Coombs and Padilla (n 14) 473–483. Eric Barbier de la Serre and Anne-Lise Sibony, 'Expert Economic Evidence Before the EC Courts' (2008) 45 Common Market Law Review 941. Ioannis Lianos, '"Judging" Economists : Economic Expertise in Competition Law Litigation : A European View' in Ioannis Kokkoris and Ioannis Lianos (eds), *The reform of EC competition law: new challenges* (Wolters Kluwer Law & Business 2010).

[28] The same approach is advocated explicitly also by Anne-Lise Sibony, *Le juge et le raisonnement économique en droit de la concurrence* (LGDJ-Lextenso éd 2008) 29.

[29] Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press ; Oxford University Press 1978) 5.

[30] Ibid 12.

arguments according to their economically relevant causal links and puts them in a coherent line.

It means that economic reasoning in that sense does not apply a different logic in comparison to traditional legal reasoning. The technique is the same, but the specificity of economic reasoning lies in the choice of acceptable arguments and in the way they are evaluated and linked according to their economic relevance.

In that regard it is worth recalling the difference between using economics on one hand, as a tool for examining law from the outside (economic analysis of law), and on the other hand as a tool serving to the legal reasoning in the inside (economic reasoning). Economic reasoning is different from the classic economic analysis *of law* which analyses impact of legal rules and tries to design them in an efficient way; rather, economic reasoning refers to economics *in law* – in other words, it represents a way of thinking within law.[31] Therefore, economic reasoning does not serve as a tool for shaping, creating or evaluating law, but for interpreting and applying legal rules with the aim to attain a certain defined goal. In other words, it "*refers to both deliberate efforts to apply economic insights as well as legal arguments which are very reasonably rationalized as resulting from the intent to apply economic insights*."[32]

2.4. The transformation of economic arguments into legal reasoning

2.4.1. The necessity to pull economic arguments into law

"*[W]hile industrial economics is highly developed as an academic discipline, application of economic theories and models in concrete cases remains an area fraught with difficulty and uncertainty*."[33]

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[31] See to that point Endre Stavang, 'Some Thoughts on Economic Reasoning in Appellate Courts and Legal Scholarship' in Klaus Mathis (ed), *Law and economics in Europe: foundations and applications* (Springer 2013) 126.
[32] Ibid.
[33] Bo Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (2005) 1 European Competition Journal 3, 17.

As it was elaborated above, economics plays an indispensable role on the level of the enforcement of competition law. However, its presence within legal reasoning is not automatic, even if economic reasoning as a technique is not different from legal reasoning as such. Both on the level of abstract arguments and on the level of application of economics to facts, there is a need for a process which will pull economic inputs into law. If we want economics to serve aptly to the needs of law, economic inputs have to be translated into a form which is comprehensible for law. Pure economics (regardless of whether it is positive or normative economics) needs to be transformed and adapted in a way that would fit into the legal style. It requires an intellectual process by which we transform economic thoughts, concepts, models and even arguments into a shape which could smoothly work within a legal reasoning. Lianos calls this process "*the incorporation of economic analysis into legal discourse*".[34]

This intellectual process involves several techniques or methods by which economics could be adapted for the needs of law. Although economics as such cannot prevail over law and must respect the boundaries of the legal system, the economic inputs may eventually inspire changes in the style of legal reasoning.

Here the logic of the intellectual process is quite opposite to the discussion on the role of economics as a basis setting tool. At the beginning, economics served as a source for creating law, however, within the sphere of legal reasoning, law must opens its doors for economics again. As a result, once economic arguments are pulled into law, they become legally relevant arguments.

Kelsen's metaphor on the power of King Midas's hand can be applied here in a rather adapted way. "*Just as everything King Midas touched turned into gold, everything to which law refers becomes law, i.e., something legally existing*."[35] In case of economics and economic considerations, we can use the metaphor saying that once law (in a form of a legal reasoning of the court) refers to economic arguments and accepts them, these arguments become legally relevant. If we apply this idea on the context of European competition law, there is the golden

[34] Lianos, "'Lost in Translation": Towards a Theory of Economic Transplants' (n 3) 368.
[35] Hans Kelsen, *General Theory of Law and State* (Russel and Russel 1961) 132.

hand of the CJEU thanks to which economic arguments, principles and opinions may be transformed into legal arguments.

2.4.2. What are the methods and techniques?

The added value of economics in competition law lies in the fact that it helps to understand the business practice, logic of the business world and the effects of practices on welfare thanks to the models. Based on consumer surveys, economics may enlighten behavioural patterns of consumers and consequently to explain the demand side of the market. What economics offers is "*a combination of the inductive and the deductive to form a syllogism which purports to model reality*."[36] It is a way of constructing a certain logic (flow of arguments) according to their economic causal links. Economics is able to identify the relevant facts, and consequently create a model according to a chosen theory. The facts are then examined through the prism of the model. All these kinds of knowledge then must be transposed into the legal system by various methods.[37]

The process of translation may be done also on the level of the Commission, both within the decisions and in guidelines or other soft law documents.[38] However, since the CJEU is the ultimate standard-maker, it has a powerful position. Only those arguments which are regarded by courts as being in compliance with law may eventually become a part of legal reasoning. In other words, even if the Commission or eventually parties of the proceedings bring new economic arguments on the table, it depends ultimately on the CJEU whether to accept them or not.

Economic models serve as a source of economic knowledge which may be transformed into an **abstract legal standard** (legal test, economic statement of

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[36] Maureen Brunt, 'Antitrust in the Courts: The Role of Economics and of Economists' in Barry E Hawk (ed), *Annual proceedings of the Fordham Corporate Law Institute: International antitrust law & policy : 1998* (Juris Publishing 1999) 362.

[37] The issue of importing techniques is in more details and with a slightly different classification discussed in Anne-Lise Sibony, 'Limits of Imports from Economics into Competition Law' in Ioannis Lianos and Daniel D Sokol (eds), *The global limits of competition law* (Stanford Law Books 2012) 39–53.

[38] See the explanation of the power of economics and economists in U.S. antitrust on the level of creating guidelines in Eleanor M Fox, 'When Economists Are Kings' [1983] 71 Cal. L. Rev. 281.

normative nature). In that case, an economic argument is transposed into legal parlance in a way that it gives the structure of a correct answer to a legal question (for example: Is this behaviour an abusive predatory pricing? Does the undertaking hold a dominant position?). In that case, the legal terms (such as restriction of competition, abuse of dominance, significant impediment of effective competition etc.) are interpreted with regard to economic considerations. Economics serves as a starting point: it offers concepts analyzing the economic reality which must be transformed into a normative structure in order to fit into legal discourse. In other words, economics is able to identify features which must be present in order that we can say that a certain conduct presents an anticompetitive practice. However, the definition of all necessary aspects alone is not enough – such a statement must be complemented with a normative aspect.[39]

A classical example of an economic statement, explaining why a certain practice is not desirable from the economic point of view and therefore anticompetitive, may look like as follows: "W*here an undertaking in a dominant position directly or indirectly ties its customers by an exclusive supply obligation, that constitutes an abuse since it deprives the customer of the ability to choose his sources of supply and denies other producers access to the market*."[40] The Court highlights the economic effects of certain clauses, notably the decrease of the choice which leads to lower satisfaction of consumers (therefore it is to the detriment of the interest of consumers), and artificial barriers to entry to the market in question. In other words, the statement explains the nature of a behaviour, shows its negative economic consequences (both on consumers and the market as such), and therefore concludes that such a conduct is abusive.

When judges have to face the necessity to make the transformation from economics into legal reasoning, the first thing they have to deal with is to

[39] See similarly the discussion on the normative statements/legal tests/legal standards eg. in Sibony, *Le juge et le raisonnement économique en droit de la concurrence* (n 28) 607ff. Lianos, '"Lost in Translation": Towards a Theory of Economic Transplants' (n 3) 368–372. Vesterdorf, 'Economics in Court: Reflections on the Role of Judges in Assessing Economic Theories and Evidence in the Modernised Competition Regime' (n 2) 520–522.
[40] *Case T-83/91 Tetra Pak II* [1994] ECR II-755 [137].

overcome so-called *epistemic asymmetry*[41]. It means that judges must, at first place, understand sufficiently how economics describes its model, how the model works and on which assumptions it is based. Only then they may accept the model and transform it into a legal standard. The process is often subtle and fragile. Since economics often works with assumptions, a result of a particular model may be completely turned over if the assumption is changed. Therefore judges cannot rely upon results, but they must know the assumptions and understand the process. The intellectual process therefore covers three steps. First, judges understand the model, second, they accept it as a normative source, and third, they proclaim it as a legal standard.

Another slightly different type of the transformative technique is turning economics into a kind of **presumption**. Economics provides for models and evidence from the real world which show a certain level of probability of the consequences. Law, due to its normative power, then may deliberately make an artificial line dividing the issue at hand into a part where a further examination is needed and a part where it is not necessary to go deeper and assess details. Such a process helps to ensure legal certainty, and it may be more efficient from the procedural point of view because relying on a presumption may be less costly and less time demanding. It must be, however, recalled that a presumption may also limit further incorporation of economics into legal reasoning because the artificial line stops additional inquiries and potentially contrary arguments to be put forward.

A good example of a presumption may be found in predatory pricing cases where it is not necessary to prove the intent to eliminate competition since *"[a] dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant*

[41] See Lianos, '"Lost in Translation": Towards a Theory of Economic Transplants' (n 3) 368.

regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced."[42]

The distinguishing feature of a creation of a presumption lies in pointing out which aspect must be proved and by whom, and what is assumed to be proved, clear or obvious. The automatic acceptance of the probability, as well as clearness and obviousness are derived from economic causality.

The process of creating a presumption is similar to the above explained making of legal standards. Therefore when judges understand the economic logic behind, and accept the economic explanation, they are able to draw the legalistic line and create a presumption, which may be both rebuttable and irrefutable.

Another type is creation of a **supportive argument**. It serves as an underpinning explanation for the standard, or for the presumption, or even for the assessment of evidence. It may include both an explanation of the consequences of a certain behaviour and a description of probable motives and incentives for the behaviour. Judges may use such an explanation directly without any specific need to transform it into law. When the explanation is understood and accepted by judges, they transplant it as a whole into the legal reasoning.

A supportive effects-focused argument says what the possible consequences of a particular conduct are, and it explains in more detail why such a conduct should be deemed as anticompetitive. The Court may either explain hypothetical consequences of the particular behaviour (abstract reasoning), or remind concrete impacts of the behaviour on the market, competition and consumers (concrete reasoning).

We can see an example within so-called "as-efficient-competitor" test used by the General Court in assessing the margin squeeze in the case Deutsche Telekom. The Court explains that "*[i]f the applicant's retail prices are lower than its wholesale charges, or if the spread between the applicant's wholesale and retail*

[42] *Case C-62/86 AKZO Chemie* [1991] ECR I-3359 [71].

charges is insufficient to enable an equally efficient operator to cover its product-specific costs of supplying retail access services, a potential competitor who is just as efficient as the applicant would not be able to enter the retail access services market without suffering losses."[43]

A similar form of economics may be seen in the explanations of the reason of a particular conduct. Economics is able to identify what a predicted intent of the alleged anticompetitive behaviour was, why the undertaking wants to undergo such a practice and what its intended goals are.

The Court of Justice explains the intent of pricing below average variable costs in the following manner: "*In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking.*"[44]

Last but not least economics may be adapted to the needs of law when assessing the **evidence**. Here, the courts work both with quantitative or qualitative data and review methods which were used for the assessment for such data. Here, the most important role of economics is that it points out *which* facts are relevant, *how* they are relevant and *why* they are relevant.[45] The evaluative method suggested by economists then requires a legal mind which would accept it as a legitimate process for the assessment of facts.

Dealing with evidence through the prism of economics requires a two-step analytical work. Judges have to understand and accept the relevance of facts in the first place. Such a process entails a classical legal method where facts are subsumed under a rule. Consequently, judges have to understand and accept the method by which the facts are classified, compared and eventually evaluated.

All above mentioned categories of transposing techniques and their results are not mutually exclusive. In practice, they may be combined. Usually one

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[43] *Case T-271/03 Deutsche Telekom v Commission* [2008] ECR II-477 [237].
[44] *Case C-333/94 P, Tetra Pak II* [1996] ECR I-5951 [41].
[45] See similarly Sibony, 'Limits of Imports from Economics into Competition Law' (n 37) 41–42.

statement of the court may start with an explanation in a form of a supportive argument and continue with a normative statement and so on.

3. The CJEU in competition law

In order to better understand the way the CJEU works with economics and to determine the prism through which its use of economics may be assessed, it is necessary to look at the CJEU, its characteristics, methods and style. This section will therefore briefly discuss the principal features of CJEU and it will elaborate briefly on the inner characteristics of its work, especially the style of reasoning and interpretative methods used by it.

On the European level, there are two main procedures where the Courts have to deal with competition law issues. Within the review procedure, the General Court in the first instance and the Court of Justice on appeal have to control the legality of administrative decision of the Commission (Art. 263 TFEU), while within the preliminary reference procedure, the Court of Justice elaborates on the interpretation or validity of a rule stemming from EU law (Art. 267 TFEU). In both cases, the task for the CJEU is to guarantee legality. It has a rather wide scope for its work within boundaries of EU law, but cannot trespass the limits and go beyond.

The way how the CJEU works and how its final outputs look like depend considerably on the chosen style of reasoning, on tools, methods and techniques of interpretation, and on the overall means how a decision is reached. Presumably, these inner characteristics of the CJEU may have an impact on the development of economic reasoning within competition law. This sub-chapter therefore recalls several aspects which may have such an influence.

3.1. Several remarks on the style of reasoning

The CJEU and its reasoning reflect the legacy of the French system which served as the most influential inspiration when the Court was established.[46] The institution was constructed according to the model of the French Conseil d'Etat, and the procedure was inspired by the French administrative review procedure. During the years, it absorbed influences from other legal systems within its work. Presumably, the German tradition played a certain role in developing the system into its specific form.[47] Regarding the broad range of inspirations and influences, together with no authoritative guidance how to decide cases, the Court was left with a wide range of tools and methods from which it has created its own style.

The style of reasoning is often labelled as apodictic, simplistic, mathematical, too syllogistic or too straightforward with no proper and clear explanation of arguments and reasons.[48] The approach of the CJEU is even regarded as the "*Cartesian discourse*"[49] which is characterized by the "*pretence of logical legal reasoning and inevitability of results*".[50] It is true that mainly early judgments were short, concise and simplistic, leaving no space for admitting alternative solutions. Due to other influences and inevitable development, the succinct style based on strict syllogism deviated from its French origin into a "specific" style.

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[46] Ditlev Tamm, 'The History of the Court of Justice of the European Union Since Its Origin', *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (T M C Asser Press 2013) 17. Anne Boerger-De Smedt, 'Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome' (2012) 21 Contemporary European History 339, 345–346.

[47] A brief explanation of the influences of the French legal tradition and the German system in Thijmen Koopmans, 'Judicial Decision-Making' in Angus IL Campbell and Meropi Voyatzi (eds), *Legal reasoning and judicial interpretation of European law: essays in honour of Lord Mackenzie-Stuart* (Trenton Publishing 1996) 99.

[48] Ole Due interestingly points out that lawyers criticise the reasoning of the CJEU based on comparison with the legal system they come from because they miss some features they are used to. Ole Due, 'Understanding the Reasoning of the Court of Justice' in Gil Carlos Rodríguez Iglesias and others (eds), *Mélanges en hommage à Fernand Schockweiler* (Nomos 1999) 73–74.

[49] Joseph HH Weiler, 'Epilogue: The Judicial Après Nice' in G De Búrca and Joseph HH Weiler (eds), *The European Court of Justice* (Oxford University Press 2001) 215.

[50] Ibid 225.

However, the style is arguably still straightforward and discoursive patterns appear only randomly.[51]

Such a style and approach condition, to a certain extent, the way how economic arguments are put into legal reasoning. In order to fit into the style, economics must be, arguably, transformed into a straightforward flow of clear arguments.

3.2. Methods of interpretation

The way how economics is pulled into the reasoning of the CJEU and its intensity presumably depends also on the general methods of interpretation that the CJEU uses.

Regarding the *sui generis* nature of EU law, the linguistic vagueness of norms and value pluralism, the CJEU has developed a specific hermeneutic approach to interpret EU law. It is generally accepted that the CJEU combines a variety of interpretative techniques. Starting with the classical textual method (grammatical, linguistic, semantic), the Court has to apply other techniques, such as contextual (systematic) interpretation, teleological (purposive) interpretation, comparative interpretation or historic interpretation.[52] According to its own case law, the CJEU considers the teleological (focus on the objective of a provision) and systematic (consideration of the context) interpretation as the core tool for its reasoning.[53] The Court explains it in the way that *"[s]ince a literal interpretation [...] does not provide an unequivocal answer [...], it is necessary to place [the provision] in its context and to interpret it in relation to [its] spirit and purpose*

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[51] Sometimes it is argued that the discoursive elements appear in the CJEU thanks to opinions of advocates general who perform more detailed analyses and put on table even an alternative interpretation or solution. See, eg. Mitchel de SO L'E Lasser, *Judicial Deliberations a Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2009) 247–256. Michal Bobek, 'A Fourth in the Court: Why Are There Advocates General in the Court of Justice?' (2012) 14 Cambridge yearbook of European legal studies 529, 558.

[52] However, the methods may not be mutually exclusive, and there is also no proper consensus on their classification and terminology. In more detail about the interpretation and interpretative methods used by the CJEU, e.g. in Nial Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20 Fordham International Law Journal 656. Giulio Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' (2009) 10 German Law Journal 537. Thijmen Koopmans, 'The Theory of Interpretation and the Court of Justice' in David O'Keeffe and Antonio Bavasso (eds), *Judicial review in European Union law* (Kluwer Law International 2000). Due (n 48).

[53] *Case 283/81 CILFIT v Ministére de la santé* [1982] ECR 3415 [20].

[...]."[54] However, there is no authoritative hierarchy of methods which are used; the CJEU uses several methods at the same time in order to find an "optimal" solution. The choice of the interpretative methods may depend on the wording of a provision at hand, its clearness, the complexity of the case at hand and the sort of arguments raised by parties.[55] Moreover, the overall approach of the CJEU is regarded as dynamic which allows for and at the same time requires a certain degree of judicial creativity. Since the Court was entrusted to authoritatively interpret an "incomplete"[56] set of rules which are, moreover, vague and textually open, a kind of creative interpretation is unavoidable.

The assessment of economic reasoning of the CJEU in competition law must be seen through the prism of its interpretative methods and of its overall approach to interpretation of competition law. Since the essential competition provisions are based on vague and textually open rules, the teleological and systematic interpretation is very important. It was explicitly mentioned in Continental Can where the Court highlighted the necessity to look into "*the spirit*", "*the general scheme and wording*" and "*the system and objectives of the Treaty*".[57]

However, what must be recalled is the issue of the plurality of goals.[58] Teleological interpretation presumes that there is a *telos* of a rule, a goal which must be reached. The plurality of goals and the ambiguity of the *telos* therefore bring a kind of obstacle or rather a challenge for the interpretation as such.

3.3. Other aspects related to the decision-making of the CJEU

Although the CJEU is bound by the obligation to state reasons, sometimes its decisions may contain argumentative or logical gaps and "*[i]n extreme cases the reasoning may even be confined to a pure statement without any argument*

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[54] *Case C-257/00 Nani Givane* [2003] ECR I-345 [38].
[55] It is highlighted, based on personal professional experience, by former Judge Kutscher in Hans Kutscher, 'Methods of Interpretation as Seen by a Judge at the Court of Justice', *Judicial and Academic Conference 27-28 September 1976* (Court of Justice of the European Communities 1976) I–15.
[56] Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004) 23–25.
[57] *Case 6/72 Continental Can* [1973] ECR 215 [22].
[58] More about the interpretative methods in the context of goals of competition law in Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' (n 15) 68–75.

supporting"[59]. Such gaps and shortages are probably caused by attempts to find a compromise among the members of the judicial chamber when deciding upon the wording of the judgment. The CJEU itself excuses this deficiency by the necessity to speak with one voice.[60] Presumably, the compromising character of the reasoning may slow down the development in the perception of new economic arguments into the legal reasoning.

What is worth mentioning is also the reliance of the CJEU upon its own case law.[61] The potential deviation from settled case law is limited by the effort to ensure basic legal principles, such as legal certainty, legitimate expectations or predictability of the decision-making. However, these principles are, sometimes and to certain extent, sacrificed in the name of the integration and the Court therefore applies more dynamic methodology to serve to this goal.[62] Overruling of earlier case law is therefore not impossible,[63] but the Court deviates rather carefully, cautiously and slowly.[64] Only in rare cases, it explicitly admits that its reasoning is contrary to settled case law.[65]

Last but not least, the overall discretion of the CJEU must be mentioned.[66] It is in hands of the CJEU to choose which tools it would use and which method it would apply. In that sense, the CJEU holds a certain power which has no strict

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[59] Due (n 48) 82.

[60] Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in Maurice Adams and others (eds), *Judging Europe's judges: the legitimacy of the case law of the European Court of Justice* (Hart Publishing 2013) 46.

[61] In detail on the reliance on case law in Marc A Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (Cambridge University Press 2014). The precedent-like nature of case law of the CJ is discussed in Jan Komárek, 'Precedent and Judicial Lawmaking in Supreme Courts: The Court of Justice Compared to the US Supreme Court and the French Cour de Cassation' (2008) 11 Cambridge yearbook of European legal studies 399. See also Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing 2012) 92–114.

[62] See similarly Rostane Mehdi, 'Le Revirement Jurisprudentiel En Droit Communautaire', *L'intégration européenne au XXIe siècle: en hommage à Jacques Bourrinet* (Documentation française 2004) 114.

[63] In more detail on the overruling in the CJ in Jacob (n 61) 155–182. The author enumerates the reasons for the overruling, such as: incorrectly decided precedent, the precedent is not workable in practice, incompatibility with subsequent decisions, incompatibility with other changes in the law, imbalance between principles, and changed circumstances and factual context.

[64] See a kind of explanation in Stone Sweet (n 56) 30–37.

[65] For example in *Joined Cases C-267/91 and C-268/91 Keck and Mithouard* [1993] ECR 1-6097 [16].

[66] See more about the judicial discretion in Stone Sweet (n 56) 23–41.

limits. It is an ultimate standard-maker and interpreter of EU law, and even if other institutions and Member States may overrule its approach, change the goals or directions of EU law, even if other stakeholders may suggest other novelties,[67] their influence is limited. As a result, in all these cases the CJEU still keeps a high margin of discretion when it comes to the choice of arguments due to several external conditions.

First, new arguments or suggestions to change a direction of the approach may come through changes in written law and new inputs may appear in soft law.[68] However, it is hard to make radical changes of written law when a consensus is needed to be reached on the political level.[69] Therefore the other stakeholders have no invincible coercion power to persuade the CJEU and to influence authoritatively the way of legal reasoning and the choice of arguments, and the CJEU keeps a space to develop its approach on its own.

Second, parties of a case may try to persuade the CJEU to change its approach within a particular case. The CJEU has also to face opinions of experts and other suggestions from subjects in the position of amicus curiae. However, it is naturally upon the Court to accept them or not, therefore the acceptance of new (economic) arguments may be rather random.

Third, the limit of the CJEU is that it is strictly allowed only to guarantee legality. However, since the contours of EU law as such are not crystal clear, the scope of practice is also not precisely defined, and thus the CJEU holds a certain power to make a creative interpretation.

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[67] More about the countervailing powers of the ECJ in Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (M Nijhoff 1986) 75–80.

[68] In competition law, there seems to be a considerable and often appreciated reliance on soft law issued by the Commission (in a form of guidelines or guidance). Their influence is presumably increasing.

[69] Karen J Alter, 'Who Are the "Masters of the Treaty?": European Governments and the European Court of Justice', *The European Court's political power: selected essays* (Oxford University Press 2009) 124–128.

3.4. Interim conclusion

It may be argued that the above mentioned aspects (style of reasoning, methods of interpretation, obedience to own case law, argumentative gaps) have certain influence on the perception and reflection of economics and economic reasoning in case law of the CJEU.

Each aspect, however, may be influential in a different way. While the focus on teleological interpretation, on one hand, opens a door for new (potentially economic) arguments, the rather apodictic style of the reasoning may, on the other hand, restricts the quantity of economic arguments in judgments. The restrictive feature may be seen also in the reliance upon settled case law. The CJEU is, presumably, not willing to make too significant developments of the reasoning unless it is unavoidable. The necessity to speak unequivocally, which seemingly causes logical shortage in the flow of arguments within a judgment, may then explain, to a certain extent, a careful "economization" of the reasoning.

4. Conclusion of the theoretical part

Lars-Hendrik Röller, a former chief economist at DG Competition, European Commission, highlights its belief that "*the use of economics will increase the precision of DG COMP's decisions, that is, it will reduce type I and type II errors*."[70] Presumably and with the same logic, the use of economics should increase the precision of even the CJEU's output – despite the fact that the CJEU is limited only to review of legal aspects of Commission's decision or to binding legal interpretation within the preliminary ruling procedure. In any event, in EU competition law, there is a highly necessary and at the same time fragile role of courts to understand economics and economic arguments and turn them into legally acceptable forms.

[70] Lars-Hendrik Röller, 'Economic Analysis of Article 82' in Abel M Mateus and Teresa Moreira (eds), *Competition law and economics : advances in competition policy and antitrust enforcement* (Kluwer Law International 2007) 325.

Before looking whether and how the CJEU really applies economic arguments into its reasoning, it is necessary to recall the context and to assess its practice through the lenses of above explained factors, mainly the following ones.

First, the CJEU is, above all, a guardian of legality in the EU. It must ensure coherence of EU law, protect rule of law and keep fundamental legal principles such as legal certainty. Sometimes the reluctance to accept new economic solutions is just explained by the attempt not to damage legal certainty.

Second, the scope of tasks of the CJEU is limited to legality review or to interpretation of EU law. Such a delimitation of the work also restricts the space where the CJEU may use economics and how it may apply it and pull into law.

Third, economics is a heterogeneous discipline which offers a variety of (sometimes contradictory) arguments. Each argument is considerably based on assumptions, and when an assumption changes, the whole argument modifies its direction. Therefore, for any court, it is a challenge to accept an economic argument in order to serve conveniently to law.

Fourth, even if consumer welfare as a highly economic standard is the currently most proclaimed goal of European competition law, competition law and policy is still built on more pillars and other goals must be taken into consideration as well.

Fifth, the whole reflection of economics into legal reasoning of the CJEU should be assessed in the context of its overall style of reasoning and methods of interpretation. Although there might be economists or commentators focusing solely on competition law, and therefore criticising its approach in this field, the practice requires a broader perspective to be understood sufficiently.

ASSESSMENT OF PRACTICE

Reflection of economics in reasoning of the CJEU

5. Content and methodology

5.1. Framework, approach, methods

The following part will deal with the question how economics, as defined in the theoretical chapter, is reflected in practice and in concrete judgments of the CJEU. It contains two chapters.

The first chapter works with a lexical analysis. It examines how much the CJEU uses economic terminology, and therefore it shows a formal reflection of economics in judgments and a potential development over time.

The second chapter is the most robust one. It deals with the development of economic reasoning over time. The aim of the chapter is to study and keep an eye on the line of gradual enrichment of reasoning by economic inputs, and therefore to shed some light on the way how the CJEU works with economics and transforms it into legal reasoning within assessment of particular practices.

Concerning the subject-matter of the study, the assessment of practice is not devoted to the whole field of competition law, but it focuses solely on the field of abuse of dominance. The reflection of economics in the reasoning of the CJEU is therefore tested within judgments based on Art. 102 TFEU.

Regarding the time-framework, the chapter devoted to lexical analysis will work with judgments issued between 1990 and 2013, while the chapter dealing with economic reasoning will take into consideration all judgments issued by the CJ or GC till nowadays.

5.2. Abuse of dominance in EU competition law

The legal rule on the abuse of dominance is embedded in Art. 102 TFEU which stipulates:

> "*Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States*."

The wording of the rule is short and simple. However, it "*is a difficult rule of law which is, unfortunately neither clear nor simple to apply in practice*."[71] The shorter the text, the greater space for interpretation and application it offers. This supports the view that law is not a self-standing system. It desperately needs inputs from around to be able to function properly. Within their practice, both the European Commission and European courts have developed a myriad of approaches and ideas how to fulfil the rather empty, vague and abstract norm with viable and reality-related arguments.

Generally speaking, the goal of Article 102 TFEU is to safeguard the efficient competition against restraints caused by an excessive economic power of one or more undertakings. It serves as a mid-goal to the overall goals of EU competition law – to protect efficient competition,[72] to ensure consumer welfare[73] and to contribute to working internal market.

Despite the gradual strengthening of the role of economics within the competition law enforcement, its role is not as strong in all fields of competition law. In that sense, the merger control represents the most developed part of competition law, while the field of abuse of dominance is considered to be *"[t]he last remaining*

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[71] Bo Vesterdorf, 'Epilogue' in Luca Rubini (ed), *Microsoft on trial: legal and economic analysis of a transatlantic antitrust case* (Edward Elgar 2010) 487.
[72] *Case 6/72 Continental Can* (n 57) [26]. *Case T-219/99 British Airways plc v Commission* [2003] ECR 5917 [311].
[73] *Case 6/72 Continental Can* (n 57) [26]. *Joined cases 40/73 et al, Suiker Unie* [1975] ECR 1663 [526]. *Case T-228/97 Irish Sugar* [1999] ECR II-2969 [111].

bulwark of "economics light"".[74] The "economization" of competition law in the late1990s came with a wave of Commission's soft law documents.[75] Through the prism of the soft law activity, the field of abuse of dominance was the last one which was "more economized". It is claimed that even on the level of judicial reasoning, it remains the least "economically" developed discipline. The following parts will focus on such a development. However, they will not assess it in comparison with other fields of competition law.

6. Reflection of economic reasoning

6.1. Lexical analysis and quantitative assessment

In the following chapter a quantitative lexical analysis of judgments will be performed. At this stage, the subject of the inquiry is not economic reasoning as such or comprehensive economic arguments, but rather the sole economic terminology.

So-called "explicitly economic terms" will be searched for. These are terms and concepts of mainstream[76] economics which are taken from economic theory and used directly in the legal reasoning without being transposed into legal parlance or changed. They are traditionally used in economic theory as tools to describe economically relevant issues and within legal reasoning they have (supposedly) the same meaning. Therefore, the advantage of using these terms in legal reasoning is that their meaning is clear from the economic terminology, and law just takes them as tools with already defined content.[77]

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[74] Quotation from Van den Bergh and Camesasca (n 18) 3. For similar opinions see, e.g., Damien Geradin and Nicolas Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment' in Massimo Merola and Jacques Derenne (eds), *The role of the Court of Justice of the European Union in competition law cases* (Bruylant 2012) 65.

[75] Notice on the relevant market (1997), Guidelines to vertical restraints (2000), Horizontal merger guidelines (2004), and lately Notice on the application of Art. 82 (2009).

[76] By mainstream economics I mean widely accepted economics as it is taught across universities world-wide and found in textbooks, such as Paul A Samuelson, *Economics* (17th ed, McGraw-Hill 2001). N Gregory Mankiw, *Principles of Economics* (6th Ed, Cengage Learning 2013).

[77] Lianos calls them "economic transplants". See Lianos, '"Lost in Translation": Towards a Theory of Economic Transplants' (n 3) 350ff.

It is obvious that the sole presence of economic terminology does not explain properly how the Courts work with economics and economic arguments in its reasoning. It says only how willing the Court is to adopt the economic language and to put it directly to the text of the reasoning. However, the presence of economic terms may show how is economics reflected formally and what is the impact on the reasoning at first sight.

The following economic terms were selected to be searched for within the text of legal reasoning of the Courts. Some of the terms were selected from among terms used and defined in the OECD Glossary[78], some others were added because of their actual appearance in judgments.[79] The researched economic terms are (in alphabetical order): allocative efficiency, average variable costs, barriers to entry, consumer welfare, contestability, economies of scale, efficiency, elasticity, incremental cost, marginal costs, market power, monopoly, oligopoly, profit maximization, SSNIP test, substitutability, supply and demand, surplus, total costs.

The time scope is from 1990 to 2013 (after the establishment of the Court of First Instance/General Court till nowadays).

Moreover, the research focuses solely on the own reasoning of the courts and within it only on substantive issues. Procedural questions are deliberately ignored. Reasoning dealing with the amount of the fine is excluded as well. Therefore in analyzing the text of each judgment, only those parts of the judgment entitled "The findings of the Court" dealing with substantive issues, are taken into account. Parts of the text where the court repeats the facts of the case, and where it summarizes submissions of the parties and/or interveners, are deliberately ignored.

First, an analysis of the judgments of the General Court is made, and then the same is done for the judgments of the Court of Justice.

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[78] Organisation for Economic Co-operation and Development, *Glossary of Industrial Organisation Economics and Competition Law* (OECD Publishing 1993). Some terms were added because of their actual appearance in judgments.

[79] They were considered economic terms and therefore chosen by the author.

6.1.1. Explicit economic terms in judicial review judgments of the General Court in Art. 102 TFEU cases

The economic terms were searched for in the sample of 27 judgments (time framework 1989 – 2013) of the General Court. These are appeal for annulment cases solely.

In the following table, we can see how often the General Court uses concrete terms. The most frequent terms are *monopoly*, *substitutability*, *supply and demand*, *economies of scale* and *market power*.

On the other hand, none of the examined judgments includes very economic terms, which are deemed to be the core of competition economics, such as *consumer welfare*, *market failure*, *marginal cost* or *allocative efficiency*. When they actually appear in the text of the judgment, they are only mentioned within the summary of the parties' submissions and they are not used within the own reasoning of the court.

It is interesting that one of the essential economic concepts – *consumer welfare*[80] – does not appear in any of the examined judgments. In the EU, consumer welfare has recently gained a prominent position between the goals of competition policy.[81] However, according to the simple lexical analysis of case law, it is apparent that the General Court is not used to working with the economic term *consumer welfare* expressly. The reasons for such a result may be only estimated. It is possible that the Court is cautious when referring to the ultimate goal of competition law and works with *consumer welfare* only implicitly.

[80] Consumer welfare is an economic term which encompasses the maximisation of consumer surplus which is a part of total surplus. In other words, it is the difference between what consumers are willing to pay and what they actually pay. From the economic point of view, it is a result of the allocative efficiency of the competition.

[81] See Russel W Pittman, 'Consumer Surplus as the Appropriate Standard for Antitrust Enforcement' (2007) 3 Competition Policy International 205, 205. Richard Whish, *Competition Law* (7th ed, Oxford University Press 2012) 19–20. Kati Cseres, 'The Controversies of the Consumer Welfare Standard' (2006) 3 Competition Law Review 122, 123.

Table 1: The presence of explicit economic terms in Art. 102 TFEU judgments (appeal for annulment) of the General Court 1990 – 2013 (total sample: 27 judgments)		
Economic term	**No. of judgments where it appeared**	**Percentage (out of 27)**
monopoly	14	51,85%
substitutability	9	33,33%
supply and demand	8	29,63%
efficiency (gains)	7	25,93%
economies of scale	7	25,93%
market power	5	18,52%
barriers to entry	4	14,81%
average variable costs	3	11,11%
total costs	3	11,11%
elasticity	2	7,41%
incremental costs	2	7,41%
SSNIP test	2	7,41%
oligopoly	2	7,41%
maximisation of profits	1	3,70%
allocative efficiency	0	0,00%
consumer welfare	0	0,00%
market failure	0	0,00%
marginal cost	0	0,00%

The following chart shows that there is no apparent increase in the use of explicit economic terms in time. Two judgments which include most of the economic terms are even on the opposite sides of the time framework. The Tetra Pak II case from 1994 (T-83/91) and the Telefónica case from 2012 (T-336/07) are – at least formally – the most "economized" judgments of the General Court. The other judgments include only few economic terms, and this resistance to economic terminology seems constant over time.

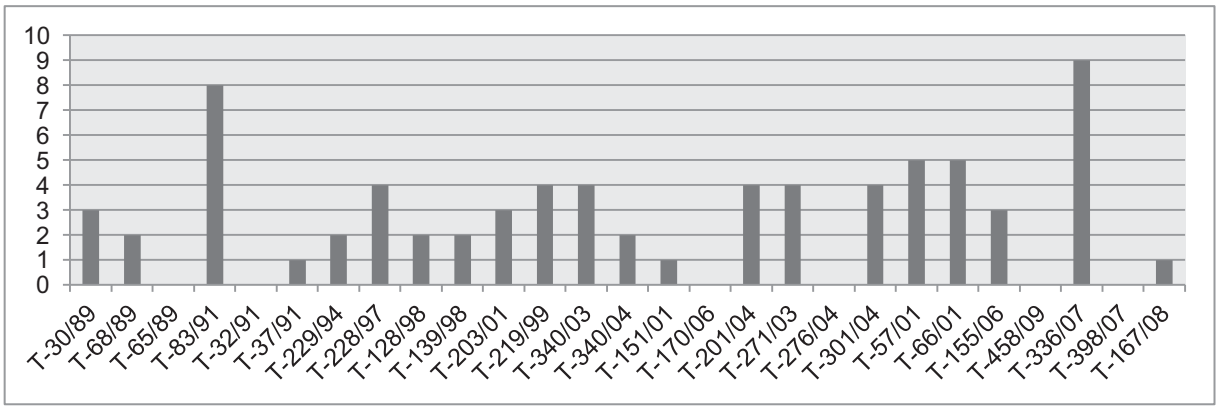

Chart n 1: The number of explicit economic terms used in 102 judgments of the GC

6.1.2. Explicit economic terms in judgments of the Court of Justice in Art. 102 TFEU cases

For a simplistic comparison, let us look at a similar lexical analysis within judgments of the Court of Justice. At first sight, it is apparent that its approach to using explicitly economic terminology is weaker than the approach of the General Court. Very probably, it is due to different procedures and functions of both courts.

Table 2: The presence of explicit economic terms in Art. 102 TFEU judgments of the Court of Justice, 1990 - 2013 (total sample: 44 judgments)

Economic term	No. of judgments where it appeared	Percentage (out of 44)
monopoly	18	40,91%
efficiency	6	13,64%
supply and demand	5	11,36%
substitutability	4	9,09%
average variable costs	4	9,09%
total costs	4	9,09%
economies of scale	2	4,55%
barriers to entry	2	4,55%
incremental costs	2	4,55%
elasticity	1	2,27%
oligopoly	1	2,27%
consumer welfare	1	2,27%
contestable/contestability	1	2,27%
market power	0	0,00%
SSNIP test	0	0,00%
profit-maximization	0	0,00%
marginal cost	0	0,00%

The chart on the evolution of the use of economics in time shows almost the same pattern as in case of the GC judgments. The Court of Justice does not seem to change its attitude to economics in time. There are just two exceptionally cases on the opposite sides of the time spectrum: Tetra Pak from 1996 (C-333/94 P) and Post Danmark from 2012 (C-209/10). No particular difference could be found between appellate judgments and preliminary reference judgments.

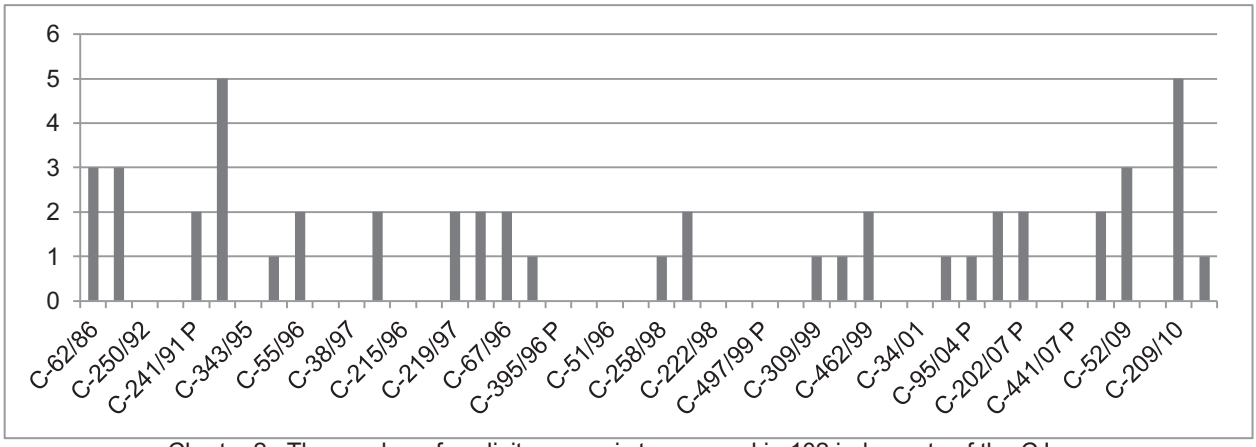

Chart n 2 : The number of explicit economic terms used in 102 judgments of the CJ

6.1.3. Using statistical methods to evaluate the data

What may be interesting is a **correlation** of the presence of certain economic terms in judgments. The correlation shows a relative linear dependence of two variables and does not imply causation. Here we also abandon the time aspect, and count with the whole dataset. The correlation coefficient (CC), which may take values from -1 (absolute negative dependence) to +1 (absolute positive dependence), shows the strength of a linear relation between two variables but does not explain the relation as such.

Let us look on the relative dependence of the presence of terms "monopoly" and "barrier to entry" in the judgments of the General Court. Here, the correlation coefficient is 0.46 – it shows a moderate dependence between these two terms. In other words, when the court uses the term "monopoly", it is moderately likely that the reasoning in the judgment would include also "barrier to entry". A slightly higher dependence, CC = 0.52, may be seen between terms "monopoly" and "substitutability". The CC of 0.61 in case of the relation between "efficiency" and "economies of scale" indicates that these two terms appear together relatively often. Typically, the Court admits that certain practices of undertakings can lead to economic advantages or gains *in terms of efficiency and economies of scale*.[82]

[82] *Case T-57/01 Solvay* [2009] ECR II-4621 [318]. *Case T-203/01 Michelin II* [2003] ECR II-4071 [58].

An interesting comparison may be seen within the reasoning of the Court of Justice. The correlation of "monopoly" and "barrier to entry" is very low, with the CC = 0.26. The same relation is between "monopoly" and "substitutability" (CC = 0.22). In case of "efficiency" and "economies of scale" the result is even slightly below zero as CC = -0.09. Therefore, between the chosen variables, we cannot see any significant linear dependence.

Let us look at the average presence of explicitly economic terms in judgments. The **arithmetic average** of the values describes just the mean value of the dataset and may be influenced by extreme values. On average, every judgment of the General Court includes 2.60 explicitly economic terms out of the list. The standard deviation is quite high, it equals to 2.50; and the variation is even 6.02. It shows quite big differences among judgments.

The average result is much lower within the judgments of the Court of Justice where the average presence of explicitly economic terms is only 1.11. The standard deviation is 1.32 and variation is only 1.69 which shows that the differences among judgments are not very significant.

6.1.4. Conclusion of the lexical analysis

This lexical analysis of the presence of economics in competition judgments is quite superficial and shows only a formal reflection of the economic terminology in the legal reasoning of the Courts. Nevertheless, it shows that the Courts are quite unwilling to use more often purely economic terms and that their approach to mainstream economics in abuse of dominance cases is reserved. Moreover, there is no visible trend and its approach stays constant.

The assessment through statistical tools shows that the use of economic terminology is rather random, and there are no considerable relations of using certain terms together.

However, even if the lexical analysis shows a kind of deterrence of both Courts to the economic terminology, economics may be present in judgments in a more legal way. Therefore in the second step, it is necessary to examine how economics

is reflected in case law in a form of arguments which were translated from economics to legal parlance. The following part will assess in detail various anticompetitive practices and will look at how economics is pulled into law by the court within each type of the investigated behaviour.

6.2. Development of economic reasoning in the CJEU

The following section will analyse the appearance of economic arguments in judgments of the CJEU. It will outline the presumable development of using economic arguments within the reasoning and will focus on particular parts.

The general framework is as it follows: The reasoning will be assessed according to the constitutive parts of the abuse of dominance, i.e. relevant market, dominant position and the anticompetitive conduct. Within the last category, only chosen types of abuses will be examined. Within each category, the analysis will go through judgments chronologically and it will trace down how economic arguments appear in judgments and how their presence evolves over time.

As already mentioned, for a necessary simplification, economics is taken artificially as one variable, as one – even if internally heterogeneous – source of arguments. It is deliberately disregarded in which stream of though a certain argument has its basis, or where it was developed and by whom.

Methodology

Every category starts with an introduction and explanation of the economic rationale behind. It briefly elaborates on which effects a particular practice brings, what are the constitutive parts of each practice from the economic point of view and on which other aspects economics focuses. Consequently, it is followed by a thorough analysis on how this economic rationale was actually reflected within the legal reasoning of the CJEU, and it is compared where the legal approach differs from the economic one.

The economic rationale and background are predominantly based on the current state of art of competition economics. The brief explanation is in majority

inspired by recent publications on law and economics in competition law,[83] and where necessary it is accompanied by information stemming from older works or from pure economics.

The case law in the respective field is scanned – either alongside the timeline (development), or according to some inner shapes and types of the behaviour. Within this scanning, it is analysed how the reasoning absorbs the economic consideration and how it developed in time. The focus is on where and when the courts add new economic elements into their reasoning (either into the normative statements or as supportive economic explanations) and how the reasoning evolved in terms of enriching argumentation by novelties.

The aim of this chapter is to make a rather neutral assessment and reflection on the use of economics. However, normative remarks on the quality of the reasoning are sometimes unavoidable. Therefore, in some parts, comments and critics of different authors are mentioned in order to see whether there is still a gap between the actual way of reasoning and the desirable picture of commentators.

At the end, the economic reasoning of all practices will be compared and evaluated with a conclusion how the economic reasoning of courts developed in time and what are the most significant patterns of this evolution.

Framework

Within this chapter, both the European courts, CJ and GC, are taken together, and not separately. This approach is based on the assumption that both courts behave in the same manner, and that the development does not go alongside the specific task or position of each court, but it is rather a process which jumps from one court to the other one and vice versa and does not differ between judicial

[83] Mainly the following ones: Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (Second Edition, Hart Publishing 2013). Geradin, Layne-Farrar and Petit (n 5). Hildebrand (n 5). Gunnar Niels, Helen Jenkins and James Kavanagh, *Economics for Competition Lawyers* (Oxford University Press 2011). Simon Bishop, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd ed, Sweet & Maxwell 2010). Van den Bergh and Camesasca (n 18). Louis Kaplow and Carl Shapiro, 'Antitrust' in A Mitchell Polinsky and Steven Shavell (eds), *Handbook of Law and Economics. Volume 2* (North-Holland 2007).

review cases and preliminary references. Concerning time framework, judgments from the very beginning till nowadays will be examined.

The analysis is divided into more sub-chapters according to the normative features of the abuse in the following way: (1) relevant market, (2) dominant position, and concrete abusive practices – (3) predatory pricing, (4) margin squeeze, (5) refusal to supply, (6) tying and bundling, and (7) fidelity rebates.

6.2.1. Relevant market

What does "market" mean? Economics defines it simply as a place where demand meets supply. For the needs of competition law, it is, however, essential to delimitate more concretely how this place where two economic forces meet each other look like and how big it is.

The European courts have consistently ruled from the outset that the proper definition of the relevant market is of the utmost importance as the first step in the examination of the dominant position.[84] Already in Continental Can, the landmark decision, the CJ held that "*the definition of the relevant market is of essential significance*" because competition may be assessed solely "*in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products*."[85] In this case, the CJ highlighted the importance of the market definition from the economic perspective, taking account mainly the elasticity of demand of a product/service in question and the substitutability of the product which has a major influence on the limitation on the market.

The necessity to start with the relevant market definition is, rather from the legal point of view, further developed in the judgment of the GC in Volkswagen, where the court explained the logical chain of analysis in the following way: "*[B]efore an abuse of a dominant position is ascertained, it is necessary to*

[84] See, among others, *Case 6/72 Continental Can* (n 57) [32]. *Case 27/76 United Brands* [1978] ECR 207 [10]. *Case T-219/99 British Airways plc v Commission* (n 72) [91].
[85] *Case 6/72 Continental Can* (n 57) [32].

establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined."[86] The rationale remains the same, saying that the market definition is the inevitable precondition for further steps of the investigation.

The definition of the relevant market directly influences the finding whether the investigated undertaking holds a dominant position or not. Moreover, the delimitation of the market has an impact on the assessment of the actual or potential effects of the practice in question. There are two opposite risks connected to an incorrect market definition. On one hand, if the relevant market is defined too broadly, the dominant position of the undertaking is melted, and the practice escapes the competition law viewfinder. On the other hand, if the definition is too narrow, it leads to the undue finding of the dominance and the misinterpretation of effects.

Economics behind the concept of relevant market

Within the sphere of relevant market, first, economics provides for the interpretation of the relevant market as a concept, and second, it also offers tools (proxies) how to assess it. From the point of view of economics, the concept of relevant market is a core of all economic assumptions. One can perform economic analysis and assess a conduct only on the basis of an assumption of the existence of a particular market which is examined.

Based on the starting assumption of the existence of relevant market, economics further explains how to find out that there is one. In doing so, it uses the following proxies. The borders of the relevant market are usually drawn alongside three elements: (1) the product and its inner characteristics, (2) consumers who buy the product and their habits, and (3) the territory where the consumers purchase the product. In practice, the first and the second element are taken together and thus lead to the definition of the relevant product market, while the third category defines the relevant geographic market.

[86] *Case T-62/98 Volkswagen* [2000] ECR II-2707 [230].

The complex economic concepts are already simplified into guidelines[87] included in the Commission's Notice on the Market Definition from 1997. According to it, the product market is delimitated by "*all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*."[88] The geographic market is then defined as "*the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area*."[89] The definition of the relevant market for the aims of competition law enforcement must be established "*by the combination of the product and geographic market*s."[90]

Regarding, first, the **relevant product market**, it is based on two elements: demand-side substitution and supply-side substitution.

The demand-side substitution reflects the willingness of consumers to switch among products which are, in their view, interchangeable as they can serve to the same consumption aims. The inner characteristics of the product are not important, what matters are the preferences and the view of consumers.[91] The higher the demand-side substitution is, the more risky is to raise prices, because customers would switch to a competing product, and therefore it broadens the size of the relevant market.

The supply-side substitution then describes the ability of competitors to change their production and smoothly adapt to the demand of the relevant product. The preparedness of other producers to react quickly and to start selling a similar

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[87] See an article by E. Fox who highlights the influence of economists on creation of soft law documents: Fox, 'When Economists Are Kings' (n 38).
[88] Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law 1997 (OJ 1997 C372/5) para 7.
[89] Ibid 8.
[90] Ibid 9.
[91] Typically, this is due to marketing and market segmentation that consumers perceive products which are physically very similar and therefore interchangeable, as completely different goods; e.g. a shampoo for women v. a shampoo for men.

product (without bearing high additional costs) enlarges the relevant product market because it creates an immediate potential substitutability.[92]

Moreover, economics predicts the occurrence and relevance of so-called chains of substitution. The theory accepts even indirect substitutes to be a part of one relevant market if they are mutually interconnected due to chains of substitution. Even if there are two products which are not direct substitutes, the existence of a third product which is deemed to be a substitute for both two, links all products to be comprised into the same relevant market because the respective pricing of the first two products is constrained by the possibility to switch for the third one.[93]

Next to assessing the pure substitutability, economics offers also other more complex tools to measure the relevant market, such as the so-called hypothetical monopolist test (hereinafter the "HMT"). It serves as an analytical tool to assess substitutability of products in the following way. Having its roots, in the US merger policy, the HMT is used to identify the narrowest market where a hypothetical profit-maximizing firm would be able to exercise its market power by imposing at least a small but significant and non-transitory increase in price ("SSNIP"; hypothetical price increase).[94] The Commission Market Definition Notice explains the steps as "*starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term*."[95]

Under the HMT, a so-called SSNIP test is used as a quantitative method to measure the substitutability. According to the Market Definition Notice, the

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[92] However, the immediate potential substitutability is different from potential competition which presents a possibility that new competitors enter the market in the long run and while bearing high costs. See *Market Definition Notice 1997* (n 88) para 24.
[93] Ibid 57. For more detailed explanation and examples see O'Donoghue and Padilla (n 83) 106–107. Geradin, Layne-Farrar and Petit (n 5) 181–182.
[94] US Department of Justice and Federal Trade Commission Horizontal Merger Guidelines 2010 s 4.1.1.
[95] *Market Definition Notice 1997* (n 88) para 16.

small increase is supposed to be in the range from 5% to 10%.[96] However, it is sometimes criticised for making false conclusions (so-called cellophane fallacy[97]).

Next to these and possibly other quantitative methods,[98] economics allows even for qualitative approach, such as the physical characteristics of the product and the intended use by consumers. The method relies on preferences of consumers therefore the results are only approximate, and it raises a risk that the conclusion is based on subjective considerations with no proper analysis of the behaviour of consumers and their actual consuming attitude.

As far as the geographic market is concerned, the economic view how to shape it is analogous to the product market definition. It works both with demand-side substitution and supply-side substitution. The demand-side substitution shows how far (in terms of real physical distance) the customers are willing to move in order to purchase a product, if the price of the relevant product increases. The economic factors which influence the geographic scope of the market include transport costs, durability of the product (customers are willing to travel more to purchase a more durable product in comparison to a product of the daily use), the physical nature of the product (there are almost no barriers e.g. for software in comparison to large and heavy movable goods), transport facilities, quality of distributional channels, administrative burdens, etc.

The supply-side substitution is influenced by obstacles that producers face when they want to adapt to the demand, or when they want to enlarge the territory they supply. These obstacles are physical limits, transportation costs, administrative burdens, costs stemming from necessary investment, contractual limits, capacity constraints, etc.

Moreover, the geographic delimitation of the market depends also on homogeneity of conditions and consumer preferences stemming from cultural

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[96] Ibid 17.

[97] This failure of the SSNIP test is called after the case United States v E.I. Du Pont de Nemours and Col, 351 US 377 (1956). The market of cellophane was wrongly claimed not to be a separate market because of a considerable cross-price elasticity of demand vis-a-vis other materials.

[98] E.g. critical loss analysis, price correlations, co-integration analysis etc. – see in more detail O'Donoghue and Padilla (n 83) 116–119. Geradin, Layne-Farrar and Petit (n 5) 182–186.

background. If differences in conditions are remarkable, it makes a barrier of market power and creates a separate market. As an example, the borders may be drawn alongside a national frontier when the condition lies in national tastes or habits. It may also follow borders of linguistic territories when a product in case is intrinsically connected with a language (e.g. books, newspapers).

Overall, economics offers quantitative as well as qualitative criteria which could serve as proxies when delimitating the relevant market in a particular case. In reality, the actual definition is quite sensitive because a wrong finding may lead either to under-enforcement, or over-enforcement.

The reflection in legal reasoning

Using words of Thomas Kauper, "*market definition is a process dominated by economists who shape lawyers' arguments and engage in testimonial battles in court*."[99] Following his argument, one could easily claim that market definition comes into legal reasoning as a ready-made product which requires from lawyers only to fulfil it with necessary factual evidence and not to examine its normative nature. However, even if it may appear at first sight that legal reasoning accepts the economic approach as such, the normative intervention of the court is necessary, at least just to approve the suggestions of economists to become a legal standard.

In any event, it is apparent from the early case law, that the CJEU was initially reluctant to pull more detailed and technical arguments into its reasoning and relied upon rather qualitative and often presumption-like arguments. The willingness to almost accept the ready-made economic product based on economic and econometric data appeared much later.

It is interesting that in early cases, the CJEU did not examine in such a detail the economic nature of the demand-side substitutability, but on the other hand,

[99] Thomas E Kauper, 'The Problem of Market Definition Under EC Competition Law' (1996) 20 Fordham International Law Journal 1682, 1682. However, it should be mentioned that Kauper refers here to U.S. antitrust law.

the supply-side substitutability was assessed more or less in accordance with the economic view.

Concerning the demand-side substitutability, it is apparent from the early judgments that the CJEU gave precedence to the qualitative aspects of the substitutability. In the case United Brands, the CJEU followed the Commission's approach taking into account the inner characteristics of the product (bananas) and its probable perception in the eyes of consumers. Starting with the objective findings that bananas are soft and do not include seeds which distinguish them from other fruits, the Court automatically jumped into a rather subjective presumption that due to this characteristics they have no proper substitutes.[100] It did not take into consideration the actual ability of the undertaking to influence prices, nor did it look at possible quantitative tools, such as price elasticity, differences between prices etc.

Such an early approach succumbed to huge criticism which blamed it for being result-oriented and presenting a reverse logic: the market was defined in such a breadth to comply with the findings of the dominant position.[101]

Even a decade later, the Hilti judgment was based on the argument highlighting the "*qualitative characteristics of the products at issue*,"[102] the way they are produced and a presumption-like use by customers. The GC found that there are three separate relevant markets in question for nail guns, cartridge strips and nails because "*cartridge strips and nails are specifically manufactures, and purchased by users, for a single brand of gun*."[103] The GC even did not change its view when facing expert economic surveys and econometric analyses.[104] The findings were criticised for defining a too narrow market, not to taking into consideration the price changes of other fastening systems than nail guns.[105]

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[100] *Case 27/76 United Brands* (n 84) [12–35].
[101] Kauper (n 99) 303.
[102] *Case T-30/89 Hilti* [1991] ECR II-1439 [72].
[103] Ibid 66.
[104] Ibid 75–76.
[105] See the critique in detail, eg. in Kauper (n 99) 1682–1767.

In Wanadoo, both the GC and the CJ accepted the concept of demand-side substitution by upholding the Commission's analysis. The question which arose within the case was whether the supply of broadband access (high-speed access) to the internet is a part of the same relevant market as narrowband access and cable access (low-speed access). Based on the SSNIP test, it was found that the substitutability between these two groups of services is "extremely asymmetrical" with an enormous shift of consumers towards high-speed access despite price differences.[106] The GC also accepted the conclusion of the SSNIP test provided by the Commission Notice, saying that the "*high percentage of subscribers who would not abandon high-speed access in response to a price increase of 5 to 10% provides a strong indication of the absence of demand-side substitution*."[107]

The Wanadoo case seems as a shift from the qualitative approach to the quantitative one. However, the courts are not willing to quit the qualitative analysis at all, since it still presents a reliable guide for them even in high-tech or financial industries. So in Microsoft, the market for media players which allowed for streaming was deemed distinct from a market of media players without streaming functions. The difference was based just on the functionality of both products.[108] In ClearStream, the GC looked at the demand-side substitutability through the presumed preferences of consumers who make differences between offered services just because of their diverse characteristics.[109]

The reliance also on qualitative analysis is not, however, a step back. Even economists approve, that both approaches are desirably complementary, especially in cases where there is a lack of quantitative evidence. It is claimed that "*qualitative data are most likely to be used in future as a cross-check on quantitative data, which would be preferable to reliance on qualitative data only*."[110]

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[106] *Case T-340/03 France Télécom (Wanadoo)* [2007] ECR II-107 [88–89].
[107] Ibid 90.
[108] *Case T-201/04 Microsoft v Commission* [2007] ECR II-3601 [914].
[109] *Case T-301/04 Clearstream* [2009] ECR II-3155 [51–57].
[110] O'Donoghue and Padilla (n 83) 120.

Regarding the supply-side substitutability, the CJEU was more ambitious even in early judgments. In the seminal judgment in Continental Can, the CJEU quashed the Commission's findings on relevant markets because it neglected the supply-side substitutability. The CJEU claimed that *"[a] dominant position on the market [...] cannot be decisive, as long as it has not been proved that competitors from other sectors [...] are not in a position to enter this market, by a simple adaptation, with sufficient strength to create a serious counterweight*."[111] Similarly, in Michelin, the CJEU used the same logic and this time approved the Commission's findings of separate relevant markets. It made a statement that there was no elasticity of supply because a modification of production would require time and significant costs into investment.[112]

In Kish Glass, the GC based its findings on the qualitative analysis of production claiming that the production of different products requires the same technology. Thus the change for a production of another product bears no additional costs for the undertaking.[113]

Concerning the geographic market, the Courts focused predominantly on transport costs and logistics in general. In United Brands, transport costs were not deemed as a barrier.[114] The same approach was taken in the Hilti case where the Court made an assumption stemming from low transport costs that price differences between Member States would enable parallel trade and would lead to price arbitrage.[115] In Aéroport de Paris, the focus was on barriers to entry.[116] The similar approach was kept in Microsoft I when the GC identified a global world-wide market because of no import restrictions and very low transport costs.[117]

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[111] *Case 6/72 Continental Can* (n 57) [33].
[112] *Case 322/81 Michelin I* [1983] ECR 3461 [41].
[113] *Case T-65/96 Kish Glass* [2000] ECR II-1885 [68]. Upheld by the CJ in *C-241/00 P, Kish Glass* [2001] ECR I-07759.
[114] *Case 27/76 United Brands* (n 84) [228].
[115] *Case T-30/89 Hilti* (n 102) [81].
[116] *Case T-128/98 Aéroports de Paris* [2000] ECR II-3929 [141–143].
[117] *Case T-201/04 Microsoft v Commission* (n 108) [1095].

Summary and assessment

When it comes to demand-side substitutability as a proxy for delimitating a product market, the CJEU has developed its approach considerably. Starting with pure qualitative and rather subjective assessment in United Brands, it was gradually able to accept new approaches and to use quantitative measures as well. It is presumably due to the Commission Notice which specified how relevant market should be defined and how quantitative data should be used and the CJEU then followed the Commission's direction.

The supply-side substitutability was, even in early cases, assessed in compliance with economic considerations. The focus was devoted mainly to qualitative data, but in line with what economics offers. Also the geographic market definition has been assessed in more or less the same way from the very beginning. The CJEU relies upon both quantitative and qualitative indicators.

Nevertheless, the product market definition still highly depends on demand-side substitutability and its understanding and application by the CJEU is crucial. The development of the approach of the CJEU is therefore is the most important change in its practice. There is a visible change in the attitude in 1990s initiated by the Commission. Consequently, the CJEU was able to approve its suggestions and to assess relevant market in accordance with current economic suggestions.

6.2.2. Dominant position

The second step of the analysis requires a determination of the dominant position on the market in question. From the legal point of view, without identifying dominance first, it is not possible to investigate abusive practices under article 102 TFEU. The treaty itself, however, does not provide for a definition of the dominance which opens a door for a clarification of the content based on economics.

Economic rationale of the dominant position

Simply said, the role of economics within the aspect of dominance is two-fold. First, economics provide for a closer definition of the dominant position

(theoretically, *in abstracto*). Second, it offers tools how to measure the dominance in concrete cases.

As to the first part, economics considers dominance on the market as a reflection of market power which is defined as the capability of an undertaking to charge prices above its marginal costs.[118] More broadly, economics sees dominance in cases where the market power enables the undertaking either to charge supracompetitive prices (prices above the competitive level), or to limit the output under the competitive level. Market power may have influence not only on prices and quantities, but also on other aspects of competition, such as quality of goods, the variety of the assortment connected to the width of consumers' choice, innovation in the long run etc.

Therefore economics sees significant market power not only if the undertaking is able to behave considerably independently of its competitors and customers, but also in all cases where it is able to charge supracompetitive prices. It is for example a case of oligopolistic market, where the prices are considerably above the level of economic optimum even if the undertakings take into account the position of their competitors on one side, and are limited by the response of consumers, on the other side.

Economic theory counts with dominance also in cases where there is one strong undertaking which competes with a fringe of small competitors. Due to its position, the strong undertaking is able to set prices (it is a price-maker), and the small rivals have to adapt and be price-takers.

Second, the role of economics related to the concept of dominance is even stronger when it comes to the issue of the assessment of a concrete dominant position. In that sense, economics provides for tools for measuring market power, and consequently concluding on dominance *in concreto*. Even according to economics, there is no clear and definite tool to measure market power. It is thus necessary to work with proxies.

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[118] See Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 115.

The first tool that economics provides is elasticity of demand. It explains the sensitivity of purchasers to price changes.[119] However, elasticity of demand is rather a theoretical concept, and it is not always possible to measure it precisely in reality. Therefore the most practical tool to work with is a proxy in the form of market shares. According to economics, a market share represents a ratio of the undertaking's revenues over the revenues of all undertakings within the same market. Alternatively, market share can be calculated in terms of sold units.[120]

Neither market shares have an absolute and ultimate informative value for the assessment of market power and need to be complemented by additional tools. According to Landes and Posner, using solely market shares to measure market power may be misleading because such an approach ignores the conditions of the market which may have a strong influence on the market power.[121] They thus suggested using a combination of market shares and other factors, elasticity of demand and elasticity of supply.[122]

The current approach of competition authorities is more or less in line with this argument. Market shares are taken as the first benchmark and consequently they are complemented by other factors. In reality, it is not only the power to charge supracompetitive prices, but also the strength to exclude actual or potential rivals.

The reflection in legal reasoning

It stems from the above that economics both defines the concept of dominance quite precisely, and offers a rich variety of tools to be used for measuring it – although they are in a form of proxies. While economics focuses on market power, law works with the term "dominance" which embodies in fact the economic concept of market power, but is more dynamic.

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[119] Dennis W Carlton, *Modern Industrial Organization* (3rd ed, Addison-Wesley 2000) 65–66.
[120] Massimo Motta claims that the revenue-based market share has a greater informational value from the economic point of view, but the volume-based market share may be of relevance as well because it may reveal additional features of the market position of the undertaking. See Motta (n 118) 119.
[121] William M Landes and Richard A Posner, 'Market Power in Antitrust Cases' (1981) 94 Harvard Law Review 937, 947.
[122] Ibid 944–963.

Quite conversely to the detailed and precise approach of economics, the legal perception by courts seems rather simplistic. The courts pick up only some variables which are then turned into the legalistic view on the dominance. Analogously to the economic view, legal reasoning must work with the definition of dominance and with tools for its measurement.

The classical legal standard, as it was developed already in 1970s, says that the dominant position requires (a) a certain *economic strength* of the undertaking leading to (b) a possibility of an *independent behaviour* of this undertaking which (c) *may prevent competition* on the relevant market. Such an undertaking is independent not only on other *competitors*, but also on its *customers* and *consumers* in general.[123] However, the economic strength may not necessarily preclude competition but rather it gives the undertaking a power to influence "*the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment*."[124]

Some authors claim that the two consequences under points (b) and (c) in fact describe one and the same aspect.[125] From the economic view, both the possibility of an independent behaviour and the possibility to prevent competition present one economic phenomenon and it is the ability to charge supracompetitive prices and/or to reduce output. However, as it was already claimed above, the ability to charge supracompetitive prices may occur even in cases when the undertaking does not behave absolutely independently on its rivals. In that sense, the legal test does not reflect the economic rationale precisely since it stipulates the condition for the dominance more narrowly than economics sets for market power.

Within the basic definition, the legal test works with two essential elements from economics: the market power and the ability to charge supracompetitive prices. The latter one, however, is translated into legal reasoning in a less precise

[123] *Case 27/76 United Brands* (n 84) [207]. *Case 85/76 Hoffmann-La Roche* (1979] ECR 461 [461]. *Case 322/81 Michelin I* (n 112) [30].
[124] *Case 85/76 Hoffmann-La Roche* (n 123) [39]. *Case 27/76 United Brands* (n 84) [113].
[125] Geradin, Layne-Farrar and Petit (n 5) 186.

manner which raises questions and doubts. The legal test is then completed by additional arguments which try to clarify the circumstances and consequences of the market power. Nevertheless, they just elaborate on the very same argument and do not change the rationale.

If we compare the legal standard created by the CJEU with the economic definition presented above, it is apparent that the legal test lacks other features which may be of importance from the economic point of view. By focusing on independence of the undertaking, the CJEU neglects the actual ability to raise prices or limit output.

In 1990s, the CJEU added several clarifications such as that "*the existence of a dominant position derives from a combination of several factors which, taken separately, are not necessarily decisive*."[126]

In order to assess the dominance more precisely, the Courts (and the Commission as well) started to use proxies. The existence of such an economic strength is predominantly based on presumption on *market shares*. A very high portion of the market pie is deemed as evidence of the existence of a dominant position and could be rebutted only *in exceptional circumstances*.[127] This statement has still been valid since the early case law and the courts have not changed the approach considerably.

The early case law was reflected in Commission Guidance Paper from which it stems that market shares should be used only as the first, but not the decisive tool. Therefore barriers of entry[128] are analysed immediately after and other conditions are taken into account as well.

The reliance on market shares in the first place shows a kind of legal presumption based on economic facts. In other words, it is a legal construction supported by economics which enables to define a limit where it is necessary to assess the facts more profoundly in order to prove the dominant position, and

[126] *Case C-250/92 Gottrup-Klim* [1994] ECR I-5641 [47].
[127] *Case 85/76 Hoffmann-La Roche* (n 123) [41]. *Case T-30/89 Hilti* (n 102) [90].
[128] *Case 27/76 United Brands* (n 84) [122].

where the dominant position is taken as proved unless exceptional circumstances prove the opposite. Such a standard clearly translated the economic rationale behind that a monopoly, almost-monopoly or quasi-monopoly undertaking – a dominant undertaking in legal parlance – has the ability to behave as a price-maker, i.e. to set prices and/or limit quantity of the output without being limited by the market conditions. In economic theory, such a position leads to decrease of the total welfare, consumer welfare and causes deadweight losses which are to the detriment of the economy in global. In majority of cases, the CJEU settles for the mere repetition of the legal standard, and concludes that the dominance was proved thanks to high market shares.

Sometimes, the reasoning is completed with an economic explanation such as in the Hilti case, where the GC reminds us that the dominant position of the undertaking on the markets was "*enhanced by the patents which it held at the time on certain elements of its DX 450 nail gun*," and then the GC explains that "*it is highly improbable in practice that a non-dominant supplier will act as Hilti did, since effective competition will normally ensure that the adverse consequences of such behaviour outweigh any benefits*."[129]

In case of so-called "statutory monopoly" or "legal monopoly" the GC does not go into detailed analysis. In case of statutory monopoly, the dominance is presumed due to the "*economic dependence on the supplier*" and cannot be denied "*even if the services provided under a monopoly are linked to a product which is itself in competition with other products*."[130] Thanks to a legal monopoly, the undertaking "*wields economic power which enables it to prevent effective competition from being maintained in the relevant market by giving it the opportunity to act independently*."[131]

The GC also takes into account the temporal aspect and insists that the high market shares must be held "for some time"[132], "throughout the period in

[129] *Case T-30/89 Hilti* (n 102) [93].
[130] *Case T-229/94 Deutsche Bahn* [1997] ECR II-1689 [57–58].
[131] *Case T-128/98 Aéroports de Paris* (n 116) [150].
[132] *Case T-139/98 AAMS* [2001] ECR II-0000 [51].

question"[133], "during relatively long periods"[134] etc end denies that a decline in market shares which are still large could mean the absence of a dominant position.[135]

As far as concrete numbers are concerned, the Court of Justice has stated that a "*market share of 70 – 80% is, in itself, a clear indication of the existence of a dominant position*"[136], and even a "*market share of 50% constitutes in itself, save in exceptional circumstances, a dominant position*".[137] Regarding possible contra arguments, the Court consistently denies the argument that *the existence of lively competition on a particular market* [*could*] *rule out the possibility that there is a dominant position on that market*."[138]

Summary and assessment

It is apparent from the rulings that the definition of dominance made by the CJEU stays constant and rigid. The abstract statements used in judgments are predominantly based on settled case law, and the development in the definition of criteria is not very remarkable. The economics is translated into a legal standard more or less in the same way.

The CJEU started with a simple legal standard and later it added some complementary economic explanations. Together with the Commission, they use proxies in a form in market shares as first indicators, and examine other characteristics of the undertaking and the market in the second place.

In any event, the main criterion is still valid: dominance is assessed based on the "ability" to influence the market, to behave relatively independently on the market. The detailed criteria, how to assess the ability, must be taken from

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[133] *Case T-83/91 Tetra Pak II* (n 40) [109].
[134] *Case T-139/98 AAMS* (n 132) [57]. *Case 85/76 Hoffmann-La Roche* (n 123) [41].
[135] *Joined Cases T-24/93 to T-26/93 and T-28/93 Compagnie Maritime Belge* [1996] ECR II-1201 [7].
[136] *Case T-30/89 Hilti* (n 102) [92]. *Case T-66/01 ICI* [2010] ECR II-000 [257]. *Case T-336/07 Telefónica* [2012] nyr [150].
[137] *Case C-62/86 AKZO Chemie* (n 42) [60]. *Case T-66/01 ICI* (n 136) [256].
[138] *Case T-336/07 Telefónica* (n 136) [162].

economics, and the CJEU leaves an open space how to make it for each particular case.

Overall, the approach of the CJEU stays rigid. Once created standard based on economic assumptions is still being repeated, and in majority of cases, the assessment of the dominance relies upon the market shares.

6.2.3. Predatory pricing

The goal of the prohibition of predatory pricing is to prevent economically strong undertakings from using their market power to get rid of weaker competitors and eventually from causing harm to consumers.

Predatory pricing practices present cases where economics is presumably much more included than in other types of behaviour, because the core of the problem lies in comparing costs and prices. Therefore the output of the ruling is considerably dependent on the settings about which costs and which prices should be taken into consideration when evaluating an alleged anticompetitive behaviour and how they should be compared. In concrete cases, the ruling depends on findings how the costs and prices were counted and what their mutual relation was.

Economic background of the predatory pricing

From the economic perspective, [139] the predatory pricing practice is easy to be explained. It presents a situation where the undertaking plans to go through two stages: first, the undertaking gives out a certain part of a possible profit by pricing below a normally profitable threshold with the aim to gain more customers and therefore to push other competitors to quit the market or to prevent other potential competitors from entering the market. Once some competitors leave the market or are foreclosed to enter it, the competition is weakened, and the undertaking may go into the second stage, where it increases the prices to the level enabling to recuperate the incurred loss.

[139] Economic theory in more detail in Kaplow and Shapiro (n 83) 1195–1196.

The first-stage loss is considered to be a kind of investment which is turned into a higher profit in the second stage where the competition is reduced. In other words, economics focuses on four aspects of the practice: (1) deliberately incurred loss in the first stage, (2) elimination of competitors as the outcome of the first stage, (3) increase in prices in the second stage, (4) recoupment of the initial loss as the result of the second stage.[140]

Even if there are sceptical opinions of economists about the plausibility of the recoupment and therefore about the harm caused by predation,[141] the mainstream economic approach agrees upon the anti-competitiveness of the above explained economic scenario.[142] The standard economic test, setting in detail when a particular pricing is predatory, was suggested by American economists Areeda and Turner already in 1975.[143] The test is based solely on comparison of costs and prices and according to it, pricing should be deemed predatory when prices are under average variable costs of the dominant undertaking.[144]

Reflection in legal reasoning

How this economic rationale is translated into legal reasoning can be seen in the landmark decision of this field - in the AKZO judgment of the Court of Justice. In this case, the Court pronounced the essential legal standards based on economic principles which are then being repeated in the consequent predatory pricing case law. The economic statement of normative nature says: "*Prices below average variable costs (that is to say, those which vary depending on the*

[140] See, slightly differently, in Patrick Rey, 'Abuses of Dominant Position and Monopolization: An Economic Perspective' in Abel M Mateus and Teresa Moreira (eds), *Competition Law and Economics. Advances in Competition Policy Enforcement in the EU and North America* (Edward Elgar 2010) 195–196. or O'Donoghue and Padilla (n 83) 301.
[141] Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978) 148–155. Frank H Easterbrook, 'Predatory Strategies and Counterstrategies' (1981) 48 University of Chicago Law Review 263.
[142] Discussion on the empirical evidence of predatory pricing see Kaplow and Shapiro (n 83) 1196–1197. Explanation through the lenses of game theory e.g. in Louis Phlips, *Competition Policy: A Game-Theoretic Perspective* (Cambridge Universtiy Press 1995).
[143] Phillip Areeda and Donald F Turner, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act' (1975) 88 Harvard Law Review 697. Critical response by Oliver E Williamson, 'Predatory Pricing: A Strategic and Welfare Analysis' (1977) 87 The Yale Law Journal 284.
[144] Areeda and Turner (n 143) 716–718.

quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive."[145]

The Court translates the economic scenario into a legal scenario in the way which emphasises two elements. First, the undertaking sets prices below certain (here: average variable) costs, and second, such a practice leads to reduction of competition. The Court disregards the other two economically relevant elements (increase in prices and recoupment of loss) and jumps directly into a presumption explaining that *"[a] dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced*."[146] It is an economic explanation of the intent in the form of a presumption. It is one of the very economic arguments the courts express, using purely economic terms (average variable costs, monopolistic position, loss, fixed costs and costs relating to the unit produced). In Tetra Pak II, the General Court comes with a more detailed economic explanation that "*the existence of gross or semi-gross margins obtained by subtracting from the sale price the variable direct costs or the average variable costs, being the costs relating to the unit produced which are negative suggests that a pricing practice is eliminatory*."[147]

If the prices are above average variable costs, but below average total costs, the legal test requires an additional element in order to regard the practice as abusive: the intent to eliminate a competitor. The Court goes even above the Areeda/Turner economic test (above the threshold of AVC) and explains that *"[s]uch prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against*

[145] *Case C-62/86 AKZO Chemie* (n 42) [71].
[146] Ibid.
[147] *Case T-83/91 Tetra Pak II* (n 40) [148].

them."[148] The legal test based on economics is followed by an economic explanation of the consequences of such a conduct. Here, the presumption of the abusive nature of the conduct is abandoned and it is required to prove the anticompetitive intent of the undertaking. The construction of the argument is therefore based on two economically relevant aspects: (1) intentionally incurred loss, and (2) elimination of competitors. The latter one, however, does not need to be proven as a result. From the legal point of view, it is sufficient to prove the intent to bring about such a consequence. In order to prove the intent, the Court of Justice highlights that the time of intentionally incurring loss should be taken into consideration.[149]

The legal approach of the courts combines a part of the purely economic test (cost/price analysis; prices below a certain threshold) with a rather legal test. In first case (prices are below average variable costs), the Court counts with a legal presumption derived from economic explanations. In the latter one (prices are above average variable costs but below average total costs), the Courts requires the anticompetitive intent to be proven.

It is interesting to see the comparison with the U.S. approach to predatory pricing. The American courts include one more economic element into the legal test. In addition to the pricing below certain level of costs and the intent to eliminate competitors, it is necessary to prove the *likelihood* of the second stage, i.e. the likelihood that the dominant undertaking *will ultimately recoup its interim losses*.[150] The American approach thus highlights the logic that there can be no consumer harm when the recoupment is impossible.[151] The European reasoning, on the other hand, does not require anything additional as it is based on simple economic explanations and presumptions that intentionally incurred losses *cannot reflect any economic rationale other than ousting competitors*.[152]

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[148] *Case C-62/86 AKZO Chemie* (n 42) [72].
[149] *Case T-83/91 Tetra Pak II* (n 40) [149]. *Case C-62/86 AKZO Chemie* (n 42) [72, 140, 146].
[150] *Case Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).
[151] More about the U.S. approach in Kaplow and Shapiro (n 83) 1201–1202.
[152] *Case T-83/91 Tetra Pak II* (n 40) [189].

Such an approach was, interestingly, criticised by AG Mazák within the appeal procedure of Wanadoo France case where he called for the recoupment to be an essential requirement in a predatory pricing case.[153] However, the Court of Justice did not follow Mazák's suggestion and kept the use of traditional AKZO rules.[154]

In accordance with this logic, the GC adds an economic explanation to rebut France Télécom's argument in the case Wanadoo France. It is claimed that the below-cost pricing is justified by *economies of scale* and *learning effects*. However, the Court rejects this argument because of a simple economic reason: economies of scale and learning effects are, in the given case, just a consequence of predatory pricing and *therefore cannot exempt the undertaking from liability*.[155]

As far as factual findings of each particular case are concerned, the Court sets guidelines for the Commission how to work with costs and prices. In AKZO, first, the Court confirms the Commission's approach that only costs and prices of the dominant undertaking should be taken into account and cost structures and pricing policies of other competitors shall be disregarded.[156] In that sense, the Court does not follow suggestions of AG Lenz who argues that in order to see the "*reliable picture of the price level*", it is "*necessary to analyse the cost structure of all three oligopolists*."[157]

Second, it reminds us that the term *cost* cannot be considered as *fixed* or *variable* by nature but it shall be determined always according to real costs in relation to the *quantities produced*.[158] It is an explanation of the economic rationale behind: variable costs are those costs which vary depending on the production volume, while fixed costs are constant regardless the changes in the output.

This definition is valid, however, only in the short run. Economic theory presumes that in the long run (long period), all costs are variable, as the

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[153] *Opinion of AG Mazak in Case C-202/07 P, France Télécom (Wanadoo)* [2009] I-02369 [68–78].
[154] *Case C-202/07 P, France Télécom (Wanadoo)* [2009] I-02369 [111].
[155] *Case T-340/03 France Télécom (Wanadoo)* (n 106) [217].
[156] *Case C-62/86 AKZO Chemie* (n 42) [74].
[157] *Opinion of AG Lenz in Case C-62/86 AKZO Chemie* [1991] I-03359 [34].
[158] *Case C-62/86 AKZO Chemie* (n 42) [94].

undertaking is able to adapt the production factors used and to make changes regarding even long-term costs. The legal approach to the predatory pricing thus accepts the short-run economic scenario accenting a limited period of time where the level of costs and prices has to be measured. In concrete and as an example, in AKZO, the Court assessed the nature of labour costs – as there was no correlation between labour costs and the output during the given period, labour costs must have been deemed as fixed costs.[159]

A slightly different approach is presented by the Commission in its Guidance[160] - the approach goes beyond the limits of the short run. It suggests counting with average avoidable costs (AAC) or long-run average avoidable costs (LRAIC). The reason is that during the relevant time the undertaking may have even additional fixed costs. The AAC thus include also the fixed costs incurred by the undertaking during the time under investigation. The failure to cover them indicates an intentional sacrifice of the undertaking and therefore pricing under AAC is considered by the Commission as an abusive conduct. The LRAIC test takes into consideration, first, that the business strategy decisions includes inevitably also long-run total costs, and second, that the simple AVC test may distort the result when variable costs are very low in relation to fixed costs.[161] Therefore the LRAIC include also the product specific fixed costs.

The only case where the Court had to face such novelties is the Post Danmark case[162] where the CJ explicitly approved the use of AAC for cases where there are much higher fixed costs in relation to variable costs, and even approved LRAIC. As it follows from the lexical analysis above, this preliminary ruling case is even the most "economic" judgment of the CJ in terms of language. A closer look shows that the CJ went deeper to economics also in terms of arguments. The reasoning itself is rather short (it is a preliminary ruling judgment which does not have to deal with facts), but it is apparent that the density of economics within it is

[159] Ibid 95.
[160] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ C 45, 24/02/2009, 7-20 para 26 and 64. Whish (n 81) 743.
[161] See *Guidance on Enforcement Priorities - Article 82* (n 160). And also commentary in O'Donoghue and Padilla (n 83) 297–298.
[162] *Case C-209/10 Post Danmark* [2012] ECR I-0000.

considerable. Regarding the pricing, the economic explanation stemming from Post Danmark says that "*to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term*."[163]

Summary and assessment

As explained above, the essential legal test derived from economics was created in AKZO ruling in since that time the CJEU did not change its approach much. The economic rationale was once translated into a legal test which is constantly used by the CJEU without any major amendments. In the consequent cases after AKZO, the Court only adds additional economic explanations of consequences of the conduct, or of the intent of the undertaking.

The approach of the CJEU remains cautious and seems far more rigid than what the Commission suggests. However, it is necessary to look at the fact that the Court has not had the opportunity to change and adapt its attitude. The only evolution may be seen when assessing the economic facts. Even in AKZO (1991), the Court went in detail through costs and prices of the investigated undertaking but it assessed them only through the lenses of the simple Areeda/Turner test. On the other hand, in Wanadoo case (2007), the Court was obliged to deal in more detail with the given data and to assess the methods of calculation of costs. In any event, it was presumably due to the pleas raised by the applicant and it cannot be seen as a change in the pattern of economic reasoning of the Court. Moreover, the GC recalled that such a question is a part of the complex economic assessment where the Commission has a broad margin of discretion.[164] The Post Danmark case then presents a change in the attitude of the CJEU towards more economic arguments and towards coherence with the new approaches suggested by the Commission. It may be read as a promise for future development.

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[163] Ibid 38.
[164] *Case T-340/03 France Télécom (Wanadoo)* (n 106) [163].

6.2.4. Margin squeeze

Margin squeeze is a practice which gained much attention of competition authorities and courts quite recently. Its dispersion in reality was due to the development of network industries, it predominantly followed the wave of de-monopolization of former national (state-owned) incumbents.

Economic explanation of margin squeeze

From the economic perspective, margin squeeze presents a practice of the vertically integrated undertaking which due to its dominant position in an upstream market (production of an indispensable product for the downstream competitors) restricts competition in the downstream market because it reduces margins of the downstream competitors.

The dominant undertaking may pursue two squeezing strategies. First, it sets its downstream prices too low in comparison to the wholesale charges, or second, it sets the prices for its input too high in comparison to the level of downstream prices. The result of both strategies is the same. Its downstream rivals cannot make any economically reasonable profit – either they cannot cover sufficiently their costs, or their prices are too high to have any possibility to compete with the dominant competitor. The profit of downstream competitors is therefore weakened or they are even eventually pushed to quit the market. As a consequence, such a practice strengthens the market power of the integrated undertaking even in the downstream market.

The first squeezing strategy has an indirect impact on downstream competitors. The dominant undertaking keeps the wholesale prices on the same level, but lowers significantly its own retail prices. In that sense, this practice is analogous to predatory pricing. In order to be able to compete, the downstream rivals are pushed to lower their retail prices. Their profit is therefore reduced, or they even incur loss if they are not able to cover their costs. Eventually, they are forced to leave the market. The economic model of this type of margin squeeze is as

follows: when downstream prices minus downstream costs are lower than wholesale prices, then there is margin squeeze ($P_d - C_d < P_w = MS$).[165]

The second squeezing strategy affects downstream rivals directly and, contrary to the first strategy, it is characterised by excessive pricing. The dominant undertaking keeps the same level of its retail prices, but increases its wholesale charges. Therefore downstream competitors have higher costs but cannot afford to adapt their retail prices because of the level of prices of the dominant undertaking. As a result, their profit is reduced or even negative, and they may be pushed to quit the market. The market is thus foreclosed directly. In this strategy, the economic model says that there is margin squeeze when downstream prices are lower than downstream costs plus wholesale prices ($P_d < C_d + P_w = MS$).[166]

There can be, however, a third mixed strategy where the dominant undertaking uses both the direct and the indirect squeeze.[167] It decreases its downstream prices and at the same time its wholesale prices rise. Within this scenario, the squeeze is stronger and the remaining retail margin is much smaller or even more negative.

It follows that the economic rationale of margin squeeze accents three factors: (1) the level of retail prices of the dominant undertaking, (2) the level of wholesale prices of the dominant undertaking, and (3) the level of downstream costs. The finding of the abuse therefore depends predominantly on the comparison of all factors according to the above mentioned economic formula.

The reflection in legal reasoning

The CJEU takes the above mentioned economic foundations into its reasoning in the following way. In the case Industrie des poudres sphériques (T-5/97), the GC defines margin squeeze as a practice which takes place "*when an undertaking which is in a dominant position on the market for an unprocessed product and*

[165] O'Donoghue and Padilla (n 83) 304–305. Niels, Jenkins and Kavanagh (n 83) 230–241.
[166] O'Donoghue and Padilla (n 83) 304–305. Niels, Jenkins and Kavanagh (n 83) 230–241.
[167] Niels, Jenkins and Kavanagh (n 83) 240.

itself uses part of its production for the manufacture of a more processed product, while at the same time selling off surplus unprocessed product on the market, sets the price at which it sells the unprocessed product at such a level that those who purchase it do not have a sufficient profit margin on the processing to remain competitive on the market for the processed product."[168] This normative statement directly pulls the economic argument into legal reasoning without any major adaptation of the sense. Furthermore, in the same judgment, the GC puts forward two possible ways how to demonstrate the abusive margin squeeze. Either it is *the existence of abusive pricing of the raw material* (= abusive prices in the upstream market), or *predatory pricing for the derived product* (= too low prices in the downstream market).[169] The CJ confirms this two-fold approach saying that "*squeeze may be the result not only of an abnormally low price in the retail market, but also of an abnormally high price in the wholesale market*."[170]

In Deutsche Telekom, the GC comes with an economic explanation of the consequence of margin squeeze saying that "*[i]f the applicant's retail prices are lower than its wholesale charges, or if the spread between the applicant's wholesale and retail charges is insufficient to enable an equally efficient operator to cover its product-specific costs of supplying retail access services, a potential competitor who is just as efficient as the applicant would not be able to enter the retail access services market without suffering losses*."[171] The *per se* anti-competitiveness of margin squeeze is highlighted in CJ's preliminary reference ruling in TeliaSonera where the normative economic statement says that *"[a] margin squeeze, in view of the exclusionary effect which it may create for competitors who are at least as efficient as the dominant undertaking, in the absence of any objective justification, is in itself capable of constituting an abuse within the meaning of Article 102 TFEU*."[172] Here, the CJ puts forward the exclusionary effect as an economic consequence of the margin squeeze, and

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[168] *Case T-5/97 Industrie des Poudres Sphériques* [2000]. ECR II-3755 [178].
[169] Ibid 179.
[170] *Case C-52/09 TeliaSonera* [2011] ECR I-527 [98].
[171] *Case T-271/03 Deutsche Telekom v Commission* (n 43) [237]. The same economic explanation may be found in *Case C-52/09 TeliaSonera* (n 170) [32].
[172] *Case C-52/09 TeliaSonera* (n 170) [31]. The same argument also in *Case T-336/07 Telefónica* (n 136) [187].

eventually allows for the possibility of an economic justification of such a practice. Both two aspects are further developed.

The anti-competitiveness of margin squeeze is based on an economic presumption that every margin squeeze makes harm to equally efficient competitors and therefore it is to the detriment of competition. This leads to a conclusion that it is "*not necessary to demonstrate an anti-competitive effect*"[173] and it is sufficient that such an effect is potential.[174]

Concerning the economic justification of the conduct, the Court allows for a counterbalancing principle seeking for an economic optimum. The undertaking may prove that its behaviour being disadvantageous for competition leads, in the end, in economic efficiency. However, such an advantage should be balanced with the loss occurred to competition: "*If the exclusionary effect of that practice bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that practice must be regarded as an abuse*."[175]

When it comes to factual findings, as a benchmark, the GC consistently highlights an "*efficient competitor*" [176], "*equally efficient operator*"[177] or "*equally efficient competitor*"[178] which is affected by the abusive pricing. By excluding a competitor with "*higher processing costs*"[179], the Court puts forward the necessity to count with the costs of the dominant undertaking. Such a logic is further developed in the Deutsche Telekom ruling where the GC explicitly explains that *"[e]quality of opportunity is secured only if the incumbent operator sets its retail prices at a level which enables competitors – presumed to be just as efficient as the incumbent operator – to reflect all the wholesale costs in their retail prices*."[180]

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[173] *Case C-52/09 TeliaSonera* (n 170) [70].
[174] Ibid 64. *Case T-336/07 Telefónica* (n 136) [268]. Generally also *Case T-203/01 Michelin II* (n 82) [239]. *Case T-219/99 British Airways plc v Commission* (n 72) [293]. *Case T-201/04 Microsoft v Commission* (n 108) [867].
[175] *Case C-52/09 TeliaSonera* (n 170) [76].
[176] *Case T-5/97 Industrie des Poudres Sphériques* (n 168) [180].
[177] *Case T-271/03 Deutsche Telekom v Commission* (n 43) [237].
[178] *Case C-52/09 TeliaSonera* (n 170) [61].
[179] *Case T-5/97 Industrie des Poudres Sphériques* (n 168) [179].
[180] *Case T-271/03 Deutsche Telekom v Commission* (n 43) [199].

This "as-efficient-competitor" test shows guidelines regarding which costs should be taken into account when assessing the performance in the market. The GC claims that a legal test of the alleged margin squeeze must be based on calculating charges and costs, considering revenues, and solely on numbers of the dominant undertaking, not of other competitors. The practice must therefore be tested against an efficient level of costs, and the dominant undertaking cannot be compared to an economically less efficient competitor. The GC reminds us in Deutsche Telekom that "*the abusive nature of a dominant undertaking's pricing practices is determined in principle on the basis of its own situation, and therefore on the basis of its own charges and costs, rather than on the basis of the situation of actual or potential competitors*."[181]

In TeliaSonera, the CJ allows for an exception to this general rule, saying that "*[o]nly where it is not possible, in particular circumstances, to refer to [...] prices and costs [of the undertaking concerned] should those of its competitors on the same market be examined*."[182] Furthermore, the CJ explains that such an exception can take place for example "*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, [...] or 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*."[183]

Summary and assessment

Overall, the CJEU's approach to margin squeeze seems constant. It clearly translates the economic rationale behind into legal tests. In that sense, all margin squeeze cases are very economic in nature and in language. They work with costs and prices and put forward arguments on the consequences of the pricing strategy of dominant undertakings.

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[181] Ibid 193.
[182] *Case C-52/09 TeliaSonera* (n 170) [46].
[183] Ibid 45.

Nevertheless, it can be seen in Deutsche Telekom as well as in Telefónica that a significant part of the reasoning is devoted to methods used to calculate relevant costs. Both two "new" cases (issued in years 2008 – 2012) include a significant pattern when it comes to methods evaluating the performance of the investigated undertakings. It is presumably an industry-specific pattern, because the costs and prices in telecoms need to be investigated with an attention. It highly depends on how product-specific costs are calculated, which period of time is taken into consideration, which costs and which revenues should be included in the calculation etc. The reasoning of the CJEU is predominantly an answer to the Commission's approach to calculation of costs as it is generally set in the Guidelines and consequently used in particular decisions. At the same time, the arguments related to methods respond to explicit pleas of appellants.

Generally speaking, the Court approves the Commission's methodology without additional arguments related to correctness or appropriateness of the methods. On one hand, the court is pushed to deal with rather technical issues as it comes to methods, on the other hand, its reasoning does not include any new argument why the approach of the Commission should be deemed correct. Such a limited reasoning still reflects the self-limitation of the court leaving the Commission a margin of discretion and focusing strictly on manifest errors of assessment the Commission could possibly have made.[184]

However, it is apparent that the Court accepts the methods of the Commission and pulls economic and econometric arguments into its reasoning. The way how the Court translates such economic considerations into its reasoning is slightly different from setting the economic statements of normative nature or giving guidelines. The Court does not create any normative reasoning saying how costs and other economic or econometric data shall be processed in similar cases. The only thing the Court says is just an approval that the Commission's steps were correct in the particular case, a confirmation that its methods were not erroneous and a rejection of alternative methods suggested by appellants.[185] It follows that

[184] *Case T-336/07 Telefónica* (n 136) [220].
[185] Ibid 212–264. *Case T-271/03 Deutsche Telekom v Commission* (n 43) [183–207].

the "more economic approach" is reflected in margin squeeze case law of the Court mainly within the sphere of review of methodology.

6.2.5. Refusal to supply

The courts' approach to economics is presumably different in refusal to supply cases. The possible scope for explicit economic reasoning is smaller because of no direct link to pricing and because of a limited use of economic data. The attention is focused mainly on facts about the circumstances, the behaviour of the dominant undertaking and their legal relevance for the outcome.

The economics of refusal to supply

From the economic point of view, the core of the problem is the economic dependence between the dominant undertaking and its downstream competitors, and the exclusionary effect of the refusal onto the downstream market.

The economic dependence occurs when the vertically integrated dominant undertaking produces or controls a product/service which is an objectively necessary element for the business of downstream competitors (it is a "*product sine qua non*"). Due to this indispensability, the downstream competitors have no other option than to get products from the dominant undertaking and their business depends, to a certain extent, on its behaviour. Thanks to this dependence, the dominant undertaking has a power to influence the downstream market by denial to give access to the indispensable input to downstream competitors. By this strategy, the dominant undertaking creates artificial barriers to entry and forecloses vertically the downstream market.

The economic consequence of such a conduct is two-fold: existing competitors are disabled to compete and potential new competitors are prevented from entry to the downstream market. Therefore a refusal to supply decreases the allocative efficiency in the downstream market. However, on the other hand, an obligatory supply of an essential input may eventually lead to dynamic inefficiency because such an approach may reduce the willingness of the dominant undertaking to

invest and to innovate.[186] As innovation usually requires huge investments and as there is a high probability of a failure, the investors are willing to undergo the risk only if they can legitimately expect a potential reward. In case of a too strong accent on the obligation to supply, they may be discouraged to make any innovative efforts. This aspect gets a considerable relevance mainly in the sphere of modern technologies and in cases where the indispensable product is covered by an IP right.[187]

In that case, there are two opposing economic consequences of the obligation to grant a licence to an indispensable IP right held by a dominant undertaking. A positive effect of the obligation is the improvement of competition in the downstream market in the short run. However, in the long run, the obligation may cause a negative effect due to the reduction of the incentives to invest into research and development. The low level of investment inhibits innovation which may eventually lead to the decrease of consumer choice and consumer satisfaction.[188]

This contradiction therefore requires a sensitive balancing between short-run and long-run effects, and between allocative and dynamic efficiency in general. As economics itself cannot say which effect is more desirable for the society, this issue raises a real challenge for law.

The translation of economics into legal reasoning

The early approach of the CJEU to refusal to supply may be seen in the cases Commercial Solvents[189], United Brands[190] and Benzine en Petroleum[191]. Generally, the case-law is based on an economic presumption that due to their market power dominant undertakings have undeniably a great influence on smaller competitors in downstream markets which creates a special obligation[192]

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[186] See Geradin, Layne-Farrar and Petit (n 5) 250–251. See also the literature quoted there.
[187] See Ibid 251. For the discussion of efficiency arguments see Kevin Coates, *Competition Law and Regulation of Technology Markets* (Oxford University Press 2011) 93.
[188] See Motta (n 118) 64. O'Donoghue and Padilla (n 83) 523.
[189] *Joined Cases 6/73 and 7/73 ICI and Commercial Solvents* [1974] ECR 223.
[190] *Case 27/76 United Brands* (n 84).
[191] *Case 77/77 Benzine en Petroleum* [1978] ECR 1513.
[192] This term was further developed in *Case 322/81 Michelin I* (n 112).

to deal with them. The logic of the CJEU translates the idea that the harm to a small competitor almost automatically restraints healthy competition.[193] In these cases, the CJEU still does not insist on a strong economic dependence between the dominant undertaking and small competitors and therefore does not define the concept of indispensability.

In later cases, the CJEU started to add other economic elements into its analysis. It highlighted the indispensability of the product for downstream competitors and the real (or potential) foreclosing effect in the downstream market.[194] Since 1990s, the case law is reflecting a shift in the approach towards a more detailed analysis of all features of anti-competitive refusal.[195] The Court further elaborates on the concept of indispensability of a given product,[196] evaluates in more detail the vertical foreclosure, deals with a possible economic justification[197] because of efficiency gains, and generally, it is more prone to the case-by case examination of effects.

The concept of indispensability is further explained in the Ladbroke case[198] and predominantly in the Bronner case.[199] In Ladbroke, the GC limits the notion of indispensability only to the extent that it has influence on the current or potential workable competition on the market."[200] In the Bronner case, which dealt with the distribution of newspapers, the CJ created a legal test to identify the indispensability which is based on two economic assumptions: (1) the real existence of substitutes, (2) the existence barriers which prevent from creating potential substitutes. According to the CJ, the indispensability takes place if "*there is no actual or potential substitute in existence for the home-delivery*

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[193] Presumably in accordance with the ordoliberal view.
[194] *Case 311/84 CBEM v CLT and IBP (Télé-Marketing)* [1985] ECR 3261 [27]. However, the CJ did not develop the content of the indispensability; as the undertaking was a statutory monopoly, the indispensability was taken as granted.
[195] *Case T-69/89 RTE* [1991] ECR II-485. *Joined cases C-241/91 P and C-242/91 P, RTE & ITP (Magill)* [1995] ECR I-743. *Case T-504/93 Tiercé Ladbroke* [1997] ECR II-923. *Case C-7/97 Oscar Bronner* [1998] ECR I-7791. *Case C-418/01 IMS Health* [2004] ECR I-5039.
[196] *Case T-504/93 Tiercé Ladbroke* (n 195) [132].
[197] *Case T-201/04 Microsoft v Commission* (n 108) [688–711].
[198] *Case T-504/93 Tiercé Ladbroke* (n 195).
[199] *Case C-7/97 Oscar Bronner* (n 195).
[200] *Case T-504/93 Tiercé Ladbroke* (n 195) [130–132, 160].

scheme."[201] The test therefore suggests a two-step analysis. If there are (even less advantageous) substitutes, the product or service cannot be regarded as indispensable.[202] If there are no substitutes, it is necessary to examine whether there are any technical, legal or economic barriers which make it impossible or excessively difficult to establish a concurring delivery system.[203] The CJ further claims that even an economic disadvantage for creating an alternative means of distribution does not lead directly to the conclusion that the service in question is absolutely essential for downstream competitors.[204] In that sense, it follows from the ruling that the notion of indispensability shall be interpreted as an objective concept, and that it is necessary to assess the objective existence of barriers disabling to make potential substitutes.

The notion of indispensability was analysed also in the preliminary ruling in IMS Health. As to the facts of the case, the IMS Health supplied information on sales in the pharmaceutical industry which was based on data from its own customers which co-operated on the creation of a database called a "brick structure". In the judgment, the CJ puts the customers' involvement as a new element into the assessment of indispensability, especially "*the degree of participation by the users in the development of the structure and the outlay, particularly in terms of cost, on the part of potential users.*"[205] The economic explanation says that a high level of participation may create a dependency by users who would bear excessive switching costs if they decide to acquire information from an alternative source.[206] As a consequence, the users are "locked-in"[207] and forced not to change the existing situation which contributes to the existence of indispensability.

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[201] *Case C-7/97 Oscar Bronner* (n 195) [41].
[202] Ibid 43.
[203] Ibid 44.
[204] Ibid 45–46.
[205] *Case C-418/01 IMS Health* (n 195) [30].
[206] Ibid 29. Interestingly, this argument of the CJ is slightly criticised by O'Donoghue and Padilla who argue that "*[c]onsumer preferences for a facility cannot […] by themselves make a facility or input indispensable*." O'Donoghue and Padilla (n 83) 550.
[207] The lock—in effect is further explained in *Case T-201/04 Microsoft v Commission* (n 108) [650]. See also in detail in Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing 2010) 98.

The question on the obligation to grant a license to an IP right arose already in Volvo/Renault case[208] and was more elaborated in Magill case. In Magill, both the GC and the CJ on appeal make a list of conditions under which a refusal to licence is deemed abusive: (1) indispensability, (2) prevention of the appearance of a new product for which there is a potential demand, (3) lack of economic justification, (4) foreclosure of the downstream market.[209] In comparison to the older case-law, the CJ adds a new economic component into its analysis and puts forward the idea of desirable innovation and market development. According to the CJ, the refusal to supply was deemed abusive because "*the conduct prevented the appearance of a new product, [...] which the appellants did not offer and for which there was a potential consumer demand*."[210] The Court thus takes into account the prospective competition and the potential development of the market which may be negatively influenced by a dominant undertaking.

This idea is further developed in the IMS Health case where the CJ calls for a balancing of interests, comparing the protection of IP rights and the freedom to contract on one side with the protection of free competition on the other side.[211] According to the CJ, the protection of free competition wins and therefore the refusal is deemed anti-competitive when it "*prevents the development of the secondary market to the detriment of consumers*."[212] The interest of consumers is thus put into the analysis as an additional component. By doing this, the CJ pulls into its reasoning the focus on dynamic efficiency (which is not, however, explicitly spelled out) and takes into consideration the impact of the refusal on the market in the long-run.

The issue of innovation and the concept of the new product are discussed also in Microsoft I case[213] where the GC deals, i.a., with the consequences of the lack of interoperability. Generally, the GC approves the Commission's approach. When it comes to the circumstances relating to the appearance of a new product, the GC

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[208] *Case 238/87 AB Volvo v* [1988] ECR 6211.
[209] *Case T-69/89 RTE* (n 195) [73]. *Joined cases C-241/91 P and C-242/91 P, RTE & ITP (Magill)* (n 195) [53–56].
[210] *Joined cases C-241/91 P and C-242/91 P, RTE & ITP (Magill)* (n 195) [54].
[211] *Case C-418/01 IMS Health* (n 195) [48].
[212] Ibid.
[213] *Case T-201/04 Microsoft v Commission* (n 108).

further develops the reasoning included in Magill and IMS Health. The GC holds that such circumstances cannot be the only yardstick determining the cause of prejudice to consumers and that "*such prejudice may arise where there is a limitation not only of production or markets, but also of technical development*."[214]

Within the concept of a new product, the Court deals with the issue of dynamic efficiency. However, the necessity to balance between allocative and dynamic efficiency, is never explicitly mentioned in the judgments.

The Microsoft I judgment also includes a strengthened economic reasoning on the aspect of elimination of competition. The GC endorses the Commission's view that Microsoft was able to use its quasi-monopoly on the upstream (operating system) market in order to influence the downstream (work group server operating systems) market thanks to a so-called leverage effect.[215] Due to the leverage effect, it is not necessary to examine whether the undertaking which holds the dominant position on the first product market is dominant also on the second market.[216] Furthermore, the GC approves that the risk of the elimination of competition is well established mainly due to two economically relevant aspects: significant network effects on the downstream market, and a high difficulty to reverse a potential elimination.[217] Concerning the mere likelihood of the elimination of competition, the GC reminds us the necessity of a preventive intervention of the Commission, explaining that Article 102 "*does not apply only from the time when there is no more, or practically no more, competition on the market*."[218] Overall, the GC puts clarifying economic arguments into its reasoning mainly in the form of an approval of the Commission's steps.

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[214] Ibid 647.
[215] Ibid 559. For leverage theory see John Simpson and Abraham L Wickelgren, 'Bundled Discounts, Leverage Theory, and Downstream Competition' (2007) 9 American Law and Economics Review 370. Rousseva (n 207) 106–107. Ward S Bowman, 'Tying Arrangements and the Leverage Problem' in Terry Calvani and John Siegfried (eds), *Economic Analysis and Antitrust Law* (Little, Brown and Company 1979) 239–250. Deficiencies of the leverage theory are explained in Posner (n 16) 198–199.
[216] *Case T-201/04 Microsoft v Commission* (n 108) [559].
[217] Ibid 562.
[218] Ibid 561.

A very similar approach is taken in the ClearStream case, where the GC highlights that the undertaking held a de facto monopoly of the services of clearing and settlement which made it an "*indispensable trading partner*" on the market.[219] The indispensability of the service then must be assessed in the light of the settled case law, i.e. it occurs "*there is no real or potential substitute*"[220] for the service in question. Furthermore, the GC upheld the Commission's view on actual effects of the refusal – harm to innovation and competition which is ultimately in the detriment of consumers.[221]

Summary and assessment

In the field of refusal to supply, we can see a step-by-step development in the translation of economics into legal reasoning of the Court. From case to case, the Court adds new economic inputs into its reasoning. The evolution of economic reasoning of the Court presumably reflected both the changes in economic doctrine and the improvements in the approach of the Commission.

The early case law works only with a simplified economic rationale that a dominant undertaking has undeniably a strong influence on its minor competitors, while in newer cases, the Court consequently puts on the table more and more complex legal tests derived from modern economics.

There is an apparent increase in the use of detailed economic analysis of all necessary features of the allegedly anti-competitive conduct and its consequences.

Presumably due to the industry-specific character of recent cases, the Court puts emphasis on the effects of the refusal, i.e. predominantly impact on the desirable and necessary innovation within the field of modern technologies.

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[219] *Case T-301/04 Clearstream* (n 109) [146].
[220] Ibid 147. Quoting: *Joined Cases T 374/94, T-375/94, T-384/94 and T-388/94 European Night Services* [1998] ECR II 3141 [208]. *Case C-7/97 Oscar Bronner* (n 195) [41].
[221] *Case T-301/04 Clearstream* (n 109) [149].

6.2.6. Tying and bundling

Anticompetitive tying and bundling are practices where the dominant undertaking forces its customers to buy various combinations of its products. Pure bundling occurs when two or more products are offered only together without the possibility to buy them individually, while in mixed bundling products can be purchased separately but their bundled version is offered with a discount.

Slightly differently, tying is a practice where the purchase of one product is conditioned by the purchase of another product.[222] From the business strategy point of view, tying may take several forms. A tying based on a contract simply forces the contracting party to purchase the tied product exclusively from the dominant undertaking together with the tying product.[223] Tying effects may be caused also through refusal to deal where the dominant undertaking is willing to supply the tying product only in case that the customer buys also the tied product. Another type is a so-called technical tying. It occurs typically in the field of modern technologies where one product is connected with another one, and the customer is not allowed to buy them separately.[224]

However, in its reasoning, courts do not make clear distinction between various shades of these practices and generally use bundling and tying as interchangeable synonyms.

The economic rationale behind

Competition law forbids tying and bundling because of their undesirable economic consequences – foreclosure effect. However, looking at tying and bundling from the economic perspective, we can see both pro-competitive and anti-competitive effects.

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[222] For the analysis of strategic reasons for tying, see: Hedvig Schmidt, *Competition Law, Innovation and Antitrust: An Analysis of Tying and Technological Integration* (Edward Elgar 2009) 25–46.
[223] E.g. *Case T-30/89 Hilti* (n 102).
[224] E.g. *Case T-201/04 Microsoft v Commission* (n 108).

Regarding, pro-competitive effects, tying and bundling may lead to efficiencies mainly due to the decrease in costs of production and distribution. The production of more products at the same time may decrease the average costs. A sale of combined products which are mutual complements may create economies of scope and scale in comparison to marketing and distribution of separated products.

Bundling may also lead to synergy effects. Consumers make differences between the evaluation of the whole bundle and the evaluation of the separate products within the bundle.[225] The value of the whole bundle is usually higher because of lower transaction costs.[226] When using a combination of products, consumers may face a problem how to combine them in order to ensure an optimal functionality. If these products are sold in a bundle, such a problem disappears, which leads to savings in time, energy and generally, in transaction costs.

Another positive aspect of the synergy effect which increases the value of the whole bundle is the reduction of information asymmetry.[227] If consumers are not sure about the quality of an offered product, this uncertainty is reduced when the product is sold in a bundle with a known complementary product. Selling complementary products together may therefore reinforce the assurance of quality, especially if the functionality of both products used together is sufficiently guaranteed.[228] Moreover, consumers may consider the bundle as an innovative product which better satisfies their needs.[229]

On the other hand, the anti-competitive effects are as follows. Due to tying, a leverage effect may occur. The dominant undertaking uses its dominance on the

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[225] Timothy Derdenger and Vineet Kumar, 'The Dynamic Effects of Bundling as a Product Strategy' [2012] SSRN Electronic Journal 2–3 <http://www.ssrn.com/abstract=2175243> accessed 4 August 2014. David S Evans, Jorge Padilla and Michele Polo, 'Tying in Platform Software: Reasons for a Rule of Reason Standard in European Competition Law' (2002) 25 World Competition 509.

[226] Kathryn M Sharpe and Richard Staelin, 'Consumption Effects of Bundling: Consumer Perceptions, Firm Actions, and Public Policy Implications' (2010) 29 Journal of Public Policy & Marketing 170. Derdenger and Kumar (n 225) 2.

[227] Francesco Russo (ed), *European Commission Decisions on Competition: Economic Perspectives on Landmark Antitrust and Merger Cases* (Cambridge University Press 2010) 149. Derdenger and Kumar (n 225) 2.

[228] O'Donoghue and Padilla (n 83) 600–601.

[229] Ibid 600. Evans, Padilla and Polo (n 225) 509.

market of one (tying) product in order to eliminate competition on the market of the second (tied) product. The market power is thus spilled over into another market. As a result, the market is foreclosed for competitors that offer separate products. Or there are barriers to entry which prevent potential competitors that are unable to offer products in a bundle to penetrate the market.

Tying and bundling may have negative effects directly on customers. When customers are forced to buy products only in the bundle, it reduces their freedom of choice and it may lead to decrease in consumer satisfaction.

Moreover, tying enables the undertaking to use price discrimination towards their customers regardless their elasticity of demand. Due to bundling, the customers are pushed to purchase products that they did not intent to buy which eventually deforms the demand and distorts the allocation of production because a part of consumer surplus is shifted to producers.

Tying may also reduce the incentives to innovate. New competitors may challenge a need of risky investment on both the tying and the tied market at the same moment in order to be able to compete with the dominant undertaking. Regarding this double uncertainty of the potential reward of their investment, their willingness to undergo the risk is lowered, and therefore the barriers of entry are stronger.[230]

Translation into law

The European courts gradually translated the economics behind into its reasoning in the following way. The landmark decision in the field of anticompetitive tying is the judgment of the GC in the Hilti case (T-30/89). Concerning the facts, Hilti's customers of nail cartridges were made to purchase also nails exclusively from Hilti which was deemed both by the Commission and by the GC as an abusive tying.

[230] O'Donoghue and Padilla (n 83) 606. Jay Pil Choi and Christodoulos Stefanadis, 'Tying, Investment, and the Dynamic Leverage Theory' (2001) 32 RAND Journal of Economics 52.

The findings of the abuse in the judgment are based predominantly on the definition of the relevant market. The GC identifies three specific markets of the products in question (nail guns, cartridge strips and nails)[231] and denies Hilti's argument that all the products form an indivisible bundle justifying why they should be offered together.[232] However, the GC does not go very deep into the analysis of anticompetitive effects of tying.

The approach of the GC is therefore very simplistic and rather legalistic. The sole fact that the purchase of one product was conditioned by the purchase of another one leads to finding that the conduct is abusive.[233] The GC focuses on the decrease in the consumers' freedom of choice and does not possible positive effects of the conduct. It even denies possible economic justification suggested by Hilti[234] and it does not pursue any analysis regarding efficiency gains.

The reasoning of the GC is generally rather short, incomplete and superficial. It translates a simple economic argument, saying that tying may lead into a foreclosure of the market, into a normative claim that tying is illegal *per se*.

A minor step forward can be seen in the Tetra Pak II case.[235] The GC moves further, at least in fact that it uses more economic arguments to support the findings that the behaviour in question was abusive. However, the outcome seems the same – the GC concludes that tying forecloses the market and is therefore anticompetitive.

Concerning the facts, Tetra Pak forced its customers to buy the primary product (packaging machines) together with a tied product (cartons) and claimed they are a part of an integrated distribution system. However, the GC did not accept the argument that the combined offer is justified by the commercial usage and the natural link between products, saying that "*[e]ven a usage which is acceptable in a normal situation [...] cannot be accepted in the case of a market where*

[231] *Case T-30/89 Hilti* (n 102) [66].
[232] Ibid 68.
[233] Ibid 99–100.
[234] Ibid 102–107.
[235] *Case T-83/91 Tetra Pak II* (n 40).

competition is already restricted."[236] The economic explanation of the consequences of the behaviour is constructed as follows: "*An overall strategy aiming to make the customer totally dependent on Tetra Pak for the entire life of the machine once purchased or leased, thereby excluding in particular any possibility of competition at the level both of cartons and of associated products*."[237]

Overall, the approach copies the way of reasoning from the Hilti case: tying increases the economic dependence of dominant undertaking's customers therefore tied-sale clauses are unfair.[238] Consequently, this conclusion was approved even by the CJ.[239]

Both in Hilti and Tetra Pak II, three economically relevant aspects of tying were put on table: (1) barriers of entry for competitors offering only individual products, (2) restriction of the freedom of choice, (3) leverage effect on the tied product market. But still, the courts do not take into consideration other features based on economics, such as the real impact on consumers, possible positive effects or the incentives to innovate. The economic reasoning in these cases is therefore rather limited.

In that sense, a big step forward is apparent a decade later in the Microsoft I case.[240] The tying aspect of the case lied in the fact, that Microsoft offered its operating system solely together with a media player application (Windows Media Player, "WMP") and there was no possibility to get the system without the player. It is apparent from the reasoning of the GC, that the case reflects the modernisation efforts in the assessment of tying. The GC considerably departs and moves away from the rather legalistic approach to a more economics-based approach which is visible in various aspects.

In its decision, the Commission suggested a new test for examining alleged tying practices which was consequently approved by the GC. The assessment of tying

[236] Ibid 137.
[237] Ibid 135.
[238] Ibid 140.
[239] *Case C-333/94 P, Tetra Pak II* (n 44) [37].
[240] *Case T-201/04 Microsoft v Commission* (n 108).

therefore requires four steps. First, it must be established that the tying product and tied products are two separate products. Second, the undertaking in question is dominant in the market for the tying product. Third, there is no possibility to get the tying product without the tied product. Fourth, the practice forecloses competition.[241] By approving the methodology suggested by the Commission, the GC creates a new legal test derived from economic assumptions.[242]

The first and the second step are the same as in the older case law. The assessment of tying makes sense only if there are (at least) two separate markets for both products and if the investigated undertaking is dominant at least on the tying market product.

The third step brings an improvement into the analysis. It requires an aspect of coercion to be examined. In other words, tying occurs only if customers are coerced to buy the tied product together with the tying product, and there is really no possibility to get them separately. As a consequence, it reduces the freedom of choice. Within the reasoning, it was sufficient for the GC to find that the media player was integrated into the operating system. In that sense, it was a technical tying. The GC disregarded the fact that users were not required to pay additional fees for the application and concluded that the price for the tied product was apparently included in the price of the whole system.[243] These findings led, according to the GC, to the conclusion that the coercion was proved.[244]

The fourth aspect – the issue of foreclosure – brings finally more economics into the assessment of the effects of tying. The analysis is based on leverage theory, information asymmetry, transactional costs and network effects.

Regarding leverage theory, the GC assumes that tying in this case was capable to "*alter the balance of competition in favour of Microsoft and to the detriment of*

[241] Ibid 842.
[242] Ibid 869.
[243] Ibid 967 – 969.
[244] Ibid 975.

other operators."[245] The GC further explains that as the media player was automatically present on the majority of computers worldwide, it therefore reached the same *level of market penetration* as the operating system did not have to *compete on the merits with competing products*.[246] It follows that the dominant position on the operating systems market could be almost effortlessly spilled over into the market of media applications. The impact on competitors on the second market is that without the advantage of the tied distribution, they are prevented to reach the same level of penetration as Microsoft has.[247] What the GC highlights here, is that tying prevents the competition on merits. In other words, the foreclosure cannot be assessed only as a barrier to entry of all possible competitors but as a prevention of those developers of media players who would be objectively capable to compete with Microsoft under normal circumstances.[248]

Additionally, the GC puts information asymmetry and a concept of transactional costs as aspects supporting Microsoft's foreclosure. Having a media player pre-installed, customers get rid of additional efforts to download an alternative media player. Moreover, the pre-installation makes a presumption of a good functionality together with the operating system, thus customers may feel more comfortable without the need to search for information of the functionality of the application purchased from a competing developer.[249] Therefore the tying decreases the incentives of customers to search for and eventually get a competing product.

Furthermore, the GC approves the Commission's theory based on the existence of network effects.[250] Thanks to the ubiquity of the WMP, the content providers and software developers incline to choose only this one technology and create products compatible with WMP because of lower additional costs and opportunity to catch a wide spectrum of customers.[251]

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[245] Ibid 1034.
[246] Ibid 1038.
[247] Ibid 1039.
[248] Ibid 1047.
[249] Ibid 1041–1042.
[250] Ibid 1061–1062.
[251] Ibid 1062, 1064, 1070, 1071.

In addition to the new four-step legal test, the GC admitted another novelty. For the first time, the GC acknowledged that there may be efficiency claims justifying the tying practice. It seems that the GC moved away considerably from per se illegality of tying. However, the reasoning does not include any guidelines or a helpful construction of how the efficiency justification should be assessed and how a balancing test should be performed. In the end, the GC rejected all justifying arguments as not proved.[252]

Summary and assessment

The differences in economic reasoning between Hilti and Tetra Pak on one side, and Microsoft on the other side show that the GC made a considerable shift towards more economic arguments in abusive tying case law. At the outset, it worked with *per se* illegality which was not supported by any further economic arguments. A decade later, the GC was apt to admit new economic arguments into its reasoning and to develop an approach based on economic considerations and actual effects of the behaviour in question. However, similarly to other practices examined above, the increase of economic arguments in the reasoning of the court is predominantly a reaction to the parties' initiatives.

Moreover, it is arguable whether the GC would adopt such a detailed effects-based approach in less complex cases being outside the sphere of modern technologies, or whether the Microsoft case was just a positive deviation. In any event, the approach of the GC in the Microsoft case is still not very praised. The commentators still insist that it neglects more elaborated analyses, holds a per se approach and disregards the effects-based investigation.[253] Therefore even if there is a pattern of development, the Court has still not reached a desirable level of its approach.

[252] Ibid 1167.

[253] See among others, Jean François Bellis and Tim Kasten, 'The Microsoft Windows Media Player Tying Case' in Luca Rubini (ed), *Microsoft on trial: legal and economic analysis of a transatlantic antitrust case* (Edward Elgar 2010) 163–164.

6.2.7. Fidelity rebates

The core of anti-competitive rebates lies in the fact that the dominant undertaking commits its customers to take products exclusively from it in the exchange for lower prices. Such conditional rebates lead to the reduction of customers' freedom of choice, to the foreclosure of the market for small competitors and to the consolidation of the market power of the dominant undertaking.

Typically, rebates are used towards retailers, distributors or other intermediaries, and do not affect final consumers directly. Retailers are thus forced to take a certain quantity of products or they breach their contractual obligation. However, they may have also a direct impact on end-users when they are used as a leverage to foreclose an adjacent market through bundling.

Economics behind fidelity rebates

From the economic point of view, rebates create a conditional structure of prices based on price discrimination. The undertaking offers a lower price if the purchaser reaches a certain level of the bought products (quantities), often during a certain period of time. Economics assumes that such a structure of prices may have both anti-competitive and pro-competitive effects.

Regarding the anti-competitive effects, fidelity rebates and loyalty discounts have the power to eliminate both actual and potential rivals in the market through ensuring that customers are tied to the dominant undertaking and will not change it for a competing supplier. The market may be foreclosed both vertically and horizontally. The effect can be achieved through contractual obligations or simply through pricing policy.

The vertical foreclosure occurs when the dominant undertaking offers fidelity rebates to a retailer in the exchange of the exclusivity clause according to which the retailer is not allowed or is limited to sell products from other competitors. The competitors are therefore foreclosed to access the channel of distribution.

The horizontal foreclosure arises in case that the dominant undertaking delivers its product directly to customers and bundles this product with a product from an adjacent market. Through the fidelity rebates on the main market, it forecloses the access to the adjacent market.

On the other hand, fidelity rebates and loyalty discounts may have positive impact by leading to economic efficiencies. First, they allow performing price discrimination which is based on differences in elasticity of demand between various groups of customers, i.e., to charge higher prices to customers whose elasticity of demand is low, and vice versa to decrease prices for customers with a high elasticity of demand – the decrease is then conditioned by the contractual promise to purchase a certain quantity of products.[254] Such price discrimination is therefore capable to lead to efficient allocation of sources. On the other hand, if undertakings were always forced to avoid such price discrimination, they would not be able to adapt their price strategy to differences in elasticity and the higher price for all customers would lead to the fact that certain customers would not be satisfied at all. Consequently, it would decrease the total output.

Second, such price discrimination may even lead to the efficient recovery of fixed costs, especially in case of a production with considerably high fixed costs. In that case, it would be economically reasonable to charge high prices which would repay the incurred fixed costs. However, the higher the price, the less quantity is demanded. On the other hand, the increasing volume of demanded products decreases the average fixed costs per product. In order to escape from this contradictory situation, the undertaking may pursue a pricing strategy based on differences in the elasticity of demand and therefore adapt the pricing in order to achieve efficiencies.[255]

Third, rebates may create better incentives for the dominant undertaking to invest into innovation. Again, especially when the production involves high fixed costs, the undertaking may be reluctant to invest unless it is sure that the

[254] Hildebrand (n 5) 376. O'Donoghue and Padilla (n 83) 465.
[255] O'Donoghue and Padilla (n 83) 465–466. And the literature quoted there, especially Lars-Hendrik Röller and Eugenio Miravete, 'Competitive Nonlinear Pricing in Duopoly Equilibrium: The Early Cellular Telephone Industry' [2003] CEPR Discussion Paper.

investment is eventually recovered. Fidelity rebates thus increase the security and reduce the initial risk.[256]

Fourth, in case of vertical relations between the dominant supplier and its retail distributors, fidelity rebates may improve incentives for retailers and consequently bring additional benefits for consumers. When retailers purchase goods for lower prices, it encourages them to perform a better marketing strategy and to compete more efficiently on the end-user market.[257]

Fifth, fidelity rebates may increase total welfare by reducing the negative side effect of the relationship within the distributional channel where both the supplier and the retailer hold a certain market power. The effect is labelled as "double marginalisation"[258]: the supplier takes its costs plus its margin to make a wholesale price which presents an input cost for the retailer. The retailer then puts its own margin to the price in the height corresponding to its market power. In comparison to the scenario under rebates, this leads to higher prices for final consumers who consequently purchase less quantity of products. As a result, total output is lower than in case where rebates are applied.[259]

Therefore, the eventual impact of fidelity rebates on competition should be assessed by balancing the counter effects and finding whether the practice leads to the increase of output or not. It is argued that the actual anti-competitive effect of rebates is quite rare and it requires several cumulative conditions to be fulfilled.[260]

Reflection into legal reasoning

Fidelity rebates may be associated with exclusive dealing which was deemed per se illegal in one of the older cases, Suiker Unie.[261] The CJ explained that they are anti-competitive as they reduce customers' freedom of choice, decrease

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[256] Hildebrand (n 5) 376.
[257] Ibid. O'Donoghue and Padilla (n 83) 466.
[258] See 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' 53 [174].
[259] See in more detail O'Donoghue and Padilla (n 83) 467. Schmidt (n 222) 21–24.
[260] See in more detail O'Donoghue and Padilla (n 83) 469 – 470.
[261] *Joined cases 40/73 et al., Suiker Unie* (n 73).

competition to the detriment of consumers and reinforce market power of the dominant undertaking.[262] The per se illegality was confirmed also in the judgment Hoffmann-La Roche where the CJ explicitly held that if the dominant undertaking applies a system of conditional fidelity rebates, it abuses its dominant position.[263] Furthermore, the CJ added that it is indifferent whether the quantity of the purchase is large or small as well as whether the rebates were requested by the customer or not.[264]

Next to the exclusive purchases, fidelity rebates may be arranged as incentives without any exclusivity clause. Their abusive nature was confirmed by the CJ in the Michelin I case (C-322/81).[265] As to the facts of the case, Michelin's pricing policy required customers to achieve a certain threshold of purchases per year in order to be granted discounts in the following year. In its reasoning, the CJ admitted that such quantitative rebates are different from rebates requiring fidelity by exclusivity clauses. Therefore it called for the necessity to "*consider all the circumstances*" and to examine the effect of such rebates on the freedom of choice, barriers to entry and strengthening the position of the dominant undertaking.[266] However, in the end, the CJ did not enrich its reasoning by any new economic element. It concluded that such quantitative rebates are abusive in the same way as classical fidelity rebates because of their loyalty-inducing nature. The CJ explained that "*[a]ny system under which discounts are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period*."[267] Additionally, the CJ examined economic relevance of facts of the case and but it did not use them as a yardstick to assess the impact on competition and consumers. It rather emphasised that all the factors (the extent of the discount, the reference period, the lack of written

[262] Ibid 51, 526, 527.
[263] *Case 85/76 Hoffmann-La Roche* (n 123) [89].
[264] Ibid.
[265] *Case 322/81 Michelin I* (n 112).
[266] Ibid 73.
[267] Ibid 82.

contracts) just accentuated the effect leading to fidelity[268] and therefore supported the conclusion of inherent anti-competitiveness of loyalty-inducing rebates.

In comparison to the previous case law, the reasoning in the Michelin I case includes, on one hand, additional economic explanations of consequences, but on the other hand, it immediately leads to the same conclusion of *per se* illegality. So even if there might be a hint of pulling more economics inside, at the end of the day, the legal test remains unchanged.

The *per se* approach persisted in rebates cases even in 1990s. The reasoning of the GC in the case British Gypsum copied the previous case law. On one hand the GC admitted that exclusive purchasing commitments are a natural part of commercial relations and their effects must therefore be examined in their specific contexts.[269] On the other hand, it emphasised further that this presumption applies only in a normal competitive market situation and therefore the commitments cannot be unreservedly accepted in the case of a market where competition is already restricted.[270] Moreover, the GC did not accept the justification that the purchasers were allowed to terminate the contract at any time explaining that "*an undertaking in a dominant position is powerful enough to require its customers not only to enter into such contracts but also to maintain them, with the result that the legal possibility of termination is in fact rendered illusory*."[271] Reminding the special responsibility of the dominant undertaking,[272] the GC highlights that due to its significant market power, the undertaking is not allowed to commit its purchasers by exclusivity clauses regardless the market power of those purchasers.

The very same approach is taken in the case Irish Sugar (T-228/97) where the GC repeats older case law insists on the triad of economically relevant aspects of

[268] Ibid 82–85.
[269] *Case T-65/89 British Gypsum* [1993] ECR II-389 [66].
[270] Ibid 67.
[271] Ibid 73.
[272] Ibid 67.

fidelity rebates: reduction of the freedom of choice, foreclosure of the market, and reinforcement of the market power.[273]

From all the above examined cases, it follows that the courts' economic reasoning in rebates cases remains consistent and just accents the above mentioned three anti-competitive effects.[274] The courts did not admit any arguments justifying the practice by economic efficiencies, they did not take into consideration actual effects of the behaviour and moreover, they disregarded market power of purchasers or the actual ability of competitors to compete on merits with the dominant undertaking. The courts are only willing to add economic explanations of the behaviour which, however, do not have any significant impact on the way of their reasoning.

A slight step further may be seen in the case British Airways (T-219/99) where the performance reward schemes to travel agents were, in nature, similar to Michelin's loyalty-inducing rebates. Within its reasoning, on one hand, the GC calls for an assessment in accordance with previous case law, [275] but on the other hand it presents it in a slightly modified way as it suggests a two-step test. At first, it must be examined whether the practice "*had a fidelity-building effect*". If the effect is determined, then at second, it must be assessed whether the practice was "*based on an economically justified consideration*".[276]

This approach was even upheld by the CJ on appeal. It stated that "*it first has to be determined whether those discounts or bonuses can produce an exclusionary effect*,"[277] and as a second step, "*[i]t then needs to be examined whether there is an objective economic justification for the discounts and bonuses granted*."[278] Furthermore, the CJ explicitly admitted that "*an undertaking is at liberty to*

[273] *Case T-228/97 Irish Sugar* (n 73) [197].
[274] *Case 322/81 Michelin I* (n 112) [71]. *Case T-65/89 British Gypsum* (n 269) [120]. *Case T-228/97 Irish Sugar* (n 73) [197].
[275] *Case 322/81 Michelin I* (n 112) [73]. *Case T-228/97 Irish Sugar* (n 73) [114].
[276] *Case T-219/99 British Airways plc v Commission* (n 72) [271].
[277] *Case C-95/04 P, British Airways* [2007] ECR I-2331 [68].
[278] Ibid 69.

demonstrate that its bonus system producing an exclusionary effect is economically justified."[279]

In this case, both courts explicitly admitted possible economic justification of rebates. It means that an additional economic argument is pulled into the legal test. However, in this particular case, the GC did not accept the efficiency arguments because there was no precise link between economies of scale and the increases in the rates of remuneration paid to travel agents,[280] and therefore the rebates were not able to "*constitute a mode of exercise of the normal operation of competition or allow it to reduce its costs*."[281]

Further development is brought by the Michelin II case (T-203/01) where the GC shifts the angle of its assessment. First it starts with the economic presumption that quantity rebates are "*deemed to reflect gains in efficiency and economies of scale*"[282] and therefore there are "*generally considered not to have the foreclosure effect*"[283] as long as they are "*linked solely to the volume of purchases made from an undertaking occupying a dominant position*."[284] Then the GC follows that such a rebate system is not abusive "*unless the criteria and rules for granting the rebate reveal that the system is not based on an economically justified countervailing advantage but tends, following the example of loyalty and target rebates, to prevent customers from obtaining their supplies from competitors*."[285]

The reasoning of the GC thus continues alongside the line of "the example of loyalty and target rebates" and concludes that "*a quantity rebate system in which there is a significant variation in the discount rates between the lower and higher steps, which has a reference period of one year and in which the discount is fixed on the basis of total turnover achieved during the reference period, has the characteristics of a loyalty-inducing discount system*."[286] In accordance with the

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[279] Ibid.
[280] *Case T-219/99 British Airways plc v Commission* (n 72) [290].
[281] Ibid 291.
[282] *Case T-203/01 Michelin II* (n 82) [58].
[283] Ibid.
[284] Ibid.
[285] Ibid 59.
[286] Ibid 95.

reasoning in British Airways, the GC then admitted the possibility of an objective economic justification of the practice. However, even in this case, the GC rejected all the raised arguments mainly because they were not capable to rebut the loyalty-inducing effect and they did not show any countervailing advantage.[287]

So even if the GC puts forward a possible economic justification, it does not make clear how such a justification should look like in order to be capable to persuasively overcome the negative loyalty-inducing effect. Although cost savings and economies of scale are theoretically acceptable to justify rebates, once a fidelity feature is in a game, they have no chance to be applied. It thus seems that in spite of the explicit proclamation of possible economic justification, the loyalty-inducing quantitative rebates are still deemed as *per se* illegal.

The Tomra case (T-155/06) brings additional economic arguments to the assessment of rebates which generally regard the economic facts related to the concrete conduct and their assessment within the case. The GC had to assess the predictability of demand of Tomra's customers which allegedly allowed it to make exclusive dealing commitments. Tomra argued that it was impossible to estimate requirements of every customer precisely. The GC did not accept it and construed the sufficient predictability from the facts that "*the customer sometimes indicated its expected future requirements*,"[288] "*the demand of each customer was relatively easy to predict*" due to enough information,[289] "'*non-recurrent' and 'irregular' demand may […] none the less be readily foreseeable*,"[290] and "*targets set by the agreements […] corresponded at least to somewhere between 75% and 80% of its total demand*."[291] Within this case, the GC highlights the economic relevance of certain facts and creates a flow of supportive arguments based on economics.

Moreover, in Tomra, the GC puts on table another economic explanation – a concept of an "unavoidable trading partner" as an inherent aspect of the strong dominant position. The GC deduces a "presumption of unavoidability" just from

[287] Ibid 110.
[288] *Case T-155/06 Tomra* [2010] ECR II-4361 [79].
[289] Ibid 80.
[290] Ibid 82.
[291] Ibid 85.

the dominant position as such. The dominant position just presupposes that "*for a substantial part of the demand, there are no proper substitutes for the product supplied by the dominant undertaking*".[292] In that case, the GC pulls an economic argument into its reasoning in a form of a presumption. However, it is criticisable because this presumption is not based on actual data. Its probability is disputable because the real effects may be different.[293]

The unresolved question is whether a quittance of the market by competitors is a sign of foreclosure or just a natural consequence of healthy competition on the market. Economics does not see an automatic causality link between the anti-competitive foreclosure and the exit of competitors because the latter may be caused by other factors. However, the Commission took such a consequence as an evidence of abuse and the GC endorsed it.[294]

A promising shift in the approach is suggested by AG Mazák in C-549/10 P – Tomra where he explicitly calls for a profound assessment of actual or likely existing exclusionary effects of rebates. He especially highlights that the approach to rebates should abandon the presumption of anti-competitive foreclosure and that it should focus on the demonstrable evidence of such an effect.[295] His appeal to consider better the way of reasoning is mostly visible in his statement that *"[r]eference to negative (anti-competitive) effects should clearly not be mechanical*."[296]

However, the CJ on appeal insists just on mechanical assessment and approved that *"the General Court was correct to hold that the determination of a precise threshold of foreclosure of the market beyond which the practices at issue had to be regarded as abusive was not required for the purposes of applying Article 102 TFEU*."[297]

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[292] Ibid 269.
[293] See the criticism in O'Donoghue and Padilla (n 83) 495.
[294] *Case T-155/06 Tomra* (n 288) [214].
[295] *Opinion of AG Mazak in Case C-549/10 P, Tomra Systems ASA and Others v Commission* (2012) nyr [44].
[296] Ibid.
[297] *Case C-549/10 P, Tomra Systems ASA and Others v Commission* (2012) nyr [46].

The GC's recent judgment in the Intel case (T-289/09) seems as a copy of the Tomra ruling. It uses a myriad of economic explanations but it still continues in the same line of arguments regarding fidelity rebates. It highlights that agreements with exclusivity or at least quasi-exclusivity clauses are considered per se abusive. The economic presumption behind is that such clauses inevitably lead to restriction of buyers' freedom of choice and to restriction of competitors' access to the market.[298] Moreover, the GC insists on per se illegality of exclusivity rebates and reminds that "*the question whether an exclusivity rebate can be categorized as abusive does not depend on an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect*".[299] Such an approach is accompanied by economic explanations based on the concept of "unavoidable trading partner" and "contestability of a market".[300] The GC builds the explanation on the economic presumption that "*[t]he 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 customer as leverage to secure also the contestable share, thus making access to the market more difficult for a competitor*."[301]

Interestingly, the GC had to deal with "as-efficient competitor" test ("AEC") as a means of a claim for justification. However, it did not accept the positive result of the AEC test as a sufficient justificatory argument explaining that it "*would not deprive that practice either of its anti-competitive object or of its capability to make access to the market more difficult for the competitor*."[302] Therefore it still seems that the GC is not willing to listen to AG Mazák's suggestions and keeps rather a resistance to the effects-based approach in rebates cases.

Summary and assessment

From the economic point of view, it is at least problematic to label rebates as unlawful automatically once they cause the loyalty-inducing effect. As argued by

[298] *Case T-289/09 Intel Corp v Commission* (2014) nyr [77].
[299] Ibid 80.
[300] Ibid 92–93.
[301] Ibid 93.
[302] Ibid 214.

economists, "*[a] low price, if it is low enough, will always create "fidelity" or "loyalty" in the obvious, lawful sense that it encourages buyers to purchase from the supplier offering the best terms*."[303] Therefore the economic reasoning of the courts remains flawed and unclear because it still cannot make a comprehensible demarcation line between the actual foreclosure and simple and desirable competition on the merits. A questionable aspect is also the reliance on the foreclosure effect which is based on an economic presumption rather than on clear demonstration of such an effect. Moreover, the courts rather ignore the objective ability of rivals to compete on the same level of efficiency, and they disregard the purchasers' power.

In the newer cases, there is a light shift in the assessment of effects from pure presumption to evidence-based demonstration. However, going too far would also bring an undesirable result: the duty to demonstrate more than just likelihood may be deceptive and precarious especially in cases where the anti-competitive effects are likely to appear in a longer term horizon. Overall, the reasoning of courts still lags behind and creates a gap between (even basic) economic considerations and their legal reflection.

In conclusion, the economic reasoning of the CJEU in case of rebates remains almost unchanged. Even if both courts put on table more economic arguments and economic explanations, at the end of the day, their reasoning still returns back to early case law. Still the reasoning does not include any convincing economic arguments related to the actual effects of rebates, nor are the courts capable or willing to formulate precise contours of economic justification.

It makes quite a sharp contrast with the purely economic view presented above. The courts are not able to answer the call for balancing the counter effects of rebates. They do not pull into its reasoning any of the offered pro-competitive arguments and do not take into consideration the position of competitors or the impact of the final output and, eventually, welfare.

[303] O'Donoghue and Padilla (n 83) 490.

7. Appraisal

The scene in background is clear: Competition law is inspired by economics, the European Commission calls for more economic approach in competition law, the focus in EU competition law is shifting more and more towards the standard of consumer welfare. However, since the CJEU is the ultimate standard-maker in EU law, it is vital to see how it perceives the gradual "economization" of competition law and how it reflects it within its own case law.

With validity at least for the field of abuse of dominance, it follows from the analyses above that its perception and reflection is slow, cautious, uneven or rather random. Although the CJEU is pushed to reflect the "more economic approach", at least recently, within its reasoning inasmuch as the circumstances require it, its approach remains conservative and rigid. On the other hand, if we take it with more understanding and sympathy, it may be described as ever evolving and gradually developing.

The lexical analysis reveals that courts are generally reluctant to use economic terminology. There is no apparent increase in the use of economic terms, and the CJEU does not seem to keep a certain relation between the terms which are actually used within its judgments. The terms are used rather randomly, and there are only several lonely cases where both the General Court and the Court of Justice let economics penetrate legal parlance more visibly.

However, taken in isolation, it does not show an undeniable deterrence of the CJEU to understand and use economic concepts. An alternative explanation could say that the CJEU (and presumably any court) needs to accommodate economics into its reasoning in a way which fits into the legal language. The mere ignorance of economic terms thus does not reflect unwillingness to understand and apply economics, but on the other hand, it supports the view that the CJEU is cautious, not very innovative and rigid in its way of reasoning.

Nevertheless, the lexical analysis shows only a small part of the picture, and the way how the CJEU actually works with economics requires a deeper

examination. The assessment of the gradual reflection of economic arguments into legal reasoning reveals that the CJEU's attitude to economics is unbalanced (and therefore still criticisable). In some parts of competition law, CJEU is willing and able to reflect economics quite precisely. However, there are still places where the CJEU rejects to accept arguments offered by economists, the Commission, parties or even commentators. Or at least, it is not deterrent absolutely to accept new suggested ideas, but generally, it does it with a kind of vigilance.

In any event, the approach of the CJEU should be assessed in the light of its overall practice, scope of tasks, its methods and style of reasoning and could not be assessed separately just for the field of competition law. Therefore it is not surprising that the CJEU is very prone to rely on its own case law. The references to legal standards elaborated in preceding judgments make a considerable part of its argumentation when it comes to using economics. Moreover, the effort to keep at least some level of legal certainty leads to a kind of unwillingness to let new economic arguments enter legal reasoning. Last but not least, when examining the approach of the CJEU, it is necessary to take into consideration the very task of the CJEU – to control legality.

Nonetheless, it rather reflects the general style of reasoning of the whole institution: the CJEU generally prefers quoting its own case law and is cautious when it comes to new (even economic) arguments. Once established legal test based on economics is then repeated in a mantra-like style and possible amendments, clarifications and changes are slow and very cautious. However, when the CJEU is pushed to deal with new questions (mainly the assessment of the methodology), it is willing to accept new arguments but still very carefully.

There are still areas where the approach of the CJEU is more reluctant than in the others. While in pricing practices, defining relevant market and assessing dominance, the CJEU seems to understand the hard data, and therefore to accept the economic argument behind, in non-pricing practices such as fidelity rebates or exclusionary practices, it is still difficult to persuade the CJEU to turn the rudder towards more detailed economic arguments.

The different intensity of development in particular fields of abuse of dominance may be explained by the real-world evolution. While some "old" practices were defined and the classification of their harmfulness was settled long ago, "new" practices require new explanations, economic arguments and even legal standards in order to be assessed in their complexity. Therefore since the new phenomena call for new approaches, the CJEU has inevitably to accommodate them into its practice.

It is a case of modern technologies which require a more creative attitude even from courts. Regarding such cases (Microsoft, Deutsche Telekom, France Télécom - Wanadoo), it is apparent that the CJEU is willing to respond to new challenges and to sink into questions about methodology and assessment of highly technical economic or econometric facts.

Nevertheless, the findings confirm, at least for the field of 102 TFEU, the claim that the early judgments worked with economic arguments "*in an imprecise and ad hoc manner*".[304] The CJEU always has to simplify and generalize complex (and sometimes contradictory) economic arguments and considerations because, in order to serve to law, economic thoughts must be transformed into rather simplified normative statements. However, in earlier cases the translation of economic arguments into law was rather oversimplified. The CJEU relied on a formalistic approach and the finding that the conduct in question fulfils certain formal features inevitably lead to the conclusion of per se illegality without further analyses.

On the other hand, from the whole overview, it is apparent that even the CJEU has been willing to abandon the strict formalism and to accommodate gradually new economic arguments into its practice. It seems that the CJEU has shifted its approach from simplistic normative statements into an attitude which takes into account more shades of the particular behaviour and its eventual effect on competition and consumers. In any event, there are still apparent discrepancies between various fields of assessment of abusive practices.

[304] Bishop (n 83) 3.

CONCLUSION

It is a generally shared view that all courts are rigid institutions which are not willing to make revolutionary changes unless they are pushed to do so. The same may apply to the CJEU, even if it is sometimes considered as an activist court which goes far beyond what is expected from him. Courts need inspiration either from parties or other institutions, and only occasionally they are willing to go into a land which no other leg has touched before when they realize that there is no authority-like clue anywhere else. In competition cases, the European courts are maybe even more cautious than in other fields of EU law. It is apparent from the analyses above that they are not courageous enough to go ahead unless the new (economic) shift is suggested to them by the Commission, economists, academics or parties of the case.

Thus it is not a surprise that the evolution of the economic reasoning of the CJEU is driven by external powers, and the CJEU succumbs to them with a varying intensity of reluctance. One explanatory aspect lies within the dispositive nature of the judicial review procedure. The sphere of preliminary references is not much different. Moreover, the courts feel bound by their previous case law and therefore every new (economic) argument must somehow fit into it. 180 degrees turns are not common. Even if the court wants to change its attitude to a specific issue, it tries to do it as smoothly as possible not to crash the previous case law explicitly in one moment. It is connected to the duty to keep legal certainty and also to the effort to keep its own authority. The judges presumably do not feel comfortable when they have to untie themselves from the, so far, stable and safe rope of case law. Every movement away presents a hard step and requires a deep consideration. The evolution is therefore slow and gradual.

No one (hopefully) expects from judges to become economists who are dealing with complex economic and econometric studies full of numbers, graphics, equations, variables or derivations. And it must be recalled again that economic reasoning does not necessarily mean to count with numbers and to calculate variables. It is rather a way of thinking and logic of putting arguments in a line

which makes sense from the economic perspective. And such logic is not foreign to "classical" legal thinking. Economics helps to decode and decipher the line of arguments which must be put together to make a convincing conclusion which will be coherent with the goals of competition law. It is natural that for the needs of courts and judges, it is intrinsically necessary to simplify the economic knowledge and to put it in a form which will be comprehensible for judges and suitable for the needs of law. It is not a process of connecting two different worlds together but rather of bridging two sides of the same town. Competition law (regardless how much it is influenced by and derived from economics) is still a part of the legal order and in that way it must be dealt with.

Anyway, a more friendly approach to economics is desirable even in the Court. The argument is simple: a tighter coherence with economics and a greater emphasis on effects (looked at through the prism of economics) serves better to the rights (mainly rights of defence) of investigated undertakings, and in the end, it leads to a more accurate maintenance of healthy competition and protection of consumers' interests within the EU. This slightly normative appeal stems from the descriptive analysis: A lot has been done so far, the CJEU has proved that they are able to take into consideration even "foreign" or "extra-legal" arguments which, however, must be served to them in a digestible form.

There are some fields of competition law (at least when limited to examined cases under art. 102 TFEU) where economists, competition lawyers and commentators in general would like to see the courts' greater involvement into economics and maybe (as well) a better understanding of the economics behind. There are still many patterns of the reasoning which may be criticisable. But, as it was shown above, the evolution of economic reasoning is a gradual process and the adaption of courts is slow.

Let us conclude with a kind of optimism for future development. Even if the current state of economic reasoning of courts is far from the ideal state economists would prefer and even if economists claim that the courts do not understand economics properly and do not follow correctly their ideas, I would counterclaim that it does not matter (so much). What is the most praiseworthy

thing is the mere evolution and development of ideas. Discussion and sharing ideas would ideally lead to clarification of the approach to competition law which would better serve the goals of European competition policy, would not hurt business and would be in the benefit of consumers. Taking it optimistically, the courts have shown the capability and willingness to adopt economic reasoning into the purely legal one and to reflect new suggestions from the Commission, economists and competition lawyers. So, maybe even the critics will be eventually satisfied and the CJEU will–step by step–fulfil their expectations.

In any event, it is not a duty for the CJEU to accept everything the economists and economic theory call for. The gap itself between economic theory and the actual practice of the CJEU cannot be considered something for which the CJEU should be automatically blamed. It just proves the existence of the difference in the episteme and in the respective roles and positions of lawyers and economists in competition law. Therefore the practice of the CJEU should be thoroughly assessed and even criticised, but always with bearing in mind that its role is to guarantee rule of law in the EU, not the rule of economics.

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