

Metadata of the chapter that will be visualized in SpringerLink

Book Title	The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law -La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence	
------------	--	--

Series Title		
--------------	--	--

Chapter Title	The Future of the Court of Justice in EU Competition Law	
Copyright Year	2013	
Copyright HolderName	Asser Press and the author(s)	

Corresponding Author	Family Name	Petit
	Particle	
	Given Name	Nicolas
	Suffix	
	Division	
	Organization	Brussels School of Competition (BSC)
	Address	Brussels, Belgium
	Division	
	Organization	University of Liège (ULg)
	Address	Liège, Belgium
Email	Nicolas.petit@ulg.ac.be	

Abstract	<p>This article offers perspectives on the future role of the Court of Justice in competition law matters. It first predicts that due to several institutional, substantive and procedural idiosyncrasies, the Court's 'rule-making' function should gain further importance. The resurgence of preliminary references that landed before the Court in recent years brings support to this prediction. In turn, this article argues that with this role, comes the heightened responsibility of setting the 'right' competition law standard. Given the lack of readily available, objective benchmark to distinguish what makes good and bad law, the paper offers thoughts on the necessity to set 'consistent' competition law standards, and explores several facets of rule-making consistency in EU competition law.</p>	
----------	--	--



The Future of the Court of Justice in EU Competition Law

New Role and Responsibilities

Nicolas Petit

AQ1

Abstract This article offers perspectives on the future role of the Court of Justice in competition law matters. It first predicts that due to several institutional, substantive and procedural idiosyncrasies, the Court's 'rule-making' function should gain further importance. The resurgence of preliminary references that landed before the Court in recent years brings support to this prediction. In turn, this article argues that with this role, comes the heightened responsibility of setting the 'right' competition law standard. Given the lack of readily available, objective benchmark to distinguish what makes good and bad law, the paper offers thoughts on the necessity to set 'consistent' competition law standards, and explores several facets of rule-making consistency in EU competition law.

1 Introduction

Most of the literature on the role of the Court of Justice ("the Court" or the "CJEU") in European Union ("EU") competition law reflects on the past.¹ With few exceptions, those studies praise the CJEU for its pivotal contribution to

Professor, University of Liège (ULg), Belgium. Director of the Global Competition Law Centre (GCLC), College of Europe. Director of the Brussels School of Competition (BSC).

¹ Goyder is one of the best textbooks to deal with the history of EU competition law, and the influence of the Court. See Goyder 2003.

N. Petit (✉)
University of Liège (ULg), Liège, Belgium
e-mail: Nicolas.petit@ulg.ac.be

21 establishing the conceptual foundations of EU competition law.² Less, however,
22 has been written on the current role of the Court, and surely even less on its future.

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

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

33 2 The Court's Future Role: Rule-Making 34 in EU Competition Law

35 The science of making predictions is complex. Oracles, mediums, scientists,
36 investors and competition authorities alike often search into the recent past to
37 forecast the future. Drawing inspiration from this methodology, two scenarios may
38 unfold in so far as the Court's role in the EU competition ecosystem is concerned.

39 2.1 A Marginalised Court?

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

46 In line with this, three sets of institutional developments may further insulate the
47 Court from competition cases. First, the idea of creating a specialised competition

² Gerber talks of "Intellectual leadership". See Gerber 1994, p. 127.

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

⁴ To deal notably with factual issues in competition cases. See Vesterdorf 2005.

⁵ As compared to what it should be if it was still in charge of first instance judicial review. In 2010, the GC received indeed 79 new competition cases, whilst the Court received only 13 competition appeals in the same year.

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

48 court under Article 257 TFEU is gaining traction.⁷ If this were ever to happen, the
49 Court would lose its remaining jurisdiction on appeals on points of law in com-
50 petition cases.⁸ And a similar effect may arise of other, yet less realistic, institu-
51 tional proposals, such as a move towards a full US-like adjudication system in
52 competition cases, along the lines proposed by Professor Schwarze and Temple
53 Lang.⁹ In this variant, the Commission would bring charges of competition
54 infringements before the GC, which would take the first legally binding decision.
55 Of course, in this system, the Court would regain an appeals jurisdiction over GC's
56 judgments. But as the United States ("US") experience suggests, this system
57 reduces the number of competition cases in the first place (the agency rarely goes to
58 Court), and thus the subsequent workload of the appeals courts system.

59 Second, the Court's marginalisation in EU competition law may also be nur-
60 tured by "bottom-up" jurisdictional transfers. In this context, with the contem-
61 plated accession of the EU to the European Convention of Human Rights
62 ("ECHR") and its own court's system, the Court may lose some grip on funda-
63 mental rights issues.¹⁰

64 Finally, the unbridled development of negotiated procedures in EU competition
65 law extinguishes opportunities for litigation before the General Court and, *a for-*
66 *tiori*, before the upper EU Court in last instance.¹¹ The "success" of leniency
67 applications and (to a lesser extent though) of settlements in cartel cases, as well as
68 the rise of Article 9 commitments as the "normal procedure" in non-cartel cases
69 leave little scope for appeal. Addressees of decisions adopted under these proce-
70 dures are in practice less likely to challenge them before the GC, and even less so
71 before the Court. And in light of the wide margin of discretion recognised to the
72 Commission by the Court in *Alrosa*, appeals by third parties (in particular com-
73 plainants) are somewhat illusory.¹²

74 All in all, this augurs a gloomy future for the Court. But this scenario has a
75 major flaw. It is based on far-fetched and wholly unrealistic assumptions. First, it
76 is doubtful that competition law constitutes a priority area for the creation of a
77 specialised court, all the more so given the decreasing backlog of competition

⁷ See Merola and Waelbroeck 2010, p. 251. See also, for a concrete proposal, Confederation of the British Industry 2006.

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

⁹ See the quotes of N. Wahl, p. 274, in Merola and Derenne 2012; Temple Lang 2011, pp. 219–256; Schwarze 2009; see also Waelbroeck and Fosselard 1994, pp. 111–142.

¹⁰ See Leskinen 2010. See, *contra*, Zivy and Luc 2010, ~~4 Concurrences~~, pp. 85–100.

¹¹ See on this and on the following points, the interesting findings of Barbier de la Serre, pp. 98 and 99.

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

78 cases due to negotiated arrangements. As a matter of fact, most discussions on the
79 creation of a specialised court concern the field of intellectual property (“IP”).

80 Moreover, the Court itself has already trumped a possible feudal subordination
81 to the Strasbourg Court. In its judgments in *KME Germany v. Commission* and
82 *Chalkor v. Commission*, the Court noted that the protection conferred by Article 47
83 of the Charter of Fundamental Rights of the EU “implements in European Union
84 law the protection afforded by Article 6(1) of the ECHR”, and that “it is necessary,
85 therefore, to refer only to Article 47”.¹³

86 2.2 A Rule-Making Court?

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

98 Looking ahead, this second scenario prophesises that the CJEU’s orbital position
99 as the ultimate rule-maker in the competition galaxy will gain even more
100 brightness. To be sure, the point here is not so much that the number of cases

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

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

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

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

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

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

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

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

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

²² Refining the notion of a concerted practice.

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

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

101 brought to the CJEU in relation to principled issues will increase.²⁵ Rather, the nub
102 of the argument is qualitative in nature. The substance of the competition law
103 issues that remain to be settled by the CJEU has perhaps never been that funda-
104 mental.²⁶ EU competition law lies indeed at several junctures. First, a debate over
105 the *goals* of EU competition law (e.g. consumer welfare, efficiency, industrial
106 policy, redistribution, etc.) has unraveled, and is currently raging. The amount of
107 scholarship devoted to this issue in recent years bears testimony to the view that
108 the goals of EU competition law remain unclear.²⁷

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

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

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

²⁷ See Stucke 2012, 2011, p. 107; see also Odudu 2006; Townley 2009; Prieto 2006, p. 1603.

²⁸ See Van Den Bergh and Camesasca 2006, pp. 105–150; Basedow and Wurmnest 2011; Gerber 2010, p. 441; Geradin et al. 2012; Drexler et al. 2011; Ortiz Blanco and Lamadrid de Pablo 2011; *mimeo*.

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

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

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

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

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

146 Fourth, with rising fines akin to quasi-criminal sanctions, the EU administrative
147 *procedure* for competition cases is in the line of fire.³⁶ Lawyers increasingly
148 challenge the compatibility of the EU procedural system with Article 47 of the
149 Charter of Fundamental Rights of the EU.³⁷ Many components of the EU proce-
150 dural system have been deferred to the CJEU—e.g. parental liability doctrine,³⁸

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

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

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

³⁴ See CJEU, Case C-375/09, *PrezesUrzęduOchronyKonkurencjiKonsumentów v Tele2 Polska sp. z o.o., devenueNetia SA*, not yet reported.

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

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

³⁷ As well as Article 6 ECHR.

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

151 intensity of judicial review,³⁹ duration of the administrative procedure—⁴⁰ and
152 cases will keep abounding.

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

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

159 3 The Court’s Future Responsibility: Setting “Consistent” 160 EU Competition Law Standards

161 3.1 Conceptual and Definitional Remarks

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

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

170 But economists and lawyers often disagree amongst themselves. Competition
171 economists are for instance split on whether competition law should promote
172 “*total*” or “*consumer*” welfare.⁴⁵ Similarly, competition lawyers are divided on
173 whether general “*forms-based*” rules or case-by-case “*effects-based*” assessments
174 promote legal certainty.

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

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

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

⁴² See, for instance, using the expression, Barbier de la Serre 2012.

⁴³ See Geradin and Petit 2012, p. 21.

⁴⁴ *Ibidem*.

⁴⁵ See Van Den Bergh and Camesasca 2006.

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

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

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

196 In a spirit of assistance, the following sections offer some fresh thoughts on
197 three possible facets of “consistency” which may arguably help the Court face the
198 challenge of setting adequate competition law standards.⁴⁹ The analysis is creative
199 in nature, given the dearth of guidance in general EU law on consistency in rule-
200 making.⁵⁰ It uses the competition case-law of the Court to offer illustrations of
201 consistencies and inconsistencies in rule-making.

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

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

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

⁴⁹ This in no way suggests that the Court does not test, in current judicial practice, the “consistency” of its competition law standards. As will be seen below, it certainly does so, but not explicitly, through its own methods, or under the authority of other related, yet distinct principles, such as the principle of legal certainty, or the principle of uniformity of EU law.

⁵⁰ The notion of consistency has been used sporadically in EU competition law. It is used in Recital 21 of Regulation 1/2003, which ambitions to ensure consistency in the articulation of European and national competition laws, ~~in line with the Masterfoods case-law~~. Recital 21 of the Regulation is worded as follows: “Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member

3.2 “Transversal Consistency”, or Consistency Across Competition Rules

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


(Footnote 50 continued)

States and the Commission”. This recital, and more generally Article 16, are offshoots of the *Masterfoods* case-law. See CJEU, Case C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, ECR [2000] I-11369. In the *Masterfoods* judgment, ~~for instance~~, the Court held that national courts “cannot” take decisions “*running counter*” to previous Commission decisions on similar agreements or practices (see §52). Interestingly, this solution was based on the principle of legal certainty. For an explicit link with the notion of consistency, see Craig and De Burca 2011, p. 733. The concept of consistency has been also enforced in the area of State aid under Article 107, to assess the legality of certain types of fiscal advantages. See Commission notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384/3, 10.12.1998. Finally it has sporadically been dealt with by the Court, primarily in relation to the judicial review carried out by the GC. See, for instance, CJEU, Case C-386/10 P, *Chalkor AE Epexergasias Metallon v European Commission*, *supra*, §48; CJEU, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00, *Aalborg Portland A/S a.o. v Commission of the European Communities*, ECR [2004] I-123, §133.

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

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

⁵³ See Krattenmaker et al. 1987, p. 241.

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

213 degree of homogeneity and convergence is warranted in the analysis of anti-
214 competitive agreements, unilateral practices and concentrations.⁵⁵

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

227 Second, the concept of transversal consistency is also relevant in relation to the
228 *tests* applicable to assess firms' conduct. The idea here is that strategies which
229 wield similar types of competition concerns should, in principle, be subject to
230 streamlined verification standards. This particular variant of transversal consistency
231 could have significant consequences on several existing case-law standards.
232 For instance, it is well known that exchanges of information agreements amongst
233 oligopolists facilitate tacit coordination.⁵⁸ Like mergers amongst oligopolists, they
234 are a form of "*facilitating practice*".⁵⁹ However, unlike under the EUMR where
235 the risk of tacit coordination is verified by the proof of three stringent cumulative
236 conditions identified in *Bertelsmann AG v. Impala*,⁶⁰ the case-law standard applied
237 under Article 101 TFEU refers loosely to the proof that the "*degree of uncertainty*

⁵⁵ See Ortiz Blanco 2012. The author for instance observes that there is no valid reason to differentiate market power thresholds in the various areas of EU competition law (p. 282).

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

⁵⁷ And thus promotes the effectiveness of competition policy.

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

⁵⁹ See Petit 2008.

⁶⁰ See CJEU, Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)*, ECR [2008] I-4951, §251. Those conditions are derived from economic theory. See Petit 2008. However, the Court noted that "*in the appropriate circumstances, [this risk can] be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position*".

238 *on the market in question*” is reduced or removed.⁶¹ This is clearly a source of
239 unfortunate incoherence, which surely would deserve to be disambiguated on
240 grounds of transversal consistency.

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

256 Finally, the principle of transversal consistency suggests to craft similar
257 *exoneration* standards across Articles 101 TFEU, 102 TFEU and the EUMR. After
258 all, why should anticompetitive practices that yield pro-competitive effects of
259 equal nature and magnitude be treated differently, simply because they take a
260 different form? As noted by Rousseva,⁶⁵ the issue becomes problematic with
261 regard to practices that can be examined under both Articles 101 and 102 TFEU
262 (e.g. vertical agreements).⁶⁶ Depending on the provision under which the case is
263 envisioned, a single branding contract may benefit from an exemption under
264 Article 101(3) TFEU on the grounds that it is pro-competitive, yet be found
265 abusive under Article 102 TFEU.⁶⁷ This inconsistency risks undermining the “*effet*
266 *utile*” of Article 101(3) TFEU, in prohibiting welfare enhancing practices (a so-
267 called “Type I error”, or over fixing). In addition, it may encourage competition

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

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

⁶³ *Ibid.*, §42.

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

⁶⁵ See Rousseva 2006, p. 32.

⁶⁶ Be it alternatively or cumulatively.

⁶⁷ See Rousseva 2006.

268 authorities, courts and complainants to circumvent the exoneration of pro-com-
269 petitive conduct by promoting innovative, yet untested interpretations of Article
270 102 TFEU.⁶⁸

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

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

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

290 3.3 “Internal Consistency”, or Consistency Within Competition 291 Rules

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

298 Second, if the Court departs from settled case-law, a consistent rule-making
299 approach is to expressly (i) distinguish the later solution from previous judg-

⁶⁸ The *Compagnie Maritime Belge* cases can be traced back to this type of avoidance strategy. See, on this, Petit 2008.

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

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

300 ments⁷¹; or (ii) overrule prior judgments.⁷² On this issue, a reminder is in order.
301 As is well known, the Court is not hostage to prior pronouncements.⁷³ It does not
302 apply the doctrine of precedent, or *stare decisis*, and is thus not technically bound
303 by its earlier judgments.⁷⁴ Yet, this should not provide a *carte blanche* for crafting
304 conflicting/evolving standards in silence. Whilst this might amuse academics (and
305 confuse students), lawyers, economists and officials alike need to clearly know
306 when legal standards change.

307 Third, when the Court defines or refines legal rules, it should refrain from
308 quoting old precedents which say wholly distinct things as source of precedential
309 authority.⁷⁵ This is indeed akin to revisiting, in disguise, settled case-law. And this
310 is, in turn, likely to degrade legal certainty.⁷⁶

311 Those three ramifications of internal consistency find illustrations in the
312 competition case-law of the Court. To start, the ruling of the Court in the *Football*
313 *Association Premier League Ltd.* (also known as the “*FAPL*” or “*Greek decod-*
314 *ers*” case) shows how the Court ensures “*internal consistency*” when faced with
315 novel competition law issues. Here, the Court was questioned on the compatibility
316 with Article 101 TFEU of several licensing agreements which sought to restrict

⁷¹ The distinguishing method is frequently used in EU law. See Coutron 2009, pp. 643–676.

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

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

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

⁷⁵ See Coutron 2009, pp. 673–674.

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

317 national TV broadcasters' exports of decoders towards other Member States. The
318 Court answered that the impugned practices were akin to restrictions of competi-
319 tion by object⁷⁷ which could not be salvaged under Article 101(3) TFEU.⁷⁸

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

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

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

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

⁷⁸ *Ibid.*, §141.

⁷⁹ See Werner and Völk 2011, pp. 18–20; Clifton 2011, pp. 38–46.

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

⁸¹ A recent judgment seems, however, to disrespect this first ramification of the principle of “*internal consistency*”. In *Pierre Fabre Dermocosmétiques* the Court held that objective justifications ought to be examined under Article 101(1) TFEU. See CJEU, Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence and Ministre de l’Économie, de l’Industrie et de l’Emploi*, not yet reported, §41. This judgment is not fully congruent with previous case-law, where the Court had surmised—in *Montecatini*, for instance—that “*rule of reason*”-inspired assessments had no place within Article 101(1) TFEU. See CJEU, Case C-235/92 P, *Montecatini SPA v Commission of the European Communities*, ECR [1999] I-4539, §133. Under this case-law indeed, objective justifications, pro-competitive effects or other efficiency benefits ought to be examined under Article 101(3) TFEU, not Article 101(1) TFEU.

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

⁸³ *Ibid.*, §70.

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

348 *It cannot be inferred from paragraphs 48 and 49 of [the Bronner] judgment that the*
349 *conditions to be met in order to establish that a refusal to supply is abusive must nec-*
350 *essarily also apply when assessing the abusive nature of conduct which consists in sup-*
351 *plying services or selling goods on conditions which are disadvantageous or on which*
352 *there might be no purchaser. Such conduct may, in itself, constitute an independent form*
353 *of abuse distinct from that of refusal to supply* (emphasis added).

354 Hence, since margin squeeze and refusal to supply cases are two distinct types
355 of cases, there is no obstacle to applying different evidentiary standards to them
356 (and in particular, to exonerating the Commission from proving that the input is
357 indispensable in margin squeeze cases).

358 At first glance, the reasoning of the Court fulfils the requirement of “*internal*
359 *consistency*”. Yet, on close examination, doubts arise as to whether the Court
360 could really distinguish the two types of cases. After all, can a firm charge rivals
361 “*unfair*” prices within the meaning of Article 102(a) TFEU, if it does not possess
362 something that is “*indispensable*” to them, within the meaning of the case-law on
363 refusal to supply? Moreover, from an “outcome” perspective, the judgment seems,
364 in and of itself, inconsistent.⁸⁶ If a firm can lawfully eliminate rivals by with-
365 holding supplies, how can it be guilty of abuse when it supplies them at high
366 prices? In the language of driving metaphors, this is akin to prohibiting speeding
367 above 120 km/h, yet tolerating it above 150 km/h. And dominant firms should be

⁸⁴ *Id.*, §56 and seq.

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

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

368 advised to forego supplies to competitors, rather than to share their inputs with
369 them. All this clearly throws doubts on whether this legal standard is a consistent
370 one.

371 Finally, the third ramification of the principle of “*internal consistency*” may
372 also have been occasionally neglected in the competition case-law. Some judg-
373 ments that introduce novel legal standards indeed cite inappropriate precedents in
374 support of them.⁸⁷ The judgment of the Court in *Pierre Fabre Dermocosmétiques*
375 is a case in point. The Court here asserts the novel principle that selective dis-
376 tribution systems “*are to be considered, in the absence of objective justification, as*
377 “*restriction by object*” under Article 101(1) TFEU.⁸⁸ And in support of this
378 contention, the Court quotes, in a previous sentence, its precedent in *AEG-Tele-*
379 *funken v Commission*. However, the judgment in *AEG-Telefunken v Commission*
380 did not use the notion of “*objective justification*” as a concept evincing the
381 application of Article 101(1) TFEU, but rather talked of “*legitimate require-*
382 *ments*”.⁸⁹ Such pronouncements, which look clearly inconsistent, generate more
383 questions than answers.⁹⁰ They would deserve at least a word of explanation.

384 **3.4 “Scientific Consistency”, or Consistency Across Competition** 385 **Law and Economics**

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

391 Interestingly, while many lawyers have voiced antipathy towards the use of
392 economics in competition enforcement activities (i.e. in cases), most of them
393 generally acknowledge their relevance for the design of general legal rules. As
394 Mrs. Ortiz Blanco and Lamadrid observe, “*the design of legal rules must neces-*
395 *sarily be the fruit of the efforts of a hybrid community in which lawyers and*
396 *economists should understand each other’s disciplines*”.⁹¹

⁸⁷ See, for a similar view in other areas of EU law, Coutroun 2009, p. 673.

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

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

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

⁹¹ See Ortiz Blanco and Lamadrid 2012, p. 308.

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

402 In our opinion, however, those objections are indecisive.⁹⁵ Contrary to what the
403 *voxpopuli* believes, competition economists do not disagree on everything. There
404 are several core, general principles of competition economics that seem suffi-
405 ciently consensual, and that are not contingent on specific assumptions (econo-
406 mists call them “*robust*” principles). To take only a few examples of them, one
407 would point out to the view that cartels are wholly inefficient, that scale (or size) is
408 not necessarily adverse to welfare, that prices below marginal costs are irrational,
409 that firms respond to incentives, that profits generate entry, etc.⁹⁶

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

419 Interestingly, the existing case-law of the Court brings telling illustrations of
420 this. For instance, the Court was used to define “*collective dominance*” with *sui*
421 *generis* terms such as “*correlative factors*”,⁹⁷ “*collective entity*” and “*connecting*

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

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

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

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

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

⁹⁷ See CJEU, Case C-68/94, *République française et Société commerciale des potasses et de l'azote (SCPA) et entreprise minière et chimique (EMC) v. Commission*, ECR [1998] I-1375, §211. Papadias 2004, p. 120.

422 factors”.⁹⁸ As a result, it remained long unclear whether pure oligopolistic tacit
423 collusion was covered under Article 102 TFEU.⁹⁹ In the *Bertelsmann AG v.*
424 *Impala* ruling, the Court eventually accepted to talk the language of economics, by
425 equating collective dominance with the economic notion of “tacit coordination”
426 in “oligopoly” markets.¹⁰⁰ In so doing, it dispelled all outstanding uncertainties.¹⁰¹
427 From a scientific consistency standpoint, this is a welcome judgment.

428 In contrast, several competition law concepts that have voyaged through the
429 decades could benefit from a definitional “lifting”. The antiquated notion of a
430 “dominant position” belongs to the list of priority candidates.¹⁰² The case-law
431 defines it in terms of “independence” from competitors, customers and

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

⁹⁹ The Court’s reluctance to employ the language of economics triggered a plethora of scholarship. In addition, it gave rise to an important degree of legal uncertainty. The doctrine of collective dominance was invoked in all directions, as a shortcut to regulate all sorts of market structures and practices. First, in the *Irish Sugar* case, the Commission crafted a somewhat innovative doctrine of “vertical” collective dominance that the Court confirmed. In this case, the Commission was attempting to put an end to a series of abuses entered into by a supplier and its distributor. See also CJEU, Case C-497/99 P, *Irish Sugar plc v Commission*, *supra*. Second, in *Almelo* and *La Crespelle*, the EU courts applied the concept of collective dominance to circumvent another legal obstacle. In those cases, several firms of regional/local importance each enjoyed a dominant position on a number of distinct and narrow geographic markets. Taken one by one, the dominant position of each firm did not seem to affect “the internal market or substantial part of it”, as requested under Article 102 TFEU. However, in close similarity with the cumulative effects doctrine under Article 101 TFEU, the Court considered that it was possible to aggregate individual dominant positions on different markets under the concept of collective dominance, so that a substantial part of the common market was affected. See CJEU, Case C-393/92, *Gemeente Almelo and others v. Energiebedrijf IJsselmij*, ECR [1994] I-1477; CJEU, Case C-383/93, *Centre d’insémination de la Crespelle v. Coopérative de la Mayenne*, ECR [1994] I-5077. See Nihoul and Rodford 2004, §3.327. Third, the Commission and the EU Courts found that agreements between maritime companies that were not subject to Article 101 TFEU, could be caught under Article 102 TFEU, under the notion of collective dominance. See C-395/96 and C-396/96 P, *Compagnie Maritime Belge transports and others v. Commission*, *supra*. Finally, a number of plaintiffs have also tried to invoke the concept of collective dominance in order to challenge national laws on the basis of Article 102 TFEU and Article 4(3) TEU. In all those cases, the CJEU dismissed the claims. See CJEU, Case C-96/94, *Centro Servizi Spediporto v. Spedizioni Marittima del Golfo*, ECR [1995] I-2883, §34; CJEU, Case C-140/94, *DIP and others v. Comune di Bassano del Grappa and others*, ECR [1995] I-3257, §27; CJEU, Case C-70/95, *Sodemare and others v. Regione Lombardia*, ECR [1997] I-3395.

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

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

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

432 consumers.¹⁰³ But from an economic standpoint, no firm “*except maybe a*
433 *monopolist protected by insurmountable barriers to entry and facing a completely*
434 *inelastic demand*” has such independence.¹⁰⁴ In addition, the requirement of
435 independence is not consistent with the application of Article 102 TFEU to jointly
436 dominant firms in a state of oligopolistic “*interdependence*”.¹⁰⁵

437 Another client for a definitional revision is the vexing notion of anticompetitive
438 “*object*” under Article 101 TFEU. In a string of judgments, the Court has moved
439 away from characterising “*object*” as “*intent*”, “*aim*” or “*purpose*”.¹⁰⁶ It has
440 allegedly expanded this notion to an indeterminate range of practices whose cat-
441 egorisation as a restriction by “*object*” requires an “*individual assessment*” of
442 “*the content of its provisions, the objectives it seeks to attain and the economic*
443 *and legal context of which it forms a part*” (e.g. selective distribution, exchange of
444 information agreements, etc.).¹⁰⁷

445 This case-law has disconcerted many lawyers.¹⁰⁸ Here again, however, eco-
446 nomics can soothe lawyers’ concerns. From an economic standpoint, a restriction
447 by object should be defined as conduct, which in the abstract, can be presumed to
448 trigger anticompetitive effects with a high likelihood (for instance, a cartel).¹⁰⁹
449 Accumulated enforcement experience and economic theory shall provide guidance
450 on which practices can be presumed to hobble competition. In contrast, all prac-
451 tices whose proclivity to trigger anticompetitive effects is indeterminate should fall

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

¹⁰⁴ See O’Donoghue and Padilla 2006, p. 108. See also Ahlborn et al. 2006.

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

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

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

¹⁰⁸ See Gerard 2012.

¹⁰⁹ See Neven 2009.

454 out of the “*object*” box, and be subject to a concrete, full-blown effects-based
455 assessment (for instance, an exclusivity contract).¹¹⁰

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

460 The Court’s case-law offers a wealth of illustrations of this, and it is beyond the
461 ambition of this paper to discuss them all. To talk of prohibition standards first,
462 perhaps one of the best examples of “*scientific consistency*” belongs to the field of
463 predatory pricing.¹¹² In *AKZO*, and later in *Tetra Pak II*, the Court devised legal
464 standards aligned on the so-called “*Areeda-Turner*” price-costs test.¹¹³ It held that
465 prices below average variable costs (“AVC”) must always be considered abu-
466 sive.¹¹⁴ In more recent times, the Court in *Post Danmark* substituted the AVC
467 benchmark with the average incremental costs (“AIC”) benchmark, presumably to
468 reflect advances in economic theory.¹¹⁵ According to economists, AIC is better
469 than AVC, “*because it most accurately reflects the cost of making the predatory*
470 *sales*”.¹¹⁶

471 Likewise, competition economics have also been influential in relation to
472 exoneration standards. In the 1980s, a controversy arose on whether a “*concerted*

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

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

¹¹² Excessive (or unfair) pricing cases under Article 102(a) TFEU provide also a good illustration of the use of economics in setting legal standards. Under Article 102(a), it is abusive to “*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*”. This is generally referred to as “*excessive pricing*”. In *United Brands*, the Court proposed to consider a price “*excessive*” when “*it has no reasonable relation to the economic value of the product supplied*”. See CJEU, Case C-27/76, *United Brands Company et United Brands Continentaal BV contre Commission*, ECR [1978] 207, §250–252. Importantly, the ECJ adopted the following two-steps approach for determining whether a price is excessive. Specifically, one would have to: “[*Examine w]hether the difference between the costs actually incurred and the price actually charged is excessive*”; and; “[*I]f the answer to this question is in the affirmative, [determine] whether a price has been imposed which is either unfair in itself or when compared to competing products*”. Whilst some of the words in those statements deserve surely to be criticised for their lack of accuracy (“*excessive*”, “*abstract*”, etc.), the use of a price-costs benchmark to filter out abuse from lawful conduct is in line with mainstream economics.

¹¹³ And went beyond the standards proposed by the Commission.

¹¹⁴ And that prices above average variable costs (but below average total costs) could only be so if an intention to eliminate competition can be shown. Areeda and Turner had proposed to hold predatory prices unlawful below marginal costs, ~~but given that~~ in practice, those prices are difficult to calculate, ~~they~~ offered to substitute average variable costs. See Areeda and Turner 1975, pp. 697–733.

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

¹¹⁶ See Motta 2004, at p. 448 (citing to a paper by Bolton et al.).

473 *practice*” under Article 101 TFEU could simply be established on the basis of
474 observed parallel conduct on a relevant market (for instance, price increases). In its
475 seminal judgment in *Woodpulp II*, the Court held that “*parallel conduct cannot be*
476 *regarded as furnishing proof of concertation unless concertation constitutes the*
477 *only plausible explanation for such conduct*”.¹¹⁷ This statement was based on the
478 findings of economist E. CHAMBERLIN, who had shown in 1929 that in certain
479 oligopolistic markets, conscious parallelism may arise, short of any collusive
480 arrangement amongst oligopolists.¹¹⁸ On this basis, the Court crafted an “*oli-*
481 *gopoly defense*” to shield oligopolists from antitrust exposure when parallel
482 conduct is dictated by structural market features.

483 Finally, the rule of “*scientific consistency*” can play a useful role with a view to
484 adapting, adjusting or modifying established competition law standards. A great
485 deal of the modern competition economics literature indeed seeks to assess
486 whether existing legal standards outlaw welfare-enhancing practices (Type 1
487 errors, or over fixing) or fail to apprehend welfare-decreasing practices (Type 2
488 errors, or under fixing). This literature can help the Court refine competition law
489 standards.

490 So far, the Court has seemed quite attentive to risks of type I and type II errors.
491 The judicial output under Article 102 TFEU provides examples of this. On the one
492 hand, the case-law is marked by the slow generalisation, in relation to all types of
493 potentially abusive practices, of a new cause of defense based on the ability for
494 dominant firms to get off the hook by proving the existence of “*objective economic*
495 *justifications*”.¹¹⁹ It is today clear that otherwise abusive refusals to supply,¹²⁰
496 excessive prices,¹²¹ margin squeezes,¹²² price cuts¹²³ and rebates¹²⁴ may be
497 redeemed if, on balance, they exert positive effects on welfare.

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

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

¹¹⁹ See CJEU, Case C-95/04 P, *British Airways plc v Commission*, ECR [2007] I-2331. Other concepts, such as “*legitimate commercial interests*” or “*objective necessity*” have also been used in the case-law. Surely, the crux of the issue is how the Commission and inferior courts will apply this exculpatory standard (on this issue, there are “*mixed signals*”, see Ortiz Blanco and Ibanez Colomo 2011, pp. 72–73).

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

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

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

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

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

498 On the other hand, the Court has revised legal standards that risked exonerating
499 welfare-reducing practices. In *Magill* and *IMS Health*, for instance, it developed an
500 “exceptional circumstances” doctrine to force dominant firms to grant licences on
501 their IP rights, if this raised an obstacle to the apparition of a new product.¹²⁵ In
502 *Compagnie Maritime Belge*, the Court also observed that in “specific circum-
503 stances” above costs price cuts could be deemed abusive.¹²⁶ In *Tetra Pak II*, the
504 Court noted that price cuts by a non-dominant firm could be tantamount to abuse in
505 “special circumstances”.¹²⁷ Finally, in *TeliaSonera*, the Court introduced three
506 exceptions to the “general rule” that low prices are only abusive if they do not
507 cover the dominant firm’s own costs.¹²⁸

508 4 Conclusion

509 In his memoirs, J. Monnet recalled that on the entire territory of the Community,
510 he had never heard anyone criticise a judgment of the Court.¹²⁹ Monnet, however,
511 had not anticipated that with rising penalties imposed on businesses for compe-
512 tition infringements, the naysayers would become increasingly vocal.

513 As explained previously, however, many of those who lambast the Court’s
514 competition case-law are biased by self-serving interests. In our opinion, consistency

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

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

¹²⁷ See CJEU, Case C-333/94 P, *Tetra Pak International SA v Commission (“Tetra Pak II”)*, ECR [1996] I-5951, §27 (see, making this point, Ortiz Blanco and Ibanez Colomo 2011, p. 79).

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

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

515 in rule-making provides a better, objective benchmark to assess the Court's com-
516 petition output.

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

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

*
* *

529 References


- 530 Ahlborn C, Denicolò V, Geradin D, Padilla J (2006) DG Comp's discussion paper on Article 82:
531 implications of the proposed framework and antitrust rules for dynamically competitive
532 industries, Working paper, March 2006. Available at SSRN: <http://ssrn.com/abstract=894466>
533 or <http://dx.doi.org/10.2139/ssrn.894466>
- 534 Areeda P, Turner DF (1975) Predatory pricing and related practices under Section 2 of the
535 Sherman Act. *Harv Law Rev* 88(4):697–733
- 536 Barbier de la Serre E (2012) Competition law cases before the EU Courts: is the well running dry.
537 In: Merola M, Derenne J (eds) *The role of the court of justice of the European Union in*
538 *competition law cases*. Bruylant, Brussels, pp. 98 and 99
- 539 Basedow J, Wurmnest W (2011) *Structure and effects in EU competition law*. Kluwer Law
540 International, The Hague
- 541 Clifton M-J (2011) The publican's dilemma: the legality of showing the premiership using an
542 imported satellite decoder card. *Eur Law Report* 2:38–46
- 543 Confederation of the British Industry (2006) *The need for an EU competition Court*, 15 June
544 2006. <http://www.cbi.org.uk>
- 545 Coutron L (2009) *Style des arrêts de la Cour de justice et normativité de la jurisprudence*
546 *communautaire*. *Revue Trimestrielle de Droit européen* 45(4):643–676
- 547 Craig P, De Burca G (2011) *The evolution of EU law*, 2nd edn. Oxford University Press, Oxford,
548 p 733
- 549 Drexel J, Kerber W, Podszun R (2011) *Competition policy and the economic approach,*
550 *foundations and limitations*. Edward Elgar Publishing, Northampton
- 551 Geradin D, Petit N (2012) *Judicial review in European Union competition law: a quantitative and*
552 *qualitative assessment*. In: Merola M, Derenne J (eds) *The role of the Court of Justice of the*
553 *European Union in competition law cases*. GCLC annual conference series, Bruylant,
554 Brussels, p 21

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

- 555 Geradin D, Layne-Farrar A, Petit N (2012) EU competition law and economics. Oxford
556 University Press, Oxford
- 557 Gerard D (2012) The effects-based approach under Article 101 TFEU and its paradoxes:
558 modernisation at war with itself? In: Bourgeois J, Waelbroeck D (eds) Ten years of the effects
559 based-approach in EU competition law. Proceedings of the 2011 annual conference of the
560 GCLC, Bruylant, Brussels
- 561 Gerber D (1994) The transformation of European Community competition law? *Harv Int Law J*
562 35:127
- 563 Gerber D (2010) Anthropology, history and the “more economic approach” in European
564 competition law—a review essay. *Int Rev Intellect Prop Compet Law* 41:441
- 565 Goyder DG (2003) EC competition law, 4th edn. Oxford University Press, Oxford
- 566 Krattenmaker T, Lande R, Salop S (1987) Monopoly power and market power in antitrust law.
567 *Georgetown Law J* 76:241
- 568 Leskinen C (2010) An evaluation of the rights of defense during antitrust inspections in the light
569 of the case-law of the ECtHR: would the accession of the European Union to the ECHR bring
570 about a significant change? Working paper IE Law School 10-04, 29 April 2010
- 571 Merola M, Derenne J (eds) (2012) The role of the Court of Justice of the European Union in
572 competition law cases, GCLC annual conference series, 2, Bruylant, Brussels
- 573 Merola M, Waelbroeck D (eds) (2010) Towards an optimal enforcement of competition rules in
574 Europe. Time for a review of regulation 1/2003? GCLC annual conference series, 1, Bruylant,
575 Brussels
- 576 Monnet J (1998) *Mémoires*. Fayard, Paris
- 577 Motta M (2004) Competition policy—theory and practice. Cambridge University Press,
578 Cambridge, p 448
- 579 Neven D (2009) Whether and how to evaluate effects. Speech at Crai conference, Brussels, 9 Dec
580 2009. http://ec.europa.eu/dgs/competition/economist/crai_122009.pdf (and/or a high magnitude)
- 581 Nihoul P, Rodford P (2004) EC electronic communications law. Oxford University Press, Oxford
- 582 O’Donoghue R, Padilla J (2006) The law and economics of Article 82 EC. Hart Publishing,
583 Oxford
- 584 Odudu O (2006) The boundaries of EC competition law: the scope of article 81. Oxford
585 University Press, Oxford
- 586 Ortiz Blanco L (2012) Market power in EU antitrust law. Hart Publishing, Oxford
- 587 Ortiz Blanco L, Ibanez Colomo P (2011) Evolving priorities and rising standards: Spanish law on
588 abuses of market power in the light of the 2008 Guidance Paper on Article 82 EC. In: Pace LF
589 (ed) European competition law: the impact of the commission’s guidance on Article 102,
590 Edward Elgar, Cheltenham, pp 72–73
- 591 Ortiz Blanco L, Lamadrid De Pablo A (2011) EU competition law enforcement elements for a
592 discussion on effectiveness and uniformity. Fordham 38th conference on international
593 antitrust law and policy, Sept 2011, mimeo
- 594 Ortiz Blanco L, Lamadrid De Pablo A (2012) Expert economic evidence and effects-based
595 assessments in competition law cases. In: Merola M, Derenne J (eds) The role of the court of
596 justice of the European Union in competition law cases, GCLC annual conference series, 2,
597 Bruylant, Brussels, p 308
- 598 Papadias L (2004) Some thoughts on collective dominance from a lawyer’s perspective. In:
599 Buigues P, Rey P (eds) The economics of antitrust and regulation in telecommunications.
600 Edward Elgar, Cheltenham, p 120
- 601 Petit N (2008) Oligopoles, collusion tacite et droit communautaire de la concurrence. Bruylant,
602 Paris
- 603 Prieto C (2006) Pouvoir de marché et liberté des entreprises: les fondements de la politique de
604 concurrence. Dalloz, Paris, p 1603
- 605 Rousseva E (2006) The concept of ‘objective justification’ of an abuse of a dominant position:
606 can it help to modernise the analysis under Article 82 EC? *Compet Law Rev* 2(2):32

AQ2

AQ3

- 607 Schwarze J (2009) Speaking at the workshop “*Accès à la justice*” at the celebration of 20 years
608 of the Court of First Instances of the European Communities, 2009. [http://curia.europa.eu/](http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-10/schwarze.pdf)
609 [jcms/upload/docs/application/pdf/2009-10/schwarze.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-10/schwarze.pdf)
- 610 Stucke M (2011) Reconsidering competition. *Miss Law J* 81:107
- 611 Stucke M (2012) What is competition? In: Zimmer D (ed) *The goals of competition law*. Edward
612 Elgar, Cheltenham, pp 27–52
- 613 Temple Lang J (2011) Three possibilities for reform of the procedure of the European
614 Commission in competition cases under Regulation 1/2003. In: Baudenbacher C (ed) *Current*
615 *developments in European and international competition law*, 17th St Gallen international
616 competition law forum. Helbing lichtenhahn verlag, Basel, pp 219–256
- 617 Townley C (2009) *Article 81 EC and Public Policy*. Hart Publishing, Oxford
- 618 Van Den Bergh R, Camesasca P (2006) *European competition law and economics. A comparative*
619 *perspective*. Sweet & Maxwell, London, pp 105–150
- 620 Vesterdorf B (2005) Judicial review and competition law—reflections on the role of the
community courts in the EC system of competition law enforcement. *Compet Policy Int* 1(2)
-  623 Waelbroeck D, Fosselard D (1994) Should the decision-making power in EC antitrust procedures
624 be left to an independent judge?—the impact of the European convention on human rights on
625 EC antitrust procedures. *Yearb Eur Law* 14:111–142
- 626 Werner P, Völk C (2011) A game of two cases—the Greek decoders litigation has got a lot of
people worried. *Compet Law Insight* 10(4):18–20
- 627 Zivy F, Luc I (2010) *L'équité procédurale devant l'Autorité de la concurrence*. *Concurrences*
628 4:85–100

Author Queries

Chapter No.: 22

Query Refs.	Details Required	Author's Response
AQ1	Please check and complete your affiliation (which must consist of organization, city, country, and e-mail). Due to technical reasons, an e-mail is mandatory. Please be aware that this e-mail address will be printed in the book and will be shown in the metadata of the online publication. You might want to provide your official institutional address here instead of the corresponding e-mail address we used for the proof procedure.	
AQ2	Please provide a page range for Gerard (2012) and Vesterdorf (2005).	
AQ3	Please check year for Monnet may be 19...	

MARKED PROOF

Please correct and return this set

Please use the proof correction marks shown below for all alterations and corrections. If you wish to return your proof by fax you should ensure that all amendments are written clearly in dark ink and are made well within the page margins.

<i>Instruction to printer</i>	<i>Textual mark</i>	<i>Marginal mark</i>
Leave unchanged	... under matter to remain	Ⓟ
Insert in text the matter indicated in the margin	∧	New matter followed by ∧ or ∧ [Ⓢ]
Delete	/ through single character, rule or underline or ┌───┐ through all characters to be deleted	Ⓞ or Ⓞ [Ⓢ]
Substitute character or substitute part of one or more word(s)	/ through letter or ┌───┐ through characters	new character / or new characters /
Change to italics	— under matter to be changed	↙
Change to capitals	≡ under matter to be changed	≡
Change to small capitals	≡ under matter to be changed	≡
Change to bold type	~ under matter to be changed	~
Change to bold italic	≈ under matter to be changed	≈
Change to lower case	Encircle matter to be changed	≡
Change italic to upright type	(As above)	⊕
Change bold to non-bold type	(As above)	⊖
Insert 'superior' character	/ through character or ∧ where required	Υ or Υ under character e.g. Υ or Υ
Insert 'inferior' character	(As above)	∧ over character e.g. ∧
Insert full stop	(As above)	⊙
Insert comma	(As above)	,
Insert single quotation marks	(As above)	ʹ or ʸ and/or ʹ or ʸ
Insert double quotation marks	(As above)	“ or ” and/or ” or ”
Insert hyphen	(As above)	⊢
Start new paragraph	┌	┌
No new paragraph	┐	┐
Transpose	┌┐	┌┐
Close up	linking ○ characters	○
Insert or substitute space between characters or words	/ through character or ∧ where required	Υ
Reduce space between characters or words		↑