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The Realist Trend of the Court of Justice of the
European Union

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Abstract

This Article seeks to explain the rationale behind the recent jurisprudential turn of the Court of Justice of the European Union. It identifies an enhanced trend to legal realism and articulates its three main propositions through an exploration of competition law, state aid law and trade mark law. Vigorous engagement with social fact and analytical clarity, the fundamental contributions of the Court's realist trend, lead to knowledge and ensure that normativity, anchored in the goals and values of the Union, can gain its full thrust. Further, decoupling a more economic approach from the realist approach reveals its independent normative value. The enhanced turn to realism represents a qualitative leap of the Court's overall judicial analysis, and is vital for effective judicial review. The Court's realist trend thus importantly serves the right to effective judicial protection, as foreseen in Article 47 of the Charter, by avoiding arbitrariness and error in law. Any departure from the three realist propositions, for example for the sake of increased administrability, thus carries an important social cost. Bearing these insights in mind, the described trend is also of broader importance to any field of European Union law.

Keywords

Legal realism, economic approach, Court of Justice of the European Union, effective judicial protection, Charter of Fundamental Rights, judicial review, competition law, state aid law, trade mark law.

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I. Introduction

The Court of Justice of the European Union ('the Court') has become a prominent player in numerous domains of social life. The methods of its reasoning are fundamental to the achievement of its central goal that in the interpretation and application of the Treaties the law is observed. This article identifies the Court's trend to legal realism, argued to be of prime importance for the right of effective judicial protection as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union¹ ('the Charter').

The past decade witnessed several developments in the fields of competition and state aid law, resulting in a significant number of annulments of the Commission's decisions by the General Court, often attributed to the increased burden of proof,² as well as in the Court of Justice's annulments of the General Court's judgments. The Court of Justice's increased requirement for deeper assessments of the conduct's actual effects on the market has been attributed to an enhanced economic approach.³ This Article attempts to better grasp the rationale behind this development.

It identifies a larger trend in the approach of the Court and a careful examination of its features. The most important propositions of the identified trend can be traced back to the anti-conceptual insights of Oliver Wendell Holmes and his realist successors. Hence, I call the recent trend of the Court the 'realist trend'.⁴

Its demands for analytical clarity and for increased judicial engagement with social and economic reality enhance the dynamics of the adversarial procedure aiming at a more targeted legal analysis that avoids over and under inclusion. The enhanced turn to realism thus represents a qualitative leap of the Court's overall judicial analysis and importantly contributes to the right of effective judicial protection as foreseen in Article 47 of the Charter. The normative value of this trend can only be appreciated when distinguished from the 'more economic approach'. While they often go hand in hand in the case law of the Court, and some of their elements overlap, they are not synonymous. The more economic approach is only one possible iteration of realism. This reveals a noteworthy independent value of the realist trend also in the light of possible disenchantment with the more economic approach and its importance for any field of European Union law. Its underlying rationale is the respect of the rights of litigants, and citizens, while simultaneously securing the rule of law in the European Union. Any departure from the realist propositions, for example for the sake of increased administrability, thus carries an important social cost.

Section two describes the jurisprudential roots of the turn to realism and its legal significance. Section three articulates and analyses the three main propositions of the Court's realist trend through an exploration of competition law, state aid law and trade mark law and is divided into three subsections. The first subsection explains the requirement of basing decision-making in the social, economic and

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¹ Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

² Anthony M. Collins, 'No need to bang on the table' [2020] *Revue Concurrences* 2.

³ Anne C Witt, 'The European Court of Justice and the More Economic Approach to EU Competition Law—Is the Tide Turning?' (2019) 64 *The Antitrust Bulletin* 172.

⁴ The turn to realism in this article takes American legal realism as its reference point. It does not explore the deeper genealogical roots of those insights which can be traced back to their European predecessors, including Rudolf von Jhering and François Géný. See for example Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in Alvaro Santos and David M Trubek (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006).

legal context. The second subsection highlights the perils of a premature termination of judicial analysis and the need for taking all the relevant facts and interests into consideration. The third subsection illustrates the requirement of a robust normative articulation of prohibited harm. Section four explains the need for a calibration of the three propositions in every particular case. Finally, section five argues that the realist trend forms an important piece of the mosaic of effective judicial review and thus of effective judicial protection, as set out in Article 47 of the Charter, with significant normative implications.

II. Jurisprudential Roots and Significance of the Realist Trend

“The life of law is experience”,⁵ argued Justice Oliver Wendell Holmes, laying the ground for the realist jurisprudence. The three propositions articulated in this article are firmly anchored in the insights based on the Holmes premise that were later developed by Wesley Hohfeld, Felix Cohen, Ronald Coase, Lon Fuller and others.⁶

Justice Holmes put forward that law is not a mystery nor a deduction from principles of ethics or admitted axioms. Instead, it is what courts do in fact.⁷ Felix Cohen subsequently argued that legal thought needs to have roots in reality.⁸ It is thus important that, in the words of Lon Fuller, concepts are not “a container of a ‘thing’ at all, but an activity of a conceiving mind”.⁹ Similarly, Felix Cohen, building on Hohfeld’s work, argued that legal concepts are not supernatural legal entities, a ‘pre-existing Something’, embodying a fixed common morality, but are rather, judicial constructions.¹⁰ Fuller accordingly affirmed that what needs abolition is a conception of a legal method which assumes that the doctrine can be understood and applied without reference to the ends it serves, in terms of their underlying policies and functions.¹¹ Finally, Hohfeld and Coase argued that a clear identification of harmful conduct, a normative premise based on social ideals, is critical for clear legal analysis.¹² This opened the way for redefining every legal concept empirically, in terms of patterns of judicial behaviour. The realists’ anti conceptual stance resulted in the requirement for the Courts to proceed by careful normative appreciation of economic and social facts.¹³

These old insights from American legal realists became hallmarks of global legal thought¹⁴ and there is certainly no direct cause and effect between their work and the described trend of the Court. The realists’ insights serve as a reference point. The article articulates and analyzes three propositions of realism whose enhanced use is visible in the recent case law of the Court. They are interrelated, several of their aspects overlapping in particular cases. Yet, to portray the trend with analytical clarity, they are articulated separately. First, legal analysis should be based in its social and economic context. Second, decision makers need to consider all the relevant facts and interests without a premature termination of

⁵ Oliver Wendell Holmes, ‘The Path of the Law’ (1907) 10 Harvard Law Review 991.

⁶ See, Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 Yale Law Journal 16; Lon L Fuller, ‘American Legal Realism’ (1934) 82 University of Pennsylvania Law Review 429; Felix S Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 Columbia Law Review 809; RH Coase, ‘The Problem of Social Cost’ (1960) 3 The Journal of Law and Economics 1.

⁷ Holmes (n 5).

⁸ Cohen (n 6) 811.

⁹ Fuller (n 6) 447.

¹⁰ Cohen (n 6) 828–829.

¹¹ Lon L Fuller, ‘Consideration and Form’ (1941) 41 Columbia Law Review 799.

¹² Hohfeld (n 6); Coase (n 6).

¹³ Cohen (n 6).

¹⁴ Kennedy (n 4).

analysis. Third, a robust articulation of harm, a normative premise, is required to argue and prove socially undesirable harm.

The Court's turn to realism importantly serves the right to effective judicial protection, as foreseen in Article 47 of the Charter, by calibrating the analysis and consequently avoiding arbitrariness and error in law. The Court needs to seek an often razor-thin line between the arguments and submitted evidence of the opposing parties to determine the case. Reliance on insufficiently explained presumptions¹⁵ or pre-existing meaning of concepts, without a careful review of all the positive and negative effects of activities on the market, clouds the identification and analysis of socially harmful behaviour and ultimately brings about erroneous decisions. When legal enforcement is over-inclusive, a false positive occurs. This is the case when a competition authority or a court incorrectly concludes that pro-competitive behaviour is illegal, such a conclusion causing harm to the undertakings as well as to consumers. A law designed to promote competition should not end up in diminishing it. At the same time, unduly lenient treatment on the part of competition authorities and courts could lead to the exclusion from the market of efficient competitors, with adverse consequences for the competitive process and consumer welfare. This is the case when legal enforcement is under-inclusive. Inaccurate findings and judicial error vitally undermine the unity, coherence and legitimacy of the European Union judicial decision-making. A sharper calibration of the legal analysis, aiming at analytical clarity and consequential reduction of the possibility of over and under inclusion¹⁶ thus importantly contributes to the right of effective judicial protection.

The realist approach can be contrasted with a 'formalist approach' that relies on form-based presumptions of illegality and pre-determined meaning of concepts, considers harm to commercial freedom as the guideline, and incorporates other elements of formalism that were the object of the realist critique. Although the realist and formalist approaches are opposed, there is no precise delineation between the two. Some judgments can thus contain elements of both approaches. They can therefore be best understood on a spectrum between two extremes.

To appreciate its normative added value, the realist approach should also be distinguished from the 'more economic approach'. The latter is premised on welfare-based concepts of harm and countervailing effects, and the idea that presumptions of legality or illegality should only be used sparingly, so that business conduct should not be prohibited as anticompetitive without prior in-depth economic assessment of the investigated conduct's actual effects on competition and consumer welfare.¹⁷ Realism, on the other hand, is a judicial approach that enables a turn to empiricism, including to the more economic approach, which represents one possible iteration of realism. They should thus not be understood as synonymous. Consequently, the only reference points for normative evaluation in this article are the three realist propositions. Normative judgment about the specific economic approach is not within the scope of this article.

¹⁵ Presumptions are important for the efficiency of administrative and judicial enforcement. Both administrative and judicial decision making rest on presumptions and premises understood as generalized insights about the world. The described turn to realism does not deny the existence or relevance of presumptions, it is rather a pronounced turn to empiricism, keeping the presumptions in check, thus ensuring the best possible quality of judicial review. This needs to be constantly balanced with efficient administration and the right to a speedy trial. On the use of presumptions in competition law see, e.g., David Bailey, 'Presumptions in EU Competition Law' (2010) 31 *European Competition Law Review* 362; Ginevra Bruzzone and Marco Boccaccio, 'Impact-Based Assessment and Use of Legal Presumptions in EC Competition Law: The Search for the Proper Mix' (2009) 32 *World Competition* 465; Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press 2006) 113–127; Andriani Kalintiri, 'Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises, and Presumptions' (2020) 15 *Journal of Competition Law & Economics* 392.

¹⁶ Damien MB Gerard, 'The Effects-Based Approach Under Article 102 TFEU and Its Paradoxes: Modernisation at War With Itself?' in Jacques Bourgeois and Denis Waelbroeck (eds), *Ten years of effects-based approach in EU competition law: State of play and perspectives* (1st edn, Bruylant 2012) 30.

¹⁷ Witt (n 3) 173.

The distinction between the two approaches is also important because the three realist propositions are used by the Court in areas of law where legal reasoning is not based on an economic rationale. The conclusions of this article which point at its important normative value for the rule of law thus need to be considered in the wider perimeter of European Union law. The three propositions are interrelated and may often overlap. However, for the sake of portraying their role in the reasoning of the Court with analytical clarity, they will be considered in turn.

III. The Three Propositions of the Court's Turn to Realism

A. *Understanding Law in its Social and Economic Context*

Human inquiry does not occur in a vacuum, it is rather a situated form of activity. The situated, historical, practice-constituted character of human life and thought should be understood as the central thesis of realism.¹⁸ Felix Cohen affirmed that legal concepts are not supernatural legal entities embodying a fixed common understanding of harm or morality, but rather, judicial constructions.¹⁹ This opened the way for a redefinition of every legal concept in an empirical way, in terms of patterns of judicial behaviour.

These insights form the first proposition, the requirement for a situated and contextual legal analysis. This requirement is visible in numerous variations in the Court's case law, including in competition law and trade mark law.

One of the most striking shifts towards realism in the case law of the Court, by enhancing its consideration of all the facts and interest in the ground, can be seen in the interpretation of the by object and by effect violation²⁰ of Article 101 of the Treaty on the Functioning of the European Union (TFEU).²¹ According to long-standing case law, by object restriction of competition is so likely to have negative effects on competition that it would be redundant to prove its actual effects.²² By object restriction constitutes a presumption of illegality based on the pre-existing understanding of harm to the proper functioning of normal competition, whereby the need to establish actual or likely effects of the conduct is made redundant.

The Court had been endowing the by object restriction with pre-existing content, which resulted in an insufficient regard for the actual social – economic and legal – context.²³ The peril of an expansive interpretation of by object restriction without a robust engagement of the social and economic context can, however, lead to a failure to appreciate the full dimension of any particular case. The recent trend significantly limited this possibility by requiring an enhanced analysis of the social and economic context of the case.

¹⁸ Thomas C Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787. The pragmatist thesis that thought is always situated in a social context could likewise be traced to the Aristotelian thesis that human beings are essentially social animals. For works of a neo-pragmatist tendency that stress their Aristotelian roots, see Alasdair C MacIntyre, *After Virtue: A Study in Moral Theory* (3rd ed, University of Notre Dame Press 2007); Martha C Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Rev ed, Cambridge University Press 2001).

¹⁹ Cohen (n 6) 188–189.

²⁰ Article 101(1) TFEU prohibits agreements or other forms of cooperation between undertakings that have the object or effect of restricting competition insofar as they are capable of affecting trade between Member States.

²¹ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2021] OJ C326/47.

²² Joined Cases 56 and 58/64 *Consten and Grundig v Commission of the EEC* [1966] ECR I-299, p. 342; Case C-67/13 P *Groupement des cartes bancaires (CB) v Commission* (ECJ, 11 September 2014), para 51.

²³ See Gerard (n 16) 36–38. Cases of the Court of Justice such as *Société Technique Minière, Brasserie de Haecht* and *Delimitis*, decided in 1966, 1967 and 1991 respectively, very-well laid the ground for the rich engagement with the economic and legal context. Reasons for omission of some of their insights in the ensuing decades are not addressed in this article. See Case Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235; Case 23/67 *SA Brasserie de Haecht v Consorts Wilkin-Janssen* [1967] ECR 407; Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] ECR I-935.

The Court of Justice ruled in *Cartes Bancaires*²⁴ that the by object restriction should be reserved exclusively to agreements which inherently reveal a sufficient degree of harm to competition for it to be considered that it is not appropriate to assess their effects. When assessing the sufficient degree of harm, one should take into account the content of the agreement, its objectives as well as ‘all relevant aspects of the economic and legal context in which the coordination takes place’, including the nature of the services at issue, as well as ‘the real conditions of the functioning and structure of the market or markets in question.’²⁵ Similarly to an earlier case *Alianz Hungária*,²⁶ the Court subsequently carried out an unprecedentedly detailed assessment of the agreement’s legal and economic context.²⁷

The need for the context-specific justification of by object restriction was restated by the Court of Justice in *Maxima Latvija*²⁸ and *Generics*.²⁹ In *Generics*, the generic manufacturers agreed to refrain, for a set period, from entering the UK market with their own generic medicines, in return for payments by the holder of the patents GlaxoSmithKline. In its detailed context-specific enquiry the Court of Justice concluded that, in the case at hand, the degree of harm required for a by object category of violation may be identified if the patent holder’s payment cannot have any other explanation than the commercial interest of the parties not to engage in competition on the merits and that there are no pro-competitive effects that cast doubt as to the agreement’s harm to competition.³⁰ However, by object analysis would not be sufficient and an effects-analysis is needed when the facts ‘reveal a complex arrangement with pro- and anticompetitive components, from which it would be impossible to determine whether, overall, it has an anticompetitive object.’³¹

The *Budapest Bank*³² case considered such a complex arrangement. The Court of Justice noted the counterintuitive claim that free competition between card systems in that particular context exerted an upward pressure on prices that was unlike under normal conditions in a market economy, where competition usually drives prices downwards. The Court of Justice thus concluded that an infringement by object cannot be upheld in the case of ‘strong indications’ that, in the absence of the disputed agreement, such upward pressure would have existed.³³

The clear message of the Court of Justice is that the by object analysis needs to be performed on a case-by-case basis and that it needs to be context-specific.³⁴ *Generics* and *Budapest Bank* confirm that the

²⁴ *Cartes Bancaires* (n 22).

²⁵ *ibid* 51-53.

²⁶ Case C-32/11 *Allianz Hungária Biztosító and Others v Gazdasági Versenyhivatal* (ECJ, 14 March 2013).

²⁷ *Cartes Bancaires* (n 22), 72-87.

²⁸ Case C-345/14 *Maxima Latvija v Konkurences padome* (ECJ, 26 November 2015), paras 22-23. In this case the Court of Justice ruled that a clause in a lease agreement which gave the tenant in a shopping centre a right to oppose the lease of commercial premises to other tenants could not be considered “by the very nature” to prevent, restrict or distort competition on the relevant market.

²⁹ Case C-307/18 *Generics (UK) Ltd and Others v Competition and Markets Authority* (ECJ, 30 January 2020), para 67-68.

³⁰ *ibid* 87, 93-94, 111. This approach was confirmed in Case C-591/16 P *Lundbeck v Commission* (ECJ, 25 March 2021), para 112-115.

³¹ Case C-307/18 *Generics (UK) Ltd and Others v Competition and Markets Authority* (ECJ, 30 January 2020), Opinion of AG Kokott, para 171.

³² Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others* (ECJ, 2 April 2020).

³³ *ibid* 83.

³⁴ *ibid* 67-86. Finally, the Court did not find the necessary degree of harm required for the purpose of the classification of the agreement as a restriction of competition by object even though it considered that the multi interchange fee might constitute indirect price fixing. The Court also confirmed that the analysis of the counterfactual is relevant not only in case of by effect restrictions but also for by object ones, specifically as an evidence that the defendant may put forward to show that the agreement does not amount to a by object restriction. See *Budapest Bank* (n 32) 65, 82-83.

evaluation of by object restriction can be very detailed and even as complex as showing the restriction by effect. Both the Commission and the Court will need to dive deeper into the analysis of all facts, interests and claims in the wider social, economic and legal context of the agreement.

An interpretation of by object violation based on the pre-existing understanding of socially harmful conduct, without a robust engagement with social reality, fails to portray the full dimension of the case. Moreover, divorced of reality, it risks arbitrariness. This reveals the importance of a restrictive interpretation and enhanced contextual analysis of by object violation in terms of effective judicial review. Instead of understanding legal concepts as tools to which courts delegate the moral responsibility of deciding cases, realist analysis perceives them as patterns of judicial behaviour.³⁵ Vigorous engagement with social fact leads to knowledge and enables the normative social compass to guide decision-making. The full grasp of the meaning of by object restriction at hand and its justification can only follow from a robust analysis of the legal and economic context in which it is situated.

The stakes of interpretation of by object restriction of competition compare with the violation of publicly accepted principles of morality as portrayed in the trade mark law case *Fack Ju Göhte*.³⁶ A German company released the comedy entitled *Fack Ju Göhte* and given its immense success, two more sequels with the same name. The European Union Intellectual Property Office (EUIPO) denied the registration of the film title as a trade mark on the grounds it infringed accepted principles of morality.³⁷ The General Court agreed.

The Court of Justice found an error in law, primarily because of a lack of a proper explanation as to why this film title would actually be contrary to moral values.³⁸ The trade mark application may be refused if, on the basis of an objective assessment, the use of the mark is perceived by the relevant public as being contrary to the fundamental moral values and standards of that society at a given moment. This assessment should be based on the perception of a 'reasonable person with an average threshold of sensitivity and tolerance' and, importantly, account should be taken of the context in which the trade mark may be encountered, and where appropriate, the particular circumstances of the case.³⁹

The Court of Justice found that this analysis should not be limited to the abstract assessment of the English expression. While *Fack Ju Göhte* is the phonetic transcription of an English obscenity, the German-speaking public would not necessarily understand it this way. In the assessment of the specific context of the German variant, it was revealed that the film had been one of Germany's greatest film successes, with millions of viewers. The film title had not given rise to any controversy. On the contrary, the film was approved for a young public and was used for educational purposes by the cultural centre Goethe-Institut. This clearly indicated that the German-speaking public does not consider the title to be morally unacceptable. Moreover, EUIPO was unable to put forward any argument to show that the German-speaking public considered the term 'Fack Ju' to be contrary to the accepted principles of morality. The Court of Justice concluded that in case of a such a lack of concrete evidence, the ground for refusal may not be applied.⁴⁰

Instead of engaging with the empirical reality, EUIPO and the General Court, enforced, in the words of Felix Cohen, a pre-existing moral Something.⁴¹ The Court of Justice confirmed that this ground for refusal should reflect the moral compass of the relevant society rather than decision-makers' gut

³⁵ Cohen (n 6) 189.

³⁶ Case C-240/18 P *Constantin Film Produktion v EUIPO* ("*Fack Ju Göhte*") (ECJ, 27 February 2020).

³⁷ Regulation (EU) 2017/1001 of 14 June 2017 on the European Union trade mark (EUTMR) [2017] OJ L154/1.

³⁸ *Fack Ju Göhte* (n 36) 69. However, what this society considers to be morally acceptable can change in due course, therefore making an objective assessment on case-by-case basis necessary.

³⁹ *ibid* 42.

⁴⁰ *ibid* 69.

⁴¹ Cohen (n 6).

feelings. Mere opinion on the content of concepts such as by object violation or on the content of public morality is arbitrary, knowledge acquired in a deliberative engagement with reality promises success of an increasingly targeted legal analysis.⁴²

B. *Avoiding Premature Termination of Engagement with the Relevant Facts and Interest*

The next important realist proposition highlights the importance of considering all the facts and interests at stake. The decision-maker should avoid a premature termination of engagement with the relevant facts and interests. This proposition is closely related to the first proposition requiring contextual analysis and they can considerably overlap. It is important, however, to address them separately, given that this proposition does not only entail mere fact gathering, but rather an analysis with profound implications for the quality of judicial review.

It is vital for keeping the channels of communication between the parties open, fundamentally enhancing the dynamics of the adversarial procedure and ultimately contributing to minimization of under and over inclusion. Yet, this engagement with the facts too often terminates prematurely. To portray this proposition, I will again first turn to by object violation of Article 101 and then move on to the analysis of this proposition within the scope of Article 102 TFEU, as well as to state aid and trade mark law.

As discussed in the previous subsection, the Court's by object analysis under Article 101(1) has been criticized for being interpreted as a formalist presumption by not requiring an engagement with actual consequences of the activity on the market. In addition, several judgments of the Court of Justice, including the General Court's judgment in *Cartes Bancaires*,⁴³ appeared to lay down a very wide test for allocating agreements to the by object category of Article 101 TFEU.⁴⁴

The more recent jurisprudence of the Court of Justice, however, shows the Court's shift to realism by enhancing its engagement with social fact. In 2014, the Court of Justice delivered its judgment in *Cartes Bancaires*.⁴⁵ In this case, the General Court agreed with the Commission that the disputed fee structure had the object of restricting competition.⁴⁶ Consequently, the General Court considered that there was no need to examine the effects of the measures on the market and did not examine the defendant's pleas contesting the Commission's analysis of the agreement's actual effects.⁴⁷

The Court of Justice, however, concluded that the General Court had misinterpreted the concept of restriction of competition by object,⁴⁸ by failing to take into account the two-sided structure of the market and adequately assessing all the relevant facts and proposed evidence.⁴⁹ The analysis of the positive and

⁴² Thomas C Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787.

⁴³ Case T-491/07 *CB v Commission* (GC, 29 November 2012).

⁴⁴ Coupled with the Commission's practice of identifying 'new' by object restrictions, there was an impression that the by object category and the scope of presumption was unstopably enlarged.

⁴⁵ *Cartes Bancaires* (n 22).

⁴⁶ The disputed measures in this case were a series of new fees that would have to be paid by group members of the 'Groupement des cartes bancaires'. The Commission found that the purpose of the measures was to keep the price of payment cards artificially high to the advantage of the major banks and to the detriment of new entrants. It concluded that the fee structure had the object and effect of restricting competition by preventing the entry of new banks into the sector. See also Commission Decision 2007/5060/EC [2007] OJ C 183/12 Decision C (2007) 5060 final of 17 October 2007 relating to a proceeding under Article [81 EC] (Case COMP/D1/38.606).

⁴⁷ *Cartes Bancaires* (n 43) 123-268.

⁴⁸ *Cartes Bancaires* (n 22) 56.

⁴⁹ *ibid* 72-87. As of a two sided structure of the market, the Court noted that banks who invested also in developing the acquiring side of the market and thus created efficiencies paid lower fees than those members of the group who only issued bank cards. Here the efficiencies appeared more obvious than the restraint, indicating that an effects analysis was required. In *Generics* (n. 29), the Court explicitly qualified the two-sided nature of a market as part of the analysis for assessing whether

negative effects of the disputed agreement on competition and a careful analysis of the two-sided structure of the relevant market was precluded by the General Court's premature conclusion that there was a by object violation.⁵⁰

The important implication of *Cartes Bancaires* is that when the Commission opts for a by object assessment, the defendant can challenge this finding by bringing up evidence that an agreement may be efficient. In such a case, the Commission is required to apply an effects analysis and explore whether the practice has anticompetitive effects.⁵¹

The Court of Justice clearly confirmed this approach in *Generics*⁵² and in *Budapest bank*.⁵³ In both cases the parties relied on the pro-competitive effects of the agreement. The Court of Justice pointed out that indications or evidence cannot be ignored in the examination of whether there is a restriction by object. If there are 'strong indications' of pro-competitive effects, or at least 'contradictory or ambivalent evidence', an in-depth examination of the effects of that agreement must be carried out.⁵⁴

The same approach can be seen in *Intel*⁵⁵ in the context of the analysis of an abuse of dominant position under Article 102 TFEU. The General Court relied on the *Hoffman-La Roche* presumption that granting exclusivity rebates by an undertaking in a dominant position was by its very nature capable of foreclosing competition in violation of Article 102 TFEU. It thus did not think it necessary to address Intel's criticism of the Commission's extensive economic analysis of Intel's rebates, using the "as-efficient competitor" (AEC) test.⁵⁶

The Court of Justice, however, opened the possibility for the undertaking to rebut the presumption.⁵⁷ It held, as in *Cartes Bancaires*, *Generics* and *Budapest Bank*, that where the undertaking submits, on the basis of supporting evidence, that its conduct was not capable of producing the alleged foreclosure effects, the Commission must examine that evidence, carry out an effects analysis, as well address any

a conduct can be considered 'sufficiently harmful' to be by object restriction. For consideration of two-sided markets in 'by effect' analysis, see Case C-382/12P, *MasterCard and Others v Commission* (ECJ, 11 September 2014).

⁵⁰ After the case was referred back to the General Court for an additional assessment of the actual effects, the General Court held that the fee structure did have the effect of restricting competition on the market for the issuing of CB payment cards and did not benefit from Article 101(3). See Case T-491/07 *RENV - CB v. Commission* [2016] ECR II-379.

⁵¹ See Giorgio Monti, 'EU Competition Law and the Rule of Reason Revisited' (Tilburg University 2020) Discussion Paper DP2020-018 17 <<https://papers.ssrn.com/abstract=3686619>>.

⁵² See *Generics* (n 31) 103-107. The Court of Justice emphasized that when parties rely on the procompetitive effects of the agreement, those effects must, as elements of the context of that agreement, be duly taken into account for the purpose of its characterisation as a restriction by object.

⁵³ *Budapest Bank* (n 32). The case was based on a reference for a preliminary ruling, arising from a decision of the Hungarian competition authority that several banks in Hungary had breached Article 101 TFEU by entering into an agreement that introduced a uniform multilateral interchange fee (MIF) for card payments.

⁵⁴ *ibid* 82-83.

⁵⁵ Case C-413/14 P *Intel v Commission* (ECJ, 6 September 2017). The dispute in *Intel* originated in the Commission's decision to impose a then-record fine of EUR 1.06 billion on the US manufacturer of central processing units, for having abused its dominant position by granting exclusivity rebates to four major computer manufacturers. The Commission, relying on the presumption established in Case C-179/16 *Hoffman-La Roche* (ECJ 23 January 2018) argued that granting exclusivity rebates by an undertaking in a dominant position was by its very nature capable of foreclosing competition, and thus in itself an abuse within the meaning of Article 102 TFEU. Nevertheless, for the sake of completeness, the Commission also conducted an extensive economic analysis of Intel's rebates, using the "as-efficient competitor" test, and concluded that this led to the same conclusion that rebates were abusive.⁵⁵ Commission Decision C (2009) 3726 final of 13 May 2009 relating to a proceeding under Article [102 TFEU] and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 Intel).

⁵⁶ Case T-286/09 *Intel v. Commission* [2014] ECR II-547, para 145.

⁵⁷ *Intel* (n 55) 137. The Court voiced no criticism of Hoffmann-La Roche presumption, which in formal terms remains good law. Advocate General Wahl, however, disagreed more forcefully with the presumption from Hoffmann-La Roche and the approach of the General Court. See Opinion of Advocate General Wahl in Case C-413/14 P, *Intel v. Commission*, ECLI: EU: C:2016:788, para 41.

possible efficiency claim.⁵⁸ The Court of Justice further held that, where the Commission had carried out the “as efficient competitor” test, the General Court was required to examine all defendant’s arguments seeking to call into question the Commission’s application of that test.⁵⁹

A premature termination of analysis in these judgments led to cognitive failure and judicial error. The Court of Justice prevented this from occurring by requiring that presentation of evidence putting in doubt the overall analysis must lead to an analysis examining that evidence in light of the relevant circumstances. By doing so, the Court of Justice corrected the broken channel of communication and exchange of evidence, enabled a robust engagement with reality and full appreciation of the factual and normative dimensions of the case.

Depending on the circumstances of the case and the implicit need for administrability, the Court can exceptionally terminate an analysis without a thorough engagement with the present facts by relying on accumulated experience of the past. However, reliance on past experience should not turn into an insufficiently explained presumption based on subjective opinion, but should be based on socially accumulated knowledge put in the context of the case at hand. In *Budapest Bank*,⁶⁰ the Court of Justice thus held that to justify the classification of an agreement as a restriction by object, there must exist a ‘sufficiently reliable and robust experience’, that is also ‘sufficiently general and permanent’, for taking the consensual view that the agreement in question is by its very nature harmful to competition.⁶¹

The present factual experience, however, is bound to have a stronger persuasive and evidentiary force than that of the past and the investigation of those facts is the primary duty of the Commission. The need to take all the relevant facts of the case into consideration is the basic principle of good administration, as required by Article 41 of the Charter. The Commission has to be pro-active in its investigations and decision-making under Articles 101 and 102 TFEU as well as in merger control and state aid. Its recently enhanced duty of diligence needs to be understood also in view of the proposition requiring that all the relevant facts and interests need to be considered also in the decision-making of the Commission. This enhanced requirement of diligence can be observed in the case law in numerous variations.

An echo of the Court of Justice’s conclusion in *Cartes Bancaires* can be observed in *Kerkosand*.⁶² The General Court annulled the Commission’s decision because it did not thoroughly check all the facts of the case and take into account the allegations made by the applicant. Given the doubts raised by the

⁵⁸ *Intel* (n 55) 138-140.

⁵⁹ *Intel* (n 55) 143-144. On that basis, the Court of Justice concluded that the General Court had committed an error in law. It thus set aside the General Court’s judgment and referred the case back to the General Court to examine, in the light of the arguments put forward by Intel, whether the rebates at issue were capable of restricting competition. For discussion of the Court of Justice’s judgment see, e.g., James S Venit, ‘The Judgment of the European Court of Justice in *Intel v Commission*: A Procedural Answer to a Substantive Question?’ (2017) 13 *European Competition Journal* 172.

⁶⁰ *Budapest Bank* (n 32). The Court of Justice referred in its judgment to the opinion of Advocate General Bobek. Advocate General Bobek also suggested that it might be relevant to consider whether there *is* ‘sufficient consensus among economists’ and even to examine the decisions of ‘authorities or courts outside of the European Union applying similar antitrust rules’. However, the Court stopped short of discussing how these sources might be appropriate when determining prior experience in relation to a particular conduct. See Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others* (ECJ, 2 April 2020), Opinion of AG Bobek, paras 54 and 63-73.

⁶¹ *ibid* 76, 79, 83. See also Case C-286/13 P, *Dole Food and Dole Fresh Fruit Europe v Commission* (ECJ, 19 March 2015), para 115 (citing *Cartes Bancaires*), where the Court of Justice concluded that experience shows that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers. Yet, as cautioned by the Advocate General Mazák earlier in *Pierre Fabre Dermo-Cosmétique* (Case C-439/09 *Pierre Fabre Dermo-Cosmétique* [2011] ECR I-9419, Opinion of AG Mazák), ‘while certain forms of agreement would appear from past experience to be *prima facie* infringements by object, this does not relieve the Commission or a national competition authority of the obligation of carrying out an individual assessment of an agreement.’

⁶² Case T-745/17, *Kerkosand v Commission* (GC, 9 September 2020).

applicant on the compliance of the aid with the Block Exemption Regulation, the Commission should have opened a formal investigation.⁶³

The consideration of all relevant interests and rights of litigants, including of the third parties, is the main concern behind the Court's requirement for diligence. For instance, in the merger case *Deutsche Lufthansa v Commission*,⁶⁴ the General Court took note that the Commission in the review of its commitments decision did not take into account several important facts raised by the main party.⁶⁵ In *Groupe Canal+*,⁶⁶ the Court of Justice emphasised that the Commission, when verifying the commitments offered, needs to take into account all the relevant interests at stake, including those of the third parties so that their rights are not rendered meaningless.⁶⁷

Yet, the Commission's duty of diligence cannot be limitless. In the state aid case *Tempus*,⁶⁸ the General Court held, echoing *Frucona Košice*,⁶⁹ that the Commission was under an obligation to seek out, examine and take into consideration 'all the relevant information', which necessarily includes information not brought to the Commission's attention and of which the latter was unaware. The Court of Justice disagreed, ruling that an obligation of such magnitude went far beyond the Commission's obligations as set out in the Court's case law.⁷⁰

The Commission's duty of diligence within its proper limits certainly has its rationale. It should not be forgotten that the Commission's diligent and pro-active investigation taking into account all the relevant facts and interests importantly lays the ground for judicial review. It enables the Court to carefully scrutinise the various factual and normative dimensions of the case on a case-by-case basis.

Finally, for good measure, I will also address this realist proposition in the scope of trade mark law. Just as in *Cartes Bancaires* and *Intel*, there are several examples of a premature termination of the engagement with all the relevant facts and interests in trade mark law. Such premature termination blunts the analysis, leading to over or under inclusion. The Court of Justice overturned the General Court's premature conclusion in *Storck*⁷¹ and *Simba Toys*.⁷² The Court of Justice pointed out in *Storck* that in

⁶³ *ibid* 104-106. The applicant claimed that the beneficiary of aid did not fulfil the conditions for a small or medium-sized enterprise (SME).

⁶⁴ Case T-712/16 *Deutsche Lufthansa AG v European Commission* (GC, 16 May 2018).

⁶⁵ According to the General Court, the Commission failed to address several important changed circumstances since the adoption of the decision, including the termination of the joint venture agreement concluded between Deutsche Lufthansa and Scandinavian Airlines System, the changed policy of not taking alliance partners into account when defining affected market and the impact of the codeshare agreement on competition between Swiss International Air Lines and Scandinavian Airlines System.

⁶⁶ Case C-132/19 P *Groupe Canal + v Commission* (ECJ, 9 December 2020). In this case, the Commission took the decision on commitments based on Article 9 of Regulation (EC) No 1/2003 in which the company Paramount committed to end contractual clauses ensuring absolute territorial exclusivity. Groupe Canal+ was an interested third party and was affected by the decision, as Paramount could no longer honour its exclusivity on the French market. The General Court referred the aggrieved third party to enforce the contract before the national court. The Court of Justice however assessed this referral as an error of law, as such a conclusion would violate Article 16(1) of Regulation 1/2003 that requires national courts to avoid giving decisions which conflict with a decision contemplated by the Commission.

⁶⁷ *ibid* 105-106.

⁶⁸ Case T-793/14 *Tempus Energy and Tempus Energy Technology v Commission* (GC, 15 November 2018).

⁶⁹ Case C 300/16 P *Commission v Frucona Košice* (ECJ, 20 September 2017), para 71. Following *Frucona Košice*, the Commission needs to obtain all the relevant information and take all interests and facts into account. The Court of Justice concluded in this case that the information available to the Commission includes "that which seemed relevant to the assessment to be carried out in accordance with the case-law and which could have been obtained, upon request by the Commission, during the administrative procedure."

⁷⁰ Case C-57/19 P *Commission v Tempus Energy and Tempus Energy Technology* (ECJ, 2 September 2021), para 49.

⁷¹ Case C-24/05 *Storck v OHIM* [2006] ECR I-5677.

⁷² Case C-30/15 P *Simba Toys v EUIPO* (ECJ, 10 November 2016).

order to assess whether a mark has acquired distinctive character through use, all the circumstances in which the relevant public may see that mark must be borne in mind, not only at the time of purchase, but also during advertising or the consumption of the product.⁷³ Thus, the General Court argued in error that a sign, a shape of a wrapped caramel candy, which is not directly visible when the purchasing decision is made, will never be perceived as a mark.

A similar premature termination of engagement with all the relevant facts and consequential limitation of the analysis occurred in *Simba Toys*. The case concerned the request for invalidity of the registration of the shape of the Rubik's cube due to its perceived technical function. The General Court limited the analysis to the visual characteristics of the shape, concluding that the shape entails no technical function and can be registered.⁷⁴ The Court of Justice, however, argued that non-visible elements of the Rubik's cube, such as its rotating capability, should also be taken into consideration, leading to the conclusion that the registration should be refused.⁷⁵

The Court of Justice has also been unwilling to accept any pre-established presumptions that could limit a case-by-case analysis in the evaluation of the similarity of trade marks. In *Sabèl v Puma*,⁷⁶ the Court of Justice set out that in the evaluation of the similarity of trade marks, the likelihood of confusion must be appreciated *globally*, taking into account all factors relevant to the circumstances of the case.⁷⁷ Overreliance on presumptions can defeat this global analysis, as confirmed in *Halloumi*.⁷⁸ In this case, the proprietor of the collective mark Halloumi, opposed the registration of the mark BBQ Loumi for various goods and services including cheese due to their perceived similarity. The Court of Justice found the error of the General Court in presuming that when the earlier mark is weak, there can be no confusion with a later mark.⁷⁹ In the realist analysis, such a decision indeed cannot be left to presumptions, but rather to judicial engagement with the facts. Instead of reliance on presumptions, as the Advocate General Kokott also argued in this case, it must be *decided* whether a likelihood specifically exists.⁸⁰ While legal thought always rests on some presumptions and pre-established meaning of concepts, it is

⁷³ *Storck* (n 71) 71. Despite setting this general rule, in para 72, the Court of Justice concluded, that in this particular category (a caramel candy) the consumer is most attentive at the time of the purchase. Finally, it thus confirmed the General Court's dismissal of the action for annulment of the Board of Appeal decision refusing registration of the three-dimensional mark consisting of the shape of a light-brown candy.

⁷⁴ Signs which consist exclusively of the shape of goods which is necessary to obtain a technical result cannot be registered, as this would grant a proprietor a monopoly over a technical solution that should normally be protected by other rights, such a patent. See EUTMR, art 7.

⁷⁵ *Simba Toys* (n 72), relying on Case C-48/09 P *Lego Juris v OHIM* (ECJ, 14 September 2010), para 72. For a similar conclusion see also Joined Cases C-337/12 P and C-340/12 P *Pi-Design and Others v OHIM* and *OHIM v Yoshida Metal Industry* (ECJ, 6 March 2014); and Case C-237/19 Gömböc (ECJ, 23 April 2020).

⁷⁶ Case C-251/95 *SABEL v Puma, Rudolf Dassler Sport* [1997] ECR I-6191.

⁷⁷ *ibid* 22-23. The global appreciation of the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. In the context of this global evaluation, the Court of Justice in case *Barbara Becker* refuted the General Court's assumption that in a composite mark a surname retains an independent distinctive role in every case solely because it will be perceived as a surname. On the contrary, the finding with respect to a distinctive role may be based only on an examination of all the relevant factors of each case, not on mere assumptions. Case C-51/09 P *Becker v Harman International Industries* [2010] ECR I-5805, para 38.

⁷⁸ Case C-766/18 P *Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi v EUIPO* (ECJ, 5 March 2020) para 67.

⁷⁹ *ibid* 67-69, 80-81, 91. The global assessment also implies, contrary to the conclusion of the General Court, some interdependence between the relevant factors, in particular between the similarity of the trade marks and that of the goods or services covered. Accordingly, a low degree of similarity between those goods or services may be offset by a high degree of similarity between the trade marks, and vice versa. See also Case C-42/12 *Hrbek v OHIM* (ECJ, 29 November 2012), para 61.

⁸⁰ Case C-766/18 P *Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi v EUIPO* (ECJ, 5 March 2020), Opinion of AG Kokott, para 24.

a matter of assessment at which point such a reliance ends.⁸¹ For the real possibility of taking all the circumstances into account, presumptions and pre-established meaning of concepts should be treated with caution.

Human inquiry does not occur in a vacuum, it is rather a situated form of activity. Taking all the relevant facts and interests into account is a sine qua non of good administration and judging and thus vital for effective judicial protection. Channels of communication between the parties, as well as between the parties and the decision maker, should be constantly kept open and the engagement with the relevant facts and interests and their analysis should not terminate prematurely.

C. *A Robust Articulation of Socially Undesirable Harm*

A contextual approach that takes all the relevant facts and interests into account, not prematurely terminating the analysis, plays a vital role in avoiding over inclusion and under inclusion. Yet, a targeted analysis also demands a strongly articulated normative dimension of the case. The third submitted realist proposition is that socially undesirable harm needs to be articulated robustly. A normative basis of prohibited conduct that is not simply derived from facts is required in a society based on the rule of law.

Harm is a normal state of affairs in the market.⁸² The determination of a socially undesirable harm is a normative question, for which its conclusion cannot be derived from a mere factual occurrence of harm. This follows from Wesley Hohfeld's insistence on the distinction between a right and a privilege to harm.⁸³ Hohfeld argued that when harm is inflicted on a competitor, the court does not automatically award the plaintiff a remedy, unless justice and policy, the values of the legal system, so require.

Specifically, in a market economy, companies do not have a general duty not to impose "negative effect on competitors". In the past, the reproach towards European Union competition law often was that its goals and the ensuing concept of competitive harm were too broad, particularly when anti-competitive conclusions were drawn from the limitations on the freedom to trade⁸⁴ without any specific articulation of theory of harm that would pass Hohfeld's analysis.

Only a robustly articulated theory of socially undesirable harm can guide the Court in finding the razor-thin line between anticompetitive and procompetitive conduct.⁸⁵ It helps explain why a particular type of conduct satisfies the relevant legal tests in order to constitute an infringement, and in particular why it causes harm to competition that should be prohibited. Moreover, a lack of the articulation of a theory

⁸¹ In a judgment following the referral of the case, the General Court again relied on insufficiently explained presumptions, for instance that the attention of the relevant public will necessarily be drawn to the first part of the mark due to its position. See, T-328/17 *RENV - Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi v EUIPO - M. J. Dairies* (BBQLOUMI) (GC, 20 January 2021), para 64. It also remains open whether the General Court's earlier error, criticized by the Court of Justice, of the lack of evaluation of distinctiveness, was not repeated in Articles 70-71 of the judgment. In addition to a mere reference of the appreciation of the Board of Appeal, no account was taken of the distinctiveness of coinciding elements BBQ and Loumi.

⁸² Hohfeld (n 6).

⁸³ *ibid.*

⁸⁴ Gerard (n 16) 29–30.

⁸⁵ Certainly, it may not be always feasible to pursue this razor-thin line in precise detail. Giorgio Monti has argued that one of the less discussed aspects of competition law is that the rules tolerate some anticompetitive effects. For example, a merger must 'significantly' impede effective competition. This means we authorize mergers that have a minor adverse impact on competition. There may be good reasons for doing so, for example the cost of assessing all mergers that cause some anticompetitive effect may outweigh the societal benefit of regulating all such mergers. See, Giorgio Monti, 'EU Merger Control After CK Telecoms UK Investments v. Commission' (2020) 43 *World Competition* 447. Yet, as will be argued, in the context of judicial review, this has a specific cost.

of harm can lead to serious over inclusion and under inclusion.⁸⁶ Both situations, given the lack of a targeted analysis, can lead to judicial error and thus to inadequate judicial protection.

The need of articulation of a robust theory of harm is particularly pertinent in the context of the interpretation of Article 102 TFEU prohibiting abuse of a dominant position. For a long time Article 102 TFEU was perceived as being used to protect competitors, not competition.⁸⁷ This danger is amplified if the Commission and the Court adopt a formalist approach, relying on a pre-existing meaning of concepts. In Article 102 TFEU cases, lack of a robust theory of harm comes close to forbidding dominance itself.

The realist analysis requiring identification of actual anticompetitive effects brings increased clarity and accuracy. The Court of Justice has made it clear in both *Post-Danmark I*⁸⁸ and more recently in *Intel*,⁸⁹ that European Union competition rules do not protect competitors from competition and, specifically, that they do not come to the rescue of a less efficient competitor when it is marginalized and losing customers.⁹⁰ The Court of Justice was particularly forceful in this respect within the context of the abuse by margin squeeze. It argued both in *Deutsche Telekom*⁹¹ as well as in *TeliaSonera Sverige*⁹² that only when there is a particular harm caused, that is, an exclusionary effect on as efficient competitor, can it be argued that there is a violation of Article 102 TFEU.⁹³

The Court of Justice likewise concluded in *Intel*, in the context of exclusivity rebates, that Article 102 TFEU did not seek to ensure that competitors less efficient than the undertaking with the dominant position should remain in the market, and that not every exclusionary effect is necessarily detrimental to competition.⁹⁴ The Court of Justice continued this approach in *MEO*⁹⁵ in the context of price discrimination, arguing that a mere disadvantage and capability of exclusion is not sufficient for an

⁸⁶ Hohfeld (n 6). Thus, following Hohfeld, a plaintiff who has been harmed, but whose harm is not socially recognized, is not bestowed a right, but rather a no-right, as a result of the other party's privilege to harm him on the market.

⁸⁷ Eleanor M Fox, "We Protect Competition, You Protect Competitors" (2003) 26 *World Competition* 149; Eleanor M Fox, 'What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect' (2002) 70 *Antitrust Law Journal* 371, 373.

⁸⁸ Case C-209/10 *Post Danmark v. Konkurrencerådet* ("Post Danmark I") (GC, 27 March 2012).

⁸⁹ *Intel* (n 55).

⁹⁰ *ibid* 134.

⁹¹ Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555. In this case, the Commission terminated its analysis of violation of Article 102 TFEU at the finding of a negative or insufficient difference to cover the product specific costs between the retail price and the wholesale price charged by a dominant undertaking, which should prove the existence of the margin squeeze. The Commission thus did not address a specific theory of harm - exclusionary effect of the price squeeze. The General Court and the Court of Justice agreed that the Commission is required to demonstrate that the pricing practices of a dominant undertaking result in a margin squeeze of its equally efficient competitor on the retail market, making market entry more difficult or impossible.

⁹² Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-527. In a similar factual situation as *Deutsche Telekom*, the Court of Justice noted that it was sufficient to demonstrate an anticompetitive effect that could 'potentially' exclude competitors. Socially undesirable harm, harm to the as efficient competitor, however, had to be articulated and proven.

⁹³ This approach can be contrasted with joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge and Others v Commission* [2000] ECR I-1365, in which the question of when above-cost price competition designed to eliminate a new (not an as efficient) competitor was not addressed. The over-90 % market share of the company may have contributed to the conclusion that the undertaking had a special responsibility and that it violated Article 102.

⁹⁴ *Intel* (n 71) 133-134.

⁹⁵ Case C-525/16 *MEO – Serviços de Comunicações e Multimédia v Autoridade da Concorrência* (ECJ, 19 April 2018), paras 26-27. Before, Article 102 TFEU had been also applied with regard to applying dissimilar conditions to equivalent transactions with other trading partners in a way that "competitive disadvantage" was capable of excluding competition. See, e.g., Case C-95/04 P *British Airways v Commission* [2007] ECR I-02331, and Case C-549/10 P *Tomra and Others v Commission* (ECJ, 19 April 2012).

abuse of a dominant position. Competition is desirable and entails constant harm.⁹⁶ Not every exit from the market is necessarily a sign of abusive conduct. Rather, it can be a sign of healthy and permissible competition.⁹⁷

A vital difference between the realist and the economic approach emerges. *Post Danmark II* has been seen as a setback for the proponents of a more economic approach also because it appeared to reject the as efficient competitor (AEC) test. Following the more economic approach, this test would have to be applied.⁹⁸ The realist approach, following Hohfeld, however, would consider that a robust theory of harm and *not any specific economic theory of harm* should be articulated and applied in a particular case.

In *Post Danmark II* Advocate General Kokott argued against the application of the AEC test by questioning the value of an expansive economic analysis, given that the available data was not always reliable and that there was no universally recognized mathematical AEC test. She also emphasized that in some markets it was impossible for other undertakings to be as efficient as the dominant undertaking, in particular in markets with high barriers to entry, high economies of scale, and strong network effects.⁹⁹ While the ensuing judgment of the Court of Justice could in some aspects be questioned also from the realist perspective, the rejection of the AEC test as such is not necessarily an aberration from the realist trend. Rather, it may be considered as a positive calibration of the analysis if the circumstances of the case so demand. In other words, when specific reasons in a particular case require a departure from the particular economic theory, as argued by Advocate General Kokott in *Post Danmark II*, its setting aside may be warranted.

A careful delineation of socially permitted and socially prohibited harm is vital for effective and targeted judicial analysis. This articulation is of equal importance in trade mark law, and particularly in trade mark infringement. In line with the described realist trend, the Court of Justice developed an additional condition for a successful invocation of an infringement of a trade mark to the ones set out in the regulation,¹⁰⁰ a proof of an *adverse effect* on one of the protected trade mark *functions*.¹⁰¹ Advocate General Kokott clarified that the essence of the discussion on the functions of trade mark lies in a thorough assessment of the *parties' interests*.¹⁰²

Mere harm on competitors, as in competition law, does not suffice for a trade mark infringement. In *Google France*¹⁰³ and in *Interflora*¹⁰⁴ the Court of Justice importantly emphasized that infringement can be assumed only if there is adverse effect on one of the trade mark functions. The origin function,

⁹⁶ Hohfeld (n 6). See also, Damjan Kukovec, 'Hierarchies as Law' (2014) 21 Columbia Journal of European Law 131.

⁹⁷ Case C-413/14 P *Intel v Commission* (ECJ, 20 October 2016), Opinion of AG Wahl, para 41.

⁹⁸ Witt (n 3) 201.

⁹⁹ Case C-23/14 *Post Danmark A/S v Konkurrencerådet* ("*Post Danmark II*") (ECJ, 6 October 2015), Opinion of AG Kokott, para 4. The Court of Justice followed the Advocate General and argued that an AEC test should merely be seen as one tool amongst others for the purposes of assessing whether a rebate was abusive. In the particular case, applying the AEC test would even be inappropriate due to the structure of the market and the fact that even the presence of a less efficient competitor might contribute to exerting a constraint on the dominant undertaking. See, *Post Danmark II*, paras 57-61.

¹⁰⁰ According to EUTMR, art 9, plaintiff must show that the use of the conflicting sign has taken place "in the course of trade" and "in relation to goods and services".

¹⁰¹ Annette Kur and Martin Senftleben, *European Trade Mark Law: A Commentary* (1st edn, Oxford University Press 2017) 304. See also Case C-487/07 *L'Oréal v Bellure* [2009] ECR I-5185, para 63. As the Court of Justice clarified in that case, the functions of the trade mark include the essential function of the trade mark, which is to guarantee to consumers the origin of the goods and services, as well as other functions, in particular that of guaranteeing the quality of goods and services and functions of communication, investment or advertising.

¹⁰² Case C-46/10 *Viking Gas* [2011] I-06161, Opinion of AG Kokott, paras 36-37.

¹⁰³ Joined Cases C-236/08 to C-238/08 *Google France and Google* [2010] ECR I-2417, paras 77 and 79.

¹⁰⁴ Case C-323/09 *Interflora v Marks & Spencer* [2011] ECR I-8625.

specifically, was deemed to be adversely affected in *Interflora* if internet users gain an incorrect impression that the keyword advertiser is part of the trade mark owner's distribution network.¹⁰⁵ As for the investment function, the Court of Justice concluded that loss of some customers is not sufficient to justify a finding of adverse effect. As long as the trade mark's reputation with power to attract and retain consumers is not *substantially* interfered with, this loss of customers is to be deemed a normal result of a competing advertising campaign.¹⁰⁶

The actual determination of the substantial interference with the trade mark proprietor's interests could be particularly obscured in trade mark law due to the fact that at its centre stands the ultimate legal concept – the property right. As explained in the previous subsection, a pre-existing meaning of concepts clouds legal analysis. To avoid analytical error, an additional realist step was thus required, a disaggregation of the trade mark right into legally protected interests. In Hohfeldian analysis, trademark is a bundle of legally protected interests that need to be carefully weighed with other objectives and rights.¹⁰⁷ The Court of Justice determined the trade mark as a bundle of functions in *L'Oréal v Bellure*,¹⁰⁸ leading to an analytically clearer engagement of the normative dimension of law with the facts of the case at hand and consequently to a sharper delineation between socially desirable and undesirable behaviour.

The adverse effect to any of the trade mark functions – to the parties' interests – thus needs to be proven in a trade mark infringement case. This harm needs to go beyond the mere loss of customers, inconvenience or experience of increased difficulty in trade mark-based advertising or investment, as they are normal side effects of the competitive process.¹⁰⁹ The aim is, as in competition law and other fields of law, to calibrate the distinction between socially desirable and socially undesirable harm in view of protection of applicable social goals.

IV. Lack of Linearity and Calibration of the Three Propositions

Thus far, the article has identified a consistent trend. The three realist propositions can be traced in the case law of the Court in countless situations, incorporating numerous judicial considerations. The account of a realist trend in the Court's decision-making is thus inevitably a partial reconstruction. Moreover, the trend should certainly not be understood as linear, unfolding on a single economic or judicial path. The lack of linearity, however, does not refute the existence of this trend but rather confirms it.

The Court needs to honour numerous considerations in its decision-making, which may, at first sight, seem to limit adherence to the realist propositions discussed in this article. Four examples will be given

¹⁰⁵ *ibid* para 45. Likewise, the Court of Justice held in *Opel v. Autec* (Case C-48/05 *Opel v. Autec* [2007] ECR I-1017, para 24) that affixing by a third party of the Opel trade mark on reduced-scale toy cars scale does not necessarily constitute a prohibited use. In particular, there was no adverse effect on the trade mark's essential origin function if the relevant public did not perceive the Opel logo on the toy cars as an indication that those products came from Opel.

¹⁰⁶ *Interflora* (n 104) 62 and 64.

¹⁰⁷ Hohfeld (n 6). Citing *Sherwood in St Louis v Hall*, he explained that the term property is sometimes applied to the thing itself, as a horse, or a tract of land. These things, however, though the subjects of property, are, when coupled with possession, but the indicia, the visible manifestations of legal relationships. For a Hohfeldian analysis of the trade mark right, see for example: Robert P Merges, 'What Kind of Rights Are Intellectual Property Rights?' in Rochelle Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (1st edn, Oxford University Press 2017); Adam Mossoff, 'The Use and Abuse of IP at the Birth of the Administrative State' (2009) 157 *University of Pennsylvania Law Review* 2001.

¹⁰⁸ *L'Oréal v Bellure* (n 101) 63.

¹⁰⁹ The proof of effects of an 'anti-competitive' behaviour of an actor on the market infringing trade mark rights has been central to proving the infringement of a trade mark. *Kur and Senfleben* (n 101) 291 fn 97.

to portray that the application of the realist propositions should be carefully calibrated within the premises and particularities of any specific case and within the overall premises of the legal system.

The Court may need to take into account other goals of the European Union legal system, such as prevention of partitioning of the common market along national lines. In the famous *Consten Grundig* case,¹¹⁰ Advocate General Roemer argued that a consideration of the distribution agreement's effects on the market is required, meaning that the market needs to be looked into *in concreto*.¹¹¹ The Court disagreed due to the fact that the agreement led to the partitioning of the common market along national lines, which went head on against the creation of the single market, and concluded that the distribution agreement constituted by object violation of Article 101 TFEU. More recently, the Court of Justice in *GlaxoSmithKline*¹¹² confirmed that restrictions of parallel trade, which are considered to partition the common market, constitute by object restriction under Article 101 TFEU, emphasizing that the objective of the competition rules was to protect 'not only the interests of competitors or of consumers' but also the 'structure of the market.'¹¹³

Furthermore, the Court needs to consider an effective conduct of administrative and judicial procedure. This requirement may shape the way in which advantages and disadvantages of the effects of measures in question are taken into account. This can be observed in *Fútbol Club Barcelona*.¹¹⁴ In this state aid case, the Commission took the view that the non-profit legal persons such as the football club Barcelona, enjoyed a preferential corporate tax rate, which constituted unlawful and incompatible state aid.¹¹⁵ The General Court annulled the Commission decision considering that the Commission should have balanced the actual positive and negative effects of the tax treatment of those football clubs.¹¹⁶ The Court of Justice, however, set aside the judgment of the General Court. It confirmed that the Commission is required to carry out a global assessment of the aid scheme, taking into account all its components both favourable and unfavourable to its beneficiaries. However, if the Commission were required to verify whether the tax advantage has actually materialised in subsequent tax years and whether the advantage has been offset by the disadvantages recorded in other tax years, this would significantly hinder the effective enforcement of state aid law.¹¹⁷

A following example of the need for the calibration in a particular case concerns the concept of 'state resources' as a condition of illegal state aid according to Article 107(1) TFEU. The Court of Justice's

¹¹⁰ *Consten and Grundig* (n 54). In this case, Consten concluded exclusive distribution agreement with Grundig and was given exclusive territorial protection in France. The company argued that despite the fact that the agreement resulted in the existence of only one distributor of Grundig products in France, which restricted intra-brand competition, the agreement led to an increase in inter-brand competition.

¹¹¹ Joined Cases 56 and 58/64 *Consten and Grundig v Commission of the EEC* [1966] ECR I-299, Opinion of AG Romer, p 338.

¹¹² Case C-501/06 P, *GlaxoSmithKline v Commission* [2009] ECR I-9291.

¹¹³ *ibid* 63.

¹¹⁴ Case C-362/19 P *Commission v Fútbol Club Barcelona* (ECJ, 4 March 2021).

¹¹⁵ Commission Decision (EU) 2016/2391 of 4 July 2016 on the State aid SA.29769 (2013/C) (OJ 2016 L 357). Fútbol Club Barcelona was among the football clubs, which came within the exception of the law setting out that clubs that had achieved a positive financial balance during the financial years preceding the adoption of that law do not need to convert into public limited sports companies if they choose to continue operating in the form of non-profit legal persons.

¹¹⁶ Case T-865/16 *Fútbol Club Barcelona v Commission* (GC, 6 February 2019). The General Court found that the Commission had not exercised its duty of diligence. It had not sufficiently assessed whether the advantage resulting from the reduced tax rate could be offset by the less favourable deduction rate for reinvestment of extraordinary profits applicable to clubs operating in the form of non-profit legal persons compared to that applicable to entities operating in the form of public limited sports companies.

¹¹⁷ *Commission v Fútbol Club Barcelona* (n 114) 97-102. The Court of Justice concluded that it is only at the stage of the possible recovery of the individual aid granted on the basis of the aid scheme that the Commission is required to look at the individual situation of each beneficiary of the aid scheme when the exact amount of aid which those beneficiaries have actually obtained in each tax year needs to be determined.

interpretation of this Article has been criticised for not properly honouring the effects of regulatory measures and thus incorrectly limiting the role of state aid in ensuring the level playing field.¹¹⁸ The judgement *Eventech*¹¹⁹ was critiqued for ignoring the actual effects of the Transport for London measure giving the Black Cabs exclusive, privileged rights by free access to the city infrastructure, at the expense of minicabs.¹²⁰ The judgment did not consider this advantage as state aid, as there was, in the opinion of the Court of Justice, no granting of state resources.

A refusal to take into account the allegedly discriminatory effects in such a case, however, does not represent a limit to the realist approach. First, not every harm on the market is actionable or relevant to legal analysis. Regulatory measures always attribute a competitive advantage to someone on the market at the expense of the other.¹²¹ Second, the effects of regulatory measures in *Eventech* cannot serve as a guideline to determine the existence of aid through 'state resources'.¹²² The actual or potential effects on the state budget, rather than the diverging effects of regulatory measure on market operators, correctly guide the Court of Justice in the assessment of this condition.

Proper normative calibration is equally important. A demand for a robust theory of harm should not turn into increasing normative demands. For example, in *CK Telecoms*¹²³ the General Court correctly concluded that a theory of harm cannot be based solely on the reduction of a competitive pressure on the remaining competitors. Harm to competitors would not necessarily fulfil the Merger Regulation criterion of a significant impediment to competition. The General Court, however, concluded that a merger will only be caught under the SIEC test if it 'confer[red] on the merged entity the power to enable it to determine, *by itself*, the parameters of competition and, in particular, to become a price maker instead of remaining a price taker.'¹²⁴ This left some observers justifiably wondering why only oligopolistic gap mergers bestowing a merged entity with market power comparable to that of a

¹¹⁸ Herwig Hofmann and Claire Micheau (eds), *State Aid Law of the European Union* (1st edn, Oxford University Press 2016) 70, 73.

¹¹⁹ Case C-518/13 *Eventech v The Parking Adjudicator* (ECJ, 14 January 2015), concerned a challenge of private hire (minicab) company to the Transport for London policy of granting exclusive rights to Black Cabs to use the bus lanes in London. One of the arguments put forward was that the Black Cabs received State aid as they were allowed to use the bus lanes as a 'State resource' for free and were not fined, in the way other vehicles could be fined, for using the bus lanes. The Court of Justice concluded that where the State is pursuing an objective, laid down in legislation, that grants privileged access to public infrastructure which is not operated commercially by the public authorities to users of that infrastructure, the State does not necessarily confer an economic advantage for the purposes of Article 107(1) TFEU.

¹²⁰ Hofmann and Micheau (n 118) 70, 73.

¹²¹ Either the European Union or, as in this case, a national legislator have the regulatory autonomy to judge how to allocate the competitive advantage and to judge what harm is socially desirable and what is not. It is for the national legislator to determine, to borrow from the language of competition law, the theory of harm in such cases. The analysis of the Court of Justice in *Eventech* reinforces its legitimacy within the perimeter of the rule of law by setting its own boundaries. Only that harm and discrimination that are deemed socially damaging by the appropriate decision-maker, in this case the national legislator, are in fact prohibited. Correct allocation of decision-making in a complex polity is thus not to be discounted. As to the degree of discretion that the Court of Justice affords the European legislator, see for example Cases C-620/18 and C-626/18 *Hungary and Poland v Council and Parliament* (ECJ, 8 December 2020).

¹²² The type of effects that can be relevant to the evaluation of whether the advantage was granted through state resources was set out in Case C-262/12 *Vent De Colère and Others* (ECJ, 19 December 2013). There it was established that any shortfalls of the particular obligation in that case would be covered by the French state and would thus affect the state budget. Compare with Case C-405/16 P *Germany v Commission* (ECJ, 28 March 2019), where no such effect on the state budget was found.

¹²³ Case T-399/16 *CK Telecoms UK Investments v Commission* (GC, 28 May 2020), para 344. In order to prove a significant impediment to effective competition, which could lead to the prohibition of the merger, two cumulative conditions would have to be satisfied. First, the elimination of important competitive constraints that the merging parties exerted on each other. Second, a reduction of competitive pressure on the remaining competitors.

¹²⁴ *ibid* 97.

dominant firm may be caught under the SIEC test.¹²⁵ The realist requirement for a robust, well-articulated and proven theory of harm should thus not be mistaken for increasing normative demands that may not necessarily have the adequate basis in the legal system. Moreover, the increased normative demands should not be presented as based on the failure to meet the adequate standard and burden of proof.¹²⁶

Furthermore, the General Court concluded in *CK Telecoms* that, in order to properly determine the future price change as a result of the merger, the Commission should build into the analysis an abstract efficiency credit. These are, however, not efficiencies that the parties have to prove,¹²⁷ but should be assumed by the Commission to arise automatically from any merger.¹²⁸ Instead of an engagement with the actual facts and the production of those facts by the party who has knowledge of them, as required by the principle of the proximity of evidence, the Commission is required to produce an abstraction. A rejection of abstract thought, was, however, the prime line of critique of formalism by Holmes and his successors. The General Court's request may thus present a departure from realism, one which demands a contextual and concrete analysis.

This brings the argument to the following two conclusions. First, by taking other considerations into account rather than applying closely a particular realist proposition, the Court actually reinforces the basic realist insight – that *all* relevant considerations have to be taken into account to have a well-functioning legal system. The turn to realism requires an overall calibration in each case according to the requirements of the system. Second, the realist approach pervades the decision making of the Court of Justice, as it does, to various degrees, the jurisprudence of courts worldwide.¹²⁹ Where careful fealty to the realist analysis fails, the quality of judicial protection can be reduced. While realism may be a *sine qua non* of good judging, loyalty to its propositions, however, does not by itself guarantee good or correct results. It is not a panacea – the quality of a judgment is always a matter of a calibration, appreciation and decision in any particular case.

V. The Realist Trend and Effective Judicial Protection

Inasmuch as it demands an anti-conceptual and contextual analysis, rejecting enforcement of a ‘pre-existing Something’,¹³⁰ the turn to realism critically contributes to the quality of the Court’s decision making. It is submitted that the realist trend is rooted in the fundamental demands of the European Union legal system, specifically in the right to effective juridical protection as set out in Article 47 of the Charter.

Article 47 importantly gives expression to the principle of effective judicial review, a general principle of European Union law¹³¹ to which I will first turn. The three realist propositions critically assist in

¹²⁵ Elias Deutscher, ‘CK Telecoms and the New Frame of Reference for the Analysis of Unilateral Effects in EU Merger Control - A Critical Appraisal’ (University of East Anglia 2021) Working Paper 21–07.

¹²⁶ The judgment in *CK Telecoms* was often presented to be resulting from the Commission’s failure to meet the burden of proof. See for example M. Collins (n 2).

¹²⁷ According to the Recital 23 of the EU Merger Regulation, efficiencies are put forward and need to be proven by the undertaking concerned. Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

¹²⁸ Monti (n 85) 455.

¹²⁹ Realism is embedded in contemporary legal thought. See Kennedy (n 4).

¹³⁰ Cohen (n 6).

¹³¹ Case C-272/09 P *KME Germany and Others v Commission* [2011] ECR I-12789, para 102.

fulfilling the requirements of the in-depth judicial review of the Court, as required in competition law, merger control and state aid cases,¹³² as well as of the universal review in trade mark cases.

Full judicial review in competition law entails checking in depth any legal and factual aspect of the challenged act.¹³³ The Court of Justice held in *Intel* that the General Court was required to examine all the arguments of the dominant firm questioning the validity of the Commission's findings. The *Intel* ruling is consistent with previous judgments, such as *Chalkor*,¹³⁴ *KME*,¹³⁵ *Galp*¹³⁶ and *Cartes Bancaires*, which all held, that the General Court must carry out a full review of any decision under appeal and may not use the Commission's 'margin of appreciation' as a basis for dispensing with an in-depth review of the law or the facts of the case.¹³⁷ The verification of facts and legal conclusions of the Commission in full judicial review is profound.

Judicial review of complex economic matters is carried out on the basis of the *Tetra Laval* formula.¹³⁸ The Court must check whether the facts presented by the Commission are accurate, reliable and consistent, whether the evidence contains all the information which must be taken into account in order to assess a complex situation and whether the evidence is sufficiently robust to be capable of substantiating the conclusions drawn from it.¹³⁹

Judicial review under the *Tetra Laval* formula, as well as a full review of legal concepts that needs to consider in-depth every fact and legal dimension of the case, are difficult to carry out appropriately without a careful consideration of the three outlined realist propositions. An indispensable implication of the realist trend is that the judicial review does not operate, in the words of Felix Cohen, in 'the heaven of legal concepts'¹⁴⁰ but engages with real-life effects, and that the party alleging their existence proves those effects. The turn to realism and effective judicial review are inextricably connected.

The accuracy, reliability and correctness of facts can often only be adequately assessed in their economic and legal context. Furthermore, if legal concepts are considered to have a pre-existing content and the need for an interpretation of those concepts in light of the relevant social and economic context is ignored, this can lead to failure to portray the full dimension of any particular case. In the words of the *Tetra Laval* formula, in such a case 'all the information which must be taken into account in order to assess a complex situation' is not considered. Divorced of reality, such judging risks arbitrariness by

¹³² For the difference between the judicial review concerning complex economic matters in Article 101 and Article 102 TFEU cases, on the one hand, and state aid and merger cases, on the other, see Marc van der Woude, 'Judicial Control in Complex Economic Matters' (2019) 10 *Journal of European Competition Law & Practice* 415., at 419-423. See also Marc Jaeger, 'L'Intensité Du Contrôle Du Tribunal Dans Les Affaires de Concurrence Soulevant Des Questions d'Appréciation Économique Complexe' (2012) 24 *European Review of Public Law* 975.

¹³³ See *Cartes Bancaires* (n 22) 44. The full review in competition cases is required by Article 47 of the Charter as well as by Article 6 of the the European Convention on Human Rights (ECHR). Following the *Menarini* judgment of the European Court of Human Rights, decisions imposing criminal fines could be taken by administrative bodies, provided that any decision was subsequently subject to full judicial review on matters of law and fact of the courts with full jurisdiction. See, *A. Menarini Diagnostics S.r.l. v Italy* App no 43509/08 (ECtHR 27 September 2011). The Court confirmed in Case C-501/11 P *Schindler Holding and Others v Commission* (ECJ, 18 July 2013) that the Commission's role both as a "prosecutor" and a "judge" in imposing the fines does not violate the right of judicial protection, when the full power of review by the Court under Article 263 TFEU is coupled with its unlimited jurisdiction under Article 261 TFEU to review those fines.

¹³⁴ Case C-386/10 P *Chalkor v Commission* [2011] ECR I-13085, para 62.

¹³⁵ Case C-272/09 P *KME Germany and Others v Commission* [2011] ECR I-12789, para 102.

¹³⁶ Case C-603/13 P *Galp Energia España and Others v Commission* (ECJ, 21 January 2016), para 72.

¹³⁷ The Court thereby sent a strong message, seeking to show the compatibility of the current level of EU judicial review with the requirements set out in Article 6(1) of the ECHR.

¹³⁸ Case C-12/03 P *Commission v Tetra Laval BV* [2015] ECR I-987.

¹³⁹ *ibid* para 39.

¹⁴⁰ Cohen (n 6).

enforcing a mere subjective opinion of judges. Hence the importance of the Court of Justice's requirement of a contextual analysis in *Generics* and *Budapest Bank* as well as in the trade mark law case *Fack Ju Göhte*.

The required identification and consideration of all relevant facts and interest brings increased clarity and accuracy. Overreliance on presumptions or assumed pre-existing content of concepts, without a robust engagement with the facts and market reality, clouds legal analysis, leading to erroneous over inclusion or under inclusion. The required judicial review could not transpire when in *Cartes Bancaire* and *Intel* the General Court failed to explore the defendant's evidence that an agreement may be efficient or that likely harm may be doubted. The recently enhanced duty of the Commission to diligently and pro-actively investigate and bring to light all the relevant facts and interest, that has been addressed, for example, in *Kerkosand* and *Groupe Canal+* cases, is essential for the Court to be able to engage with those facts and uphold the rights of the parties.

Lastly, a targeted judicial analysis requires a robustly articulated theory of harm. A careful articulation of a socially undesirable harm that goes beyond a merely posited harm entailing a difficulty or inconvenience is fundamental to the identified realist trend. It is vital for a society based on the rule of law that such articulation is not derived from facts. At the same time, as for example shown in trade mark cases *Google France* and *Interflora*, a robustly articulated theory of harm allows for an identification of all the interests and facts that need to be taken into consideration, enabling the Court to check whether the evidence at hand is sufficiently robust to be capable of substantiating the conclusions drawn from it.

In addition to its importance for judicial review, the realist approach importantly enhances other related elements¹⁴¹ of the right to effective judicial protection as required by Article 47 of the Charter.¹⁴² I will address its significance in the context of three inter-related elements of Article 47, respectively equality of arms, the right to an adversarial hearing and the right of defence.¹⁴³

Equality of arms requires that each party be given a reasonable opportunity to present her case under conditions that do not place her at a disadvantage vis-à-vis her opponent.¹⁴⁴ The right to an adversarial trial is closely related to equality of arms. It demands the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's

¹⁴¹ Article 47 of the Charter of Fundamental Rights comprises various elements, which themselves constitute rights and principles of their own. This is in particular the case for the principle of equality of arms and the right of defence, which are applied in a somehow flexible fashion, sometimes as self-standing principles, sometimes in connection with the principle of effective judicial protection or as a part of it. See Andriani Kalintiri, 'Article 47 of the Charter of Fundamental Rights in EU Competition Enforcement: A Quantitative and Qualitative Assessment' in Matteo Bonelli, Mariolina Eliantonio and Giulia Gentile (eds), *Effective Judicial Protection through the Prism of Article 47 of the EU Charter of Fundamental Rights before the CJEU* (Hart Publishing, an imprint of Bloomsbury Publishing 2022, on file with author). See also Sacha Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in Christophe Paulussen and others (eds), *Fundamental Rights in International and European Law* (TMC Asser Press 2016) 149–150 <<http://link.springer.com/10.1007/978-94-6265-088-6>>. It should also be noted that a partial overlap exists between Articles 47 and Article 41 (the right to good administration) and Article 48 of the EU Charter of Fundamental Rights (the right of defence).

¹⁴² For a recent elaboration of this right by the General Court, see Case T-249/17 *Casino, Guichard-Perrachon and AMC v Commission* (GC, 5 October 2020).

¹⁴³ See Kalintiri (n 141). She argues that Article 47 elevated procedural fairness in at least two respects. First, it has provided parties with due process guarantees during the administrative proceedings where undertakings also enjoy the right to be heard and to access the Commission's file and they have many opportunities for engagement with the authority. Second, it has imposed stringent obligations on the Commission and the EU Courts.

¹⁴⁴ The aim of the principle of equality of arms is to ensure a procedural balance between the parties to judicial proceedings, guaranteeing the equality of rights and obligations of those parties as regards, inter alia, the rules that govern the bringing of evidence and the adversarial hearing before the court. See, e.g., *Casino, Guichard-Perrachon* (142) 83.

decision.¹⁴⁵ What makes adversarial procedure impartial is the very dialectical interaction between the thesis and the antithesis. As a general rule, the channels of information from both sides should not be cut off in an adversarial procedure.¹⁴⁶

In recent judgments such as *Cartes Bancaires*, *Generics* and *Intel*, the Court of Justice enabled an enhanced dynamic of the adversarial procedure. In particular, the Court of Justice opened the possibility for the defendant to challenge a simple by object analysis, by showing that there are plausible efficiencies (*Cartes Bancaires*, *Generics*) or that the likely harm may be doubted (*Intel*). The Court of Justice thereby constructed an analytical framework that allows for a *conversation* between the two sides to the dispute.¹⁴⁷ The depth of analysis demanded of plaintiffs depends on the obviousness of the restraint to competition. Defendants, on the other hand, are given opportunities to challenge the plaintiff's claim, by showing that the restrictive nature of the conduct is more complex. When their pleas are successful, plaintiffs are forced to conduct a deeper assessment of the effects.¹⁴⁸ This dynamics enhances the exchanges between the parties, importantly contributing to the equality of arms, the right of defence,¹⁴⁹ as well as to the quality of adversarial procedure.

The adversarial system has been said to make possible a higher degree of judicial scrutiny and ensure that the evidence provided is robust,¹⁵⁰ as all information and material must be fully communicated between the parties. The quality of the Courts' decision also depends on the effort of the parties to find the evidence and their strategies to communicate the evidence.¹⁵¹ When one of the parties is allowed to rely on presumptions drawn from the form of the impugned conduct or on assumed pre-existing content of concepts communication between the parties is broken and cognitive failure can occur. Conversely, the more the Commission and the Court are required to rely in their analysis on the context, taking all the relevant facts and interests into consideration, the quantity and quality of evidence increases, which vitally affects the quality of the adversarial procedure and ultimately of the judicial review.

The realist analysis thus crucially contributes to effective judicial protection as foreseen in Article 47 of the Charter of Fundamental Rights and has an indelible normative value. It plays a significant role in the respect of the rights of litigants and citizens, as well as in securing the rule of law in the European Union.

This also brings us to an important conclusion in the context of disenchantment with the complexity of the more economic approach resulting in calls for less complexity and a return to the bygone era when enforcement of competition law was simpler.¹⁵² True, 'justice delayed is justice denied' and this

¹⁴⁵ See *Brandstetter v. Austria* App no Application no 11170/84, 12876/87, 13468/87 (ECtHR, 28 August 1991), para 67.

¹⁴⁶ Boštjan M Zupančič, *The Owl of Minerva: Essays on Human Rights* (Nandini Shah ed, Eleven International Pub 2008).

¹⁴⁷ Monti (n 51) 18.

¹⁴⁸ *ibid* 18, 28. Monti has argued that the adopted approach serves to strike a perfect balance between legal certainty and economic accuracy.

¹⁴⁹ The right of defence encompasses the right to give evidence in one's defence and to hear the evidence against oneself. It is foreseen also separately in Article 48 of the Charter of Fundamental Rights. However, it is often considered by the Court within the scope of Article 47. This right is particularly important in a setting of legal disputes in which the Commission, a powerful regulator, is one of the parties, as in competition and trade mark cases. Realist trend clearly enhances the right of defence. When defence is not even addressed, as by the General Court in *Cartes Bancaires* and *Intel*, the right to give evidence in one's defence fails to be protected. On the other hand, the more robust evidence is required from the plaintiff to substantiate the claims, the more strengthened is the protection of the right to hear the evidence against oneself.

¹⁵⁰ Yves Botteman, 'Mergers, Standard of Proof and Expert Economic Evidence' (2006) 2 *Journal of Competition Law & Economics* 71, 88.

¹⁵¹ Claude Fluet and Thomas Lanzi, 'Effets Stratégiques de La Qualité Des Éléments de Preuve Dans Une Procédure Accusatoire' (2020) 71 *Revue économique* 403, 423.

¹⁵² See Monti (n 85) 462. Monti cites John Kwoka, *Controlling Mergers and Market Power: A Program for Reviving Antitrust in America* (1st edn, Competition Policy International 2020). At some point the legislator may find that this approach to integrating economics into law prevents it from acting as a merger authority at all. It might then wish to revert to a less

important element in itself forms part of effective judicial protection.¹⁵³ Yet, an attempt to increase the speed or administrability of the judicial procedure by a return to formalism does not seem warranted. Such a desire needs to be carefully balanced with the insights and importance of realism for effective judicial protection, and should thus be pursued primarily through other measures that can enable a strengthened and faster judicial review¹⁵⁴ without compromising it.

VI. Conclusion

Practical knowledge of the moral realm is attained through reflection and capacity for deliberation. The fundamental contribution of the realist trend is ensuring that the case law of the Court does not become a ‘heaven of legal concepts’. Analytical clarity is importantly boosted by the three realist propositions. The goal of this clarity is that normativity anchored in the goals and values of the Union can gain its full and unclouded thrust.

Decision-making cannot rely on pre-existing meaning of concepts, cognitive success depends on a dynamic engagement with empirical reality.¹⁵⁵ By object violation, trade mark right, morality and other legal doctrines are not a ‘pre-existing Something’, but rather judicial constructions that have to be interpreted within their context taking into account all relevant facts and interests. They are proven in an adversarial procedure, which takes into account all the economic, moral and social aspects of the case, thus generating evidence that is sufficiently robust to substantiate the legal conclusions. An important side effect of the realist trend is thus also a more labour-intensive procedure for the Commission, other parties and for the Court that needs to conduct careful judicial review, loyal to realist insights as reflected in the three propositions.

Enhancing effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental rights and thus the legitimacy of the judicial process is the ultimate rationale of the realist trend. In this light, any departure from the three propositions should be treated with caution. Its anti-formalist reasoning strengthens the quality of the judicial process and thus the rights of citizens generally and of litigants specifically. Bearing these insights in mind, the described trend is of equal relevance and importance to any field of European Union law.

The mutual dependence of hard social facts and normative evaluation, which is necessary for effective judicial review,¹⁵⁶ can only come to fruition following a robust engagement with reality and robust normative articulation of socially undesirable harm. The Court’s turn to realism ensures that European Union law can be interpreted and applied in a more concise and unerring manner, yet its precise calibration on a case-by-case basis is a condition of its success.

In its deep connection to anti-conceptualism and empiricism, realism incorporates and honours the insight that reality, just as the ever-changing autonomous new legal order of the Union¹⁵⁷, is in a constant

economically sophisticated standard which tolerates some type 1 errors but is more manageable than a system that ends up yielding too many type 2 errors and involves significant resources to assess each merger. Recently such a recommendation has been made by John Kwoka with respect to US merger laws.

¹⁵³ Eleanor Sharpston, ‘Effective Judicial Protection through Adequate Judicial Scrutiny—Some Reflections’ (2013) 4 *Journal of European Competition Law & Practice* 453.

¹⁵⁴ For some of those measures, see Marc van der Woude and Jean-François Bellis, ‘Marc van der Woude (GCEU) : The reform of the General Court for a better and faster judicial review’ [2020] *Revue Concurrences* 16.

¹⁵⁵ Holmes (n 5).

¹⁵⁶ Cohen (n 6).

¹⁵⁷ See Koen Lenaerts, ‘The Autonomy of European Union Law’ (2019) I *Post AISDUE* 1; Koen Lenaerts, José A Gutiérrez-Fons and Stanislas Adam, ‘Exploring the Autonomy of the European Union Legal Order’ (2021) 81 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law* 47; Damjan Kukovec, ‘The

war of change. The European Union legal order is a living instrument. The enhanced realist trend is opening the avenues for analyses and adjudication on issues involving the swift developments of society, new markets and technologies, disruptive innovations and new challenges for the Union, as well as requiring a robust normative guidance to address those developments based on the Union's fundamental values. As such, the Court's turn to realism ensures the quality of judicial review and its legitimacy, as well as solidifies the Court's position as one of the most prominent courts in the global judicial landscape.