

# Discretionarists vs legalists in competition law

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# Summary

- **The debate about the objectives of competition law (and its limits)**
- Discretionary vs legalists
- Does economic analysis lead to discretion or legalism?
- Is formalism the way to legalism?
- Where does the case law stand in the EU?
- Conclusions: what about current debates?

# The debate about objectives (and its limits)

- The debate about the 'soul' of competition law is often framed around its objectives
  - According to this view, disagreements depend on the objective of competition law that is endorsed
  - Similarly, the outcome of individual cases would depend on whether competition law is deemed to be about consumer welfare, or something else
- This question has become relevant in recent years, as some commentators wish to depart from the consumer welfare standard

# The debate about objectives (and its limits)

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# The debate about objectives (and its limits)



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## Fairness and competition

Fairness and competition

*GCLC Annual Conference, Brussels, 25 January 2018*

# The debate about objectives (and its limits)



Source: Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy'

# The debate about objectives (and its limits)

- One can think of many reasons why the debate tends to focus on objectives:
  - It is **easier**: abstract discussions about consumer welfare and/or the competitive process avoid the practical intricacies of many cases
  - It is a powerful **rhetorical device** to dismiss rival views ('you protect competitors'; 'you are a Chicago boy')
  - It reflects the influence of **economic analysis**: for many economists, defining the goal of a regime comes across as the most obvious step

# The debate about objectives (and its limits)

- Crucially, it is important to understand the (many) limits of a focus on objectives
- Because it is easier, it does not provide a meaningful answer to the real, concrete problems that arise in practice:
  - A particular legal test does not derive logically and inevitably from a particular objective
  - The issue of objectives is only relevant, if at all, in a very limited range of cases (for instance, cases relating to market integration in the EU)
  - The legal controversies of recent years have little to do with the objectives of competition law

# The debate about objectives (and its limits)

- My point tonight is a different one: debates about the objectives of competition law are, in reality, debates about something else
- These debates reflect a fundamental divide in the approach to the application of competition policy:
  - A **discretionalist** view, whereby courts and authorities should enjoy discretion to reach the desired outcomes
  - A **legalist** view, whereby courts and authorities should be subject to effective constraints

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# Discretionarists vs legalists

- **Discretionarists** are essentially concerned about the ability of authorities (and courts) to reach the desired outcome in a given case
  - Accordingly, authorities (and courts) should be entitled to account for all considerations that may assist in the adoption of the correct decision
  - For the same reasons, under-enforcement is deemed more problematic than over-enforcement
  - Likewise, judicial review should be limited so as to ensure that authorities are as unconstrained as possible to advance policy

# Discretionarists vs legalists

- For **legalists**, on the other hand, it is essential to ensure that enforcement remains consistent and predictable:
  - Under this approach, occasional under-enforcement is an inevitable price to pay to preserve the consistency and predictability of the system
  - It is important that administrative action is subject to effective constraints:
    - *Endogenous constraints* that come from the case law
    - *Exogenous constraints* that would logically derive from economic analysis
  - For the same reasons, full judicial review on all issues of law and fact is indispensable in the system

# Discretionarists vs legalists

## **Refusal to license intellectual property rights: a case study**

According to a discretionarist approach, a refusal to license intellectual property rights would be abusive when it is deemed to go against the public interest, or when it is deemed capable of harming follow-on innovation.

The *Magill* judgment, on the other hand, provides a good example of a legalist approach to the question. An administrative authority would need to show that the input is indispensable, that it prevents the emergence of a new product and that it leads to the elimination of all competition.

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# Discretionism, legalism and economics

- Economic analysis is often considered to open the door to discretionism
  - The majority of potentially problematic practices have ambivalent effects on competition and thus require a case-by-case analysis
  - As a result, economic analysis often advocates the elimination of bright-line rules applying to certain practices (e.g. RPM, exclusivity agreements)
  - Economists tend to address the question of the impact of practices by asking whether it will be welfare-enhancing or welfare-decreasing

# Discretionarism, legalism and economics

- At the same time, economic analysis can contribute decisively to a legalist approach to enforcement:
  - Economic analysis is useful to ensure consistency (make sure that like practices are treated alike)
  - It may also be useful to craft legal tests that are operational and that can be anticipated by stakeholders
  - Many (if not most) economists acknowledge that full-blown welfare balancing is impracticable, and probably undesirable
    - As a result, under-enforcement and over-enforcement cannot be avoided
    - By the same token, it is necessary to resort to proxies

# Discretionarism, legalism and economics

## **Legalist economic analysis: predatory pricing as a case study**

The *AKZO* case provides a valuable example showing how economic analysis can be relied upon to provide effective constraints on the administrative authority. In its *AKZO* decision, the Commission had crafted a holistic/discretionalist approach to predatory pricing: below-cost selling would not be necessary in every case.

The Court instead, introduced a clear and operational set of rules: selling below average variable cost is *prima facie* abusive, where as above-cost sales are deemed lawful (confirm in the *Post Danmark* saga).

# Discretionarism, legalism and economics

**Substance  
legalists**



**Welfare  
discretionarists**

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# Is formalism the way to legalism?

- Formalism refers to approaches to enforcement in which:
  - The legality of a practice depends on its form, and not its nature and/or effects
  - These approaches tend to be sceptical of economic analysis
  - Typically, a formalist approach relies upon bright-lines: practices are either prima facie prohibited or allowed
- As a result, formalism tends to be praised for their ability to ensure the consistency and predictability of the system
  - Firms would clearly know where they stand, and how to avoid liability
  - It would always be possible for firms to advance a justification for behaviour that is prima facie prohibited

# Is formalism the way to legalism?

- It would be mistaken to assume that formalism guarantees a legalist approach to enforcement
  - By focusing on form, as opposed to the nature and operation of practices, formalism may lead to inconsistent enforcement
  - In the same vein, reality tends to be much messier than the rigid categories upon which a formalist approach rests
  - If a formalist approach introduces a low threshold for liability, it becomes a powerful tool for discretionary policy-making

# Is formalism the way to legalism?

## **Formalism, inconsistency and discretion: rebates as a case study**

In *Hoffmann-La Roche*, the Court ruled that loyalty rebates are prima facie abusive and quantity rebates lawful. Superficially, this divide looks favourable to predictable enforcement. Reality proved to be much more complex. Many practices are somewhere between the two ideal types upon which the ruling is based. The grey area made the law difficult to predict (*Michelin I*, *Michelin II*, *British Airways*) and gave, in practice, wide discretion to the Commission.

To make matters worse, rebates are essentially identical in their nature, purpose and effects. As a result, it seemed difficult to justify the different treatment.

# Is formalism the way to legalism?

## **Formalism, inconsistency and discretion: block exemptions as a case study**

Traditionally, the Commission favoured a very wide interpretation of Article 101(1) TFEU. Under this approach, virtually all agreements restricting a firm's freedom of action were deemed restrictive of competition. As a result, the legality of practices was examined under Article 101(3) TFEU, the application of which was then subject to limited review (*Consten-Grundig*).

In this context, its formalist approach gave the Commission wide discretion to formulate policy in the context of Article 101 TFEU. The Commission could decide, in its individual decisions and block exemption regulations, the conditions under which certain practices were allowed.

# Is formalism the way to legalism?

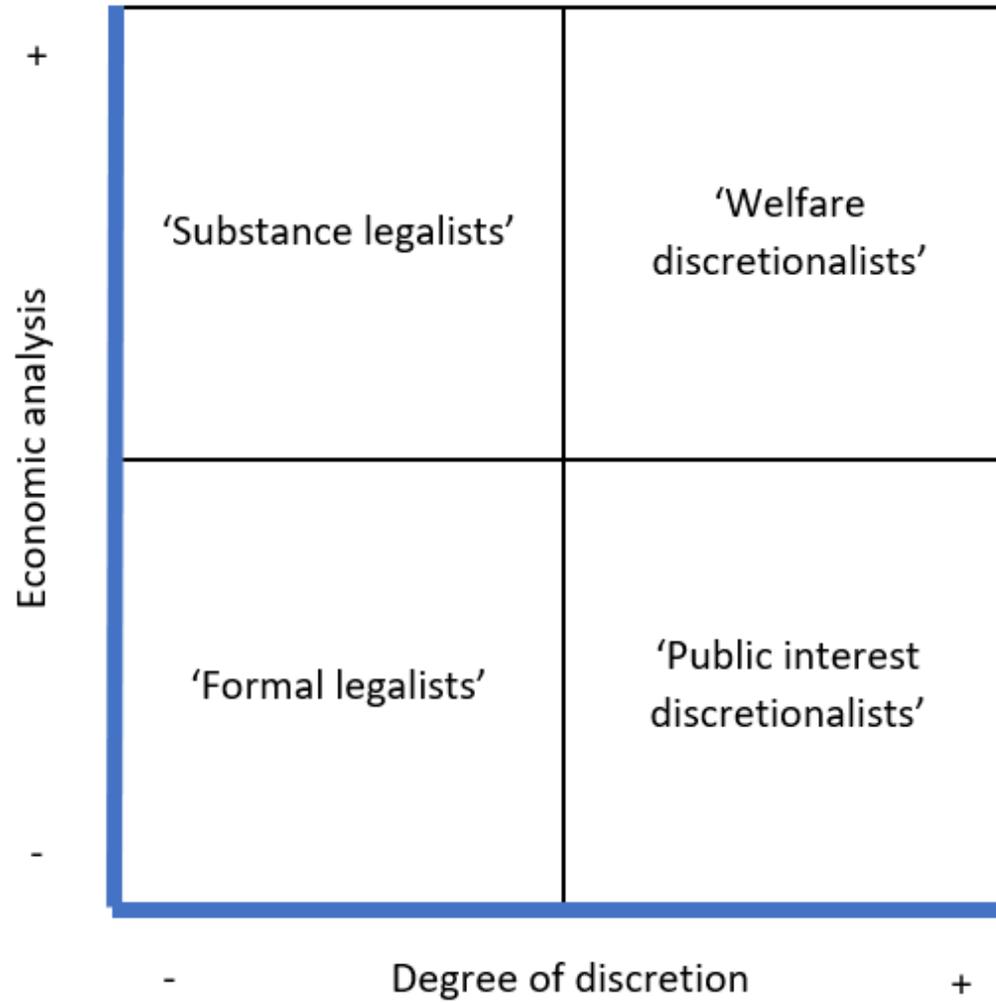


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# Where does the case law stand in the EU?

- The above suggests that there are four broad approaches to the enforcement of competition law
  - Two legalist approaches: one is sceptical of economic analysis ('formal legalism') and the other one embraces it ('substance legalism')
  - Two discretionaryist approaches: one is grounded on economic analysis ('welfare discretionaryism'), one is not ('public interest discretionaryism')



# Where does the case law stand in the EU?

- Is it possible to say that the Court of Justice is closer to one approach or the other?
- One may examine the question in light of several sub-issues:
  - Whether the Court favours substance over form
  - The concern with consistency
  - The role of economic analysis
  - The scope and extent of judicial review
- There are grounds to believe that the case law and the system established in the TFEU favour a substance legalist approach

# Where does the case law stand in the EU?

- Traditionally, the Court has favoured substance over form: liability cannot be established on the basis of form alone
  - This is particularly apparent in the context of Article 101(1) TFEU
    - The legal status of an agreement requires an analysis of its nature and wording in the economic and legal context of which it is a part
    - Accordingly, even prima facie restrictions by object can fall outside the scope of Article 101(1) TFEU in certain circumstances (*Coditel II*, *Murphy*, *E.On Ruhrgas*)
  - Recent developments suggest that the same is true in the context of Article 102 TFEU
    - The legal status of a practice cannot be examined in hypothetical terms (*Post Danmark II*)
    - The economic and legal context may play a role (*Intel*)

# Where does the case law stand in the EU?

- It would seem that the Court is increasingly concerned with consistency in the case law. The trend is manifested in two ways:
  - First, through the introduction of broad principles guiding enforcement across the board
  - Second, through the incremental refinement of doctrines so as to do away with seeming contradictions

# Where does the case law stand in the EU?

## **Consistency in legal doctrines: the road to *Post Danmark I***

The status of selective price-cutting (and predatory pricing) remained unclear for a long time. After *AKZO*, the EU courts suggested that selective price-cutting could be abusive even when it remains above cost (*Irish Sugar*, *Compagnie Maritime Belge*).

This confusion lasted until 2012, when the Court addressed (in *Post Danmark I*) the tension in the case law by stating that selective price cuts are to be assessed in light of the principles laid down in *AKZO*.

# Where does the case law stand in the EU?

## **Unifying legal principles: competition is about equally efficient rivals**

Following *AKZO* and *Post Danmark I*, it was clear that predatory pricing and related practices are only abusive when they are capable of excluding equally efficient competitors.

However, the extent of this principle was not clear. Arguably, it did not apply to exclusivity and rebates, which (some claimed) are not exactly about prices. However, it is clear from *Intel* and *Post Danmark II* that, as a matter of principle, Article 102 TFEU is only concerned with the exclusion of equally efficient rivals.

# Where does the case law stand in the EU?

- The case law suggests that the Commission cannot ignore the lessons of economic analysis
  - Where the Court acknowledges the economic consensus, it does not dispute it; it accepts it as a given
  - If the Commission ignores the consensus among economists, its decision will be annulled
  - It would seem that the Court acknowledges that effective judicial review cannot be exercised if the Commission ignores consensus positions
  - When past case law ignored the consensus, change may be slower, *eppur si muove* (see *Intel*)

# Where does the case law stand in the EU?

## **Economic consensus and judicial review: *Airtours* as a case study**

In *Airtours*, the Commission defined collective dominance in a way that ignored the economic concept of tacit collusion. By ignoring the consensus, the Commission interpreted the substantive legal test in a way that gave it discretion to take action in any merger taking place in an oligopolistic market. The CFI presented the notion of tacit collusion as the framework around which the law should be interpreted.

# Where does the case law stand in the EU?

## **Economic consensus and judicial review: *Cartes Bancaires* as a case study**

In *Cartes Bancaires*, the Court departed from the approach favoured by the Commission. The consequences of the two-sided nature of the market played a key role in this regard. The Court engaged with the theory of two-sided markets as a given that it did not question.

Taking this economic insight into account, the Court concluded that the Commission (and the GC) had failed to acknowledge that the contested clauses were a plausible means to attain a pro-competitive objective (and thus not an object infringement).

# Where does the case law stand in the EU?

- Finally, the system established by virtue of the TFEU does not leave any doubt as to the extent and scope of judicial review
  - The Commission does not enjoy any discretion regarding the interpretation of EU competition law provisions
  - The (negative) consequences of leaving the Commission a margin of discretion are well known
  - The question, however, is whether full judicial review is effectively exercised in practice, not whether the Commission enjoys deference

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# Conclusions: what about current debates?

- The above provides a useful framework to make sense of current debates
- Pleas against consumer welfare and/or in favour of a wider public interest test are essentially pleas in favour of discretion
  - Mainstream economics is an effective constraint that introduces discipline and rigour in enforcement
  - A wider public interest test that accounts for several goals or considerations renders judicial review much more difficult and/or much less effective

# Conclusions: what about current debates?

- EU competition law is currently at a crossroads between the legalist and the discretionalist paths
  - On the one hand, crucial steps had been taken in recent years towards substance legalism:
    - The value of economic analysis to ensure consistency and predictability had been widely acknowledged
    - The importance of effective judicial review permeates most debates in the field
  - On the other hand, discretionalist instincts seem to have gained a new lease of life