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EU Competition Law as Responsive Law

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Abstract

This article proposes two broad ways to conceptualise EU competition law. EU competition law could be viewed as 'autonomous law' ('AL'), namely as a closed normative system a technocratic tool consisting in a set of rules that prohibit undue restraints of trade. Or, EU competition law could be viewed as 'responsive law' ('RL'), namely as a relatively open normative system and an interpretive practice that oscillates between openness and integrity. The responsiveness approach offers a compelling conceptualisation as it explains certain endogenous features of EU competition law: its fuzzy mandate, conceptually elastic vocabulary, and use of rules and standards. In addition, the responsiveness approach can clarify the role economics plays in EU competition law. It views economics as an 'ideological science', which, even though it cannot insulate this legal field from value disagreements and make it 'autonomous', it can provide a source for positive and normative interpretive statements. On this basis the responsiveness approach maintains that EU competition law is by design open—ie conceptually elastic and factually sensitive—and that its openness can enhance, but also undermine its integrity—ie its capacity to realise its objective in a rule of law compatible manner. These conflicts between openness and integrity are the cause of EU competition law's relative indeterminacy. To deal with the problem of indeterminacy, the RL approach proposes a tripartite legal-institutional modus operandi consisting in constructive interpretation, responsive enforcement, and catalytic adjudication. Hence, considering EU competition law as a form of responsive law has three major implications: first, it offers a new way for understanding how this legal field works and changes; second, it suggests a strategy for dealing with EU competition law's indeterminacy, and third it proposes a new framing for the discursive practices of EU competition law's epistemic community.

Keywords: EU competition law, Indeterminacy, Legal Theory, Law & Economics, Interpretation, Enforcement, Regulatory Theory, Judicial Review

INTRODUCTION

It would not raise any eyebrows to notice that the members of the competition law community, be they scholars, practitioners, enforcers, or judges, on both sides of the Atlantic, still disagree about the normative and conceptual foundations of

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competition law; its purpose, function, and proper implementation.[1] Such disagreements suggest that this legal field is relatively indeterminate, namely that the legal provisions and courts' authoritative interpretations cannot fully guide (or determine) its future interpretations and applications. Such indeterminacy may derive from competition law's semantic ambiguity or vagueness, but it could also be the by-product of in-built normative uncertainty and complexity.[2] One way to view competition law's indeterminacy is as lack of expert legal or economic knowledge: the law is uncertain on a specific matter because the case law has not been sufficiently developed or because a conclusive economic study of the welfare implications of a particular practice is missing. From this perspective, law's indeterminacy is a 'necessary evil' that ought to be eliminated. Alternatively, indeterminacy could be perceived as the by-product of the fact that competition is a multifaceted ideal, and as a result, value judgments are inevitable in competition law cases.[3] In this case, the law is bound to remain uncertain or vague, to a certain extent, because value disagreements cannot be settled once and for all.

These two takes on the issue of indeterminacy can motivate two broad ways to conceptualise EU competition law.[4] Viewing law's indeterminacy as a lack of legal or economic technocracy relies on the premise that EU competition law is a form of 'autonomous law' ('AL'), namely a closed normative system, a set of rules that simply prohibits undue restraints of trade and is insulated from value disagreements.[5] From this angle, indeterminacy is a shortcoming that ought to and will eventually be eliminated through legal and economic technocracy without having recourse to any type of moral reasoning or value choices. Hence, from an AL perspective, EU competition law is single-valued and insulated from value conflicts, and indeterminacy derives from the provisional failure of legal institutions to use legal hermeneutics

[1] In previous work I identified this phenomenon as 'reasonable disagreements', namely as disagreements among rational, well-informed, and benevolent interlocutors about the content of competition norms, the direction of competition policy, or the appropriate remedial response. I identified three types of reasonable disagreements and explained their analytical structure. S Makris, 'Openness and Integrity in Antitrust' (2020) 17(1) *Journal of Competition Law & Economics* 1, pp 6–23.

[2] A Marmor, *Philosophy of Law* (Princeton University Press, 2014), p 145 ('The law requires interpretation when its content is indeterminate in a particular case of its application. There are three main sources of indeterminacy in the law: conflict between different legal norms that apply, semantic indeterminacy, and some pragmatic features of communication'). However, according to Dworkin what generates law's indeterminacy is that it is a 'branch of morality', it incorporates values and thereby necessarily leads to value conflicts. See R Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011), pp 154, 255, 407.

[3] R H Allensworth, 'The Commensurability Myth in Antitrust' (2016) 69 *Vanderbilt Law Review* 1, pp 16–44 (showing that value judgments are unavoidable in US antitrust).

[4] With the term 'EU competition law', I refer to the EU's rules on competition ensuing from Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU'), the body of relevant Regulations and Directives, the European Commission's ('Commission') institutional practices and of course to the case law the Court of Justice of the European Union ('CJEU'). For some basic material, see https://eur-lex.europa.eu/summary/chapter/0801.html.

[5] P Nonet and P Selznick, *Law and Society in Transition: Towards Responsive Law* (Harper and Row, 1978), pp 53–55.

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and input from positive economics sufficiently well so as to settle every uncertainty in the law.

However, competition law's indeterminacy could be understood as the result of value disagreements, namely as the by-product of different interpretive attitudes towards the notion of competition and the values, purposes, interests, and principles encapsulated in competition rules.[6] In this case, EU competition law could be conceptualised as a 'responsive law' ('RL'), namely as a relatively open normative system and an adaptive interpretive practice that oscillates between openness and integrity. Openness means normative flexibility, conceptual elasticity, and factual sensitivity, while integrity refers to principled, value-laden consistency and mission-realisation and demands that legal institutions realise law's principal purpose in a rule of law compatible manner.[7] If EU competition law is inherently open to value disagreements and not insulated or autonomous from them, it would inevitably give rise to interpretive struggles, namely to attempts to concretise its relatively indeterminate principal objective (ie the protection of market competition), and make it, provisionally, fully determinate.[8]

Such interpretive struggles may allow for readjustments and recalibrations and enable the law to adapt to new knowledge and different market contexts, as well as to accommodate different values.[9] Nonetheless, such interpretive struggles can also blur the boundaries of the law and undermine its integrity. Excessive openness, thus, can destabilise the rule of law or incite EU competition law's instrumentalisation, and thereby diminish its integrity. Yet, integrity—ie rule of law-compliant mission-realisation—requires EU competition law to be and remain open so as to

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[6] R Dworkin, *Law's Empire* (Harvard University Press, 1986), pp 45–48, 52–53 (arguing that what triggers theoretical disagreements about the grounds of law (ie indeterminacy) is the fact that law invites a certain 'interpretive attitude' according to which its users consider that it has a certain value, serves a certain interest or purpose or enforces some principle).

[7] According to Dworkin integrity includes the basic rule-of-law principles such as clarity, certainty, and coherence, but also the core substantive value of the specific legal field it refers to. Ibid, pp 4–11, 31–44. See also R Dworkin, *A Matter of Principle* (Harvard University Press, 1985), p 11 (distinguishing between the 'rule-book' and the 'rights' conception of the rule of law. The former considers substantive justice as an independent ideal and not a part of the rule of law, whereas the latter requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights); Nonet and Selznick, note 5 above, pp 76–77 (noting that 'Integrity is protected when an institution is strongly committed to a distinctive mission. … Openness on the other hand, presumes wide grants of discretion, so that official conduct may remain flexible, adaptive and self-corrective. … A responsive institution retains a grasp on what is essential to its integrity while taking account of new forces in its environment. To do so it builds upon the ways integrity and openness sustain each other even as they conflict. … Only when an institution is truly purposive can there be a combination of integrity').

[8] See for instance, *T-Mobile Netherlands BV et al v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C-8/08, ECLI:EU:C:2009:343, para 38 (stating the competition rules laid down in the Treaty 'aim to protect not only the interests of competitors or of consumers, but also the structure of the market and, in doing so, competition as such').

[9] For an interesting analysis of competition law's in-built flexibility, see A Ezrachi, 'Sponge' (2017) 5(1) *Journal of Antitrust Enforcement* 49, and S P Sullivan, 'Antitrust Amorphisms' (2019) *Antitrust Chronicles* 37.

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respond to new challenges and realise its open-ended goal. In other words, integrity demands a certain degree of openness, but excessive openness can undercut law's integrity. It is, thus, this interplay between openness and integrity what triggers EU competition law's indeterminacy. From an RL point of view, therefore, EU competition law's indeterminacy is Janus-faced: it creates uncertainty and unpredictability, but it also makes the law flexible and adaptive.

If EU competition law is viewed as RL, it becomes apparent that its indeterminacy is in-built, it manifests itself in cases that involve value disagreements[10] and derives from the dynamic struggle between its openness and its integrity.[11] Nevertheless, this indeterminacy is 'relative'. EU competition has boundaries, is not amorphous and not everything is 'up for grabs'. The principal goal of the law, the various interpretive struggles and institutional practices that take place within its contours, and the rule of law set its boundaries and create its code of integrity. It is especially these interpretive struggles and institutional practices that make EU competition law a coherent field of law—to the extent that it is—and not pure legal reasoning coupled with positive economics and a monothematic focus on consumer or total welfare or some other single value, as the AL model advocates.

Considering, nonetheless, EU competition law as a form of RL, does not mean that it is always fully responsive. Its openness gives it the *ability* to be responsive. Whether it is really responsive depends on whether it actually manages to tame conflicts between its two endogenous, complementary, and antithetical forces (ie openness and integrity). Responsiveness, thus, is not a static state of affairs, but an adaptation process, a dynamic equilibrium between openness and integrity.[12] Such equilibria cannot be found under the AL model, since, under this framework, even though competition law can adapt to factual changes, it needs to remain insulated from value conflicts to retain its character as 'law' and not become 'policy'. In other words the AL approach rejects the thesis that EU competition law can be a relatively open normative system and a purposive interpretive practice. As a result, AL is bound to ignore the dynamic interplay between openness and integrity. On the contrary, the RL approach accepts and welcomes EU competition law's openness, and proposes a modus operandi for calibrating it with its integrity. Three are the hallmarks of this modus operandi: (1) constructive interpretation;[13] (2) responsive

[10] Indicatively, *Wouters and Others*, C-309/99 [2002] ECR I-1577; *Conseil National de l'Ordre national des pharmaciens v Commission*, T-23/09 [2013] EU:T:2014:1049; *Meca-Medina v Commission,* C-519/04 P [2006] EU:C:2006:492; *Ordem dos Tecnicos Oficiais de Contas (OTOC) v Autoridade da Concorrencia* C-1/12 [2013] EU:C:2013:127.

[11] Nonet and Selznick, note 5 above, pp 73–78.

[12] The term 'dynamic equilibria' here is used loosely and not in its technical sense to convey the idea that competition law does not live in a world of order, stasis and knowableness, as the AL claims, but in a world of self-reflection, exploration, and re-adjustment. Yet despite its fluidity and continuous evolution, it manages to be a relatively stable and effective legal system. See W B Arthur, *Complexity and the Economy* (Oxford University Press, 2015), pp 2–4.

[13] Dworkin, note 6 above, pp 1–44, 51–53.

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enforcement;[14] and (3) catalytic adjudication.[15] The aim of this modus operandi is to tame EU competition law's openness so as to enable it to effectively materialise its purpose in a rule of law compliant manner.

Casting EU competition law as a form of RL has three main implications. First, the RL framework can function as a descriptive device allowing us to properly grasp certain key features of EU competition law; specifically its fuzzy mandate, conceptually elastic vocabulary, rules and standard mode of analysis, and use of economics. In this regard, the RL approach could offer a more accurate picture of how EU competition law functions and changes, and provide a diagnosis of a persistent phenomenon: its relative indeterminacy. Second, the RL framework, by considering EU competition law's indeterminacy as the by-product of value conflicts triggered by openness and integrity, puts forward a distinct modus operandi. European legal institutions might be better equipped to deal with EU competition law's indeterminacy by utilising this modus operandi instead of the AL modus operandi. Third, the competition law community could use the RL approach to reframe its discursive practises, and better understand the underlying reasons of disagreement in certain heated debates. By doing so, the various interlocutors might become more able to discern the underlying reasons of their agreements and disagreements and perhaps reach consensus positions.

Part I sets up the two different ways to conceptualise EU competition law. Part II explains why the RL model captures better than the AL model certain essential features of EU competition law suggesting, thereby, that this field of law could be better conceptualised as a form of RL. Part III shows how the European enforcers and adjudicators could improve law's interpretation and enforcement by using the RL modus operandi, while Part IV highlights how the members of the competition law epistemic community could use the RL model to reframe certain debates and identify the reasons behind their agreements and disagreements.

I. TWO POINTS OF VIEW

Given that the argument presented here draws on the work of Nonet and Selznick, some background information might help the reader to put things into perspective. Nonet and Selznick adopted a socio-legal, 'integrative' approach that sought to unite different legal theories and disciplinary fields, and came up with a typology of legal systems.[16] Their aim was to grasp the key features and functions of different forms of legal orderings in reference to their sociological, jurisprudential, and

[14] Responsive enforcement involves a flexible pyramid of escalating threats, tripartism, deliberative processes, and institutional cooperation. This regulatory theory was developed by Ayers and Braithwaite and falls within the lines of Nonet and Selznick's Responsive Law. I Ayres and J Braithwaite, *Responsive Regulation* (Oxford University Press, 1992), pp 3–18, 158–59.

[15] J Scott and S Sturm, 'Courts as Catalysts: Re-thinking the Judicial Role in New Governance' (2007) 13(3) *Columbia Journal of European Law* 1, p 2.

[16] Nonet and Selznick, note 5 above, pp 18–28. For a similar jurisprudential vision, see B Tamanaha, *Realistic Theory of Law* (Cambridge University Press, 2017) 1–11 (seeking to combine systematic

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institutional aspects. For this purpose they developed three ideal-types: repressive, autonomous, and responsive law.[17] These three models purport to shed light on the different aspects of the same legal reality and are not mutually exclusive. As a result, elements of autonomous and responsive law may coexist. Furthermore, the appearance, say, of responsive law elements does not require a paradigm shift or a radical break with an autonomous law legal ordering, and nothing guarantees that the transition from autonomous to responsive law (if it takes place) is full or irreversible. It should be noted from the outset that the reason I employ the AL/RL divide here is to capture certain patterns of thought, modes of reasoning, hidden assumptions and interpretive attitudes[18] of various participants in EU competition law as a *field*.[19] In other words, I use this divide to engage in a form of a 'conceptual sociology' of EU competition law from the 'internal point of view'.[20]

A. EU Competition Law as Autonomous Law

According to Nonet and Selznick, in an autonomous legal ordering fidelity to the law or upholding the rule of law is the backbone of the law in general, while law is perceived as a normatively fixed set of rules which enforcers have some discretion to apply and adjudicators need to elaborate, without transgressing their role as 'the mouthpieces of the law'.[21] Within this conceptual paradigm, law-making

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(F'note continued)
normative moral-political philosophy with analytical jurisprudence and a historical-sociological tradition of jurisprudential thinking).

[17] Nonet and Selznick, note 5 above, pp 29–52 (Noting that repressive law refers to a situation where the state has the monopoly of legitimate violence but is not constrained by the rule of law. Under this model, the main function of law is to legitimatise power and secure hierarchies of privilege and dependency. The model of repressive law is not relevant for the purposes of this study as it refers to legal orderings where rule of law does not exist. Furthermore the risk of responsive law turning repressive law is addressed through the instrumentalisation-related discussion.).

[18] The AL model is used to describe patterns of thought associated with certain forms of legal positivism, and the RL model to synthesise Raz's and Hart's positivisms and Dworkin's interpretivism. The reason behind this choice of terminology is that I do not intend here to participate in a jurisprudential debate of the form 'legal positivism: friends and foes' or develop a general legal theory about competition law, but to harness the intellectual fruits of different legal and socio-legal theories to the benefit of competition law scholarship. For the jurisprudential debate, see G Leslie and T Adams, 'Legal Positivism' (2003) *The Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/legal-positivism; N Stavropoulos, 'Interpretivism' (2014) *The Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/law-interpretivist.

[19] P Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805, pp 806, 817 (defining the field as an area of structured socially patterned activity or 'practice' organised around a body of internal protocols and assumptions, characteristic behaviours and self-sustaining values and noting that 'the juridical field is the site of a competition for monopoly of the right to determine the law').

[20] H L A Hart, *The Concept of Law* (Oxford University Press, 1961), pp v, 89–90.

[21] C Louis de Secondat, Baron de Montesquieu, *Complete Works, Vol. 2 The Spirit of Laws* [1748] (T. Evans, 1777), p 193.

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categorically differs from law-application,[22] and the existence of law is independent from its merits.[23] The rule of law defines the *raison d'être* of the legal system and every sub-system and sets their boundaries. Enforcers or policymakers are legitimate and unconstrained to make their decisions as long as they accept the supremacy of the law, while judges remain the supreme legal authority, as long as they do not enter the policy domain.[24] Otherwise, if, for instance, judges step into policymaking by going beyond their duty to state 'what the law is', they will lose their legitimacy and will be discredited as 'doing politics' or engaging in judicial activism.[25]

What flows from such a point of view is the aspiration to frame EU competition rules as a normatively closed set of rules or as a technocratic device[26] aimed at improving market performance, understood in terms of total or consumer welfare maximisation.[27] This point of view does not mean that competition law is not grounded on certain values, as nobody would deny that wherever competition law is adopted the society has made a decision favouring markets, as a mechanism for allocating resources, and competition, as an organisation principle of this distributive mechanism. The AL model, therefore, does not make maximalist claims about competition law's value neutrality. It merely advocates that once competition law is adopted, its interpretation and implementation *can* be insulated from value disagreements and rely exclusively on legal reasoning and input from positive economics.[28] Virtually every approach that casts competition law as a single-value technocratic enterprise goes hand in hand with a desire to insulate it from any possible value disagreements and reflects AL thinking.[29]

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[22] I Venzke, 'The Role of International Courts as Interpreters and Developers of Law: Working out the Jurisgenerative Practice of Interpretation' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 99 (convincingly arguing that this distinction is artificial).

[23] J Gardner, 'Legal Positivism: 5 ½ Myths' (2001) 46 *Journal of Jurisprudence* 199, p 202 (stating that the gist of legal positivism is the thesis that the validity of a norm depends only on its sources never on its merits).

[24] Nonet and Selznick, note 5 above, pp 39, 55–56.

[25] J T Lang, 'Has the European Court of Justice Been Involved in "Judicial Legislation"?' (2011) 96 *Svensk Juristtidning* 299; Dworkin, note 7 above, pp. 9–33 (considering this criticism misguided and arguing that judges do and should rest their judgments on controversial cases on arguments of political principle, but not on arguments of political policy).

[26] J Yan and S Sacher, 'Some Reactions to "Reactionary Antitrust"' (2020) *Concurrences Competition Law Review* 20, 24 (supporting the consumer welfare paradigm on the basis that it offers a 'scientific framework for analysis' and 'involves scientific reasoning'. However, these authors recognise that competition law is value-laden in the sense that 'there that there is no escaping ideology to the extent that ideology means there must be some predictable and reliable normative prescription for the objective').

[27] Daniel Crane, 'The Tempting of Antitrust: Robert Bork and the Goals of Antitrust' (2014) 79(3) *Antitrust Law Journal* 835, 853.

[28] Richard Posner, *Antitrust Law*, 2nd ed (University of Chicago Press, 2001), pp 11–17.

[29] Adi Ayal, *Fairness in Antitrust* (Hart Publishing, 2014), p vi (observing that 'the current focus in antitrust enforcement towards economically-oriented rules applied by technocratic administrative agencies avoids philosophical disputes regarding rights by focusing on scientific economic principles applied by supposedly value-neutral professionals').

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Consequently, for the proponents of the AL model, even though certain values lie at the foundations of EU competition law, its application can take place without recourse to any non-legal normative facts.[30] Such a line of thinking presupposes and puts forward a specific relationship between competition law and economics. Economics is considered as the realm where all uncertainties or ambiguities about competition law could be settled either by turning competition law into a branch of microeconomics (internalisation of economics) or by endowing economists with the power to decide competition law questions (externalisation of law).[31] When, for instance, certain scholars advocate in favour of the consumer welfare paradigm as 'the one and only disciplined and objective framework for courts and enforcers to assess a challenged conduct's likelihood to harm competition',[32] they also assume (or propose) that competition law is or can fully rely on economic technocracy. In this regard, the advocates of total or consumer welfare paradigms[33] fall within the AL framework because (or if) they perceive EU competition law as normatively closed system, as a 'monocentric'[34] legal field, the interpretation of which can be a non-evaluative exercise, guided solely by legal and economic technocracy.[35] Yet, as will be shown below, value neutrality is not an option in competition law.[36]

The AL thinking could also be traced to the view that enforcers' one and only task is to detect and punish violations that occurred in the past and apply the law in a 'crime-tort fashion'.[37] According to this view, enforcers are pure technocrats who

[30] AL does not negate that legal propositions are normative facts; it only states that non-legal normative facts are legally relevant. For the role of normative facts in determining legal validity, see Stavropoulos, note 18 above, pp 5–8. Normative facts could be legal and non-legal (eg moral rules, rules of games). See J Raz, *Practical Reason and Norms* [1975] (Oxford University Press, 1999), pp 107, 117–23 (discerning between different normative systems: systems of interlocking norms, systems of joint validity, autonomous systems and institutionalised systems).

[31] R Feldman, *The Role of Science in Law* (Oxford University Press, 2009), pp 13–14, 19–21, 41–48.

[32] J Wright, E Dorsey, J Rybnicek, and J and J Klick, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust* (George Mason Law & Economics, 2018), Research Paper 18, pp 55–57 (arguing that 'by realigning antitrust under a singular objective grounded in economics, the consumer welfare standard heralded the advent of the modern antitrust revolution that squarely rejects populist desires to balance multiple non-economic factors, in favour of a consistent and coherent framework focused on the straightforward, but elegant, question of whether a transaction or commercial arrangement makes consumers better off').

[33] R Bork, *The Antitrust Paradox* [1978] (Free Press, 1993), p 50.

[34] I Lianos, 'Polycentric Competition Law' (2018) 71(1) *Current Legal Problems* 169.

[35] D Crane, *Technocracy and Antitrust* (Cardozo Legal Studies, 2008), Research Paper 108, pp 1, 4–7 (defining technocracy as the 'insulation of a governmental function from popular political pressures and its administration by experts rather than generalists'; and as a school of thought which contends that the rationalisation of the economic order requires 'the objective and detached rule of industrial and scientific experts and problem solvers').

[36] Ayal, note 29 above, pp 19–36 (arguing on this basis that modern antitrust considers consumers rights as a moral imperative, efficient competition as a cradle of objective and value neutral criteria for state intervention, but ignores or downplays producers' rights).

[37] For a description of the crime-tort model, see D Crane, 'Antitrust Antifederalism' (2008) 96(1) *California Law Review* 1, p 32, and H First, 'Is Antitrust Law?' (1995) 10 *Antitrust* 9. The crime-tort

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either enforce the law or exercise discretion which is essentially 'non-law'. Furthermore, when they exercise discretion they should do so in a technocratic manner and refrain from making any value choices. Otherwise they would risk 'delusions of grandeur giving succour to the idea that they are somehow designers of the modern economy and not simply its policy force'.[38] They can use non-legal input to determine the content of the law, as long as this input remains value neutral, ie non-normative and scientific. For example, they could rely on consensus positions of positive economics to concretise a vague EU competition law provision, but they could not identify as anticompetitive a commercial practice that restricts competition and harms sustainability or privacy without having any adverse effects on consumer welfare. If they were to make such a finding they would 'politicise' competition law; they would engage in an impermissible value choice which would undermine the autonomous character of law.

This AL line of thinking leads also to the inference that when enforcers use their discretion in such a technocratic manner and respect the confines of the rule of law they should expect to remain unchecked. This is the case because adjudicators' task is either to elaborate the norms and ensure that enforcers exercise their discretion in a way compatible with the rule of law or to punish infringers and compensate the victims of competition law infringements. They should, thus, merely 'uphold the rule of law' by elaborating or discovering the content of the legal norms, but not make the rules.[39] They must also, at all costs, refrain from policymaking and rule-creation for they are not permitted to make any value choices, as this the task of the legislator. When they elaborate an unclear provision they should either use legal knowledge (eg case law) or non-normative extra-legal knowledge (eg expert opinions, econometric studies). In other words, when they determine 'what the law is' they should only employ the traditional methods of interpretation—ie legal technocracy—or objective, technocratic and scientific knowledge—ie economic technocracy.

This kind of AL reasoning lies behind the suggestion that that judges should adopt the consumer welfare standard in that any other standard or a 'hodgepodge of social

(F'note continued)

model considers enforcers as similar to policy force and private enforcement as the paradigmatic type of enforcing competition law. For an interesting analysis of EU competition law as a distinct strand of 'European tort law', see N Dunne, 'Antitrust and the Making of European Tort Law' (2015) 36(2) *Oxford Journal of Legal Studies* 366, pp 376–77. It should be noted, though, that this author does not deny that EU competition law follows a mixed public/private model.

[38] D Foster, 'Do Competition Lawyers Harm Welfare? – A Response to Richard Whish', https://www.linkedin.com/pulse/do-competition-lawyers-harm-welfare-response-richard-whish-foster (arguing that competition enforcers should merely 'police' competition law as police forces do with criminal law, otherwise they would dispose 'huge amounts of power and discretion', become 'open to abuse' and 'make social policy choices that involve judgment and need democratic legitimacy', which they do not dispose as 'unelected bodies').

[39] K Lenaerts, 'The Court's Outer and Inner Shelves: Exploring the External and Internal Legitimacy of the European Court of Justice' in M Adams et al (eds), *Judging Europe's Judges: the Legitimacy of the Case Law of The European Court of Justice* (Hart, 2013), pp 1–5; Nonet and Selznick, note 5 above, pp 60–65.

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goals' would necessarily require them to trade off some amount of consumer welfare for some other set of values, thereby opening the door to uncertainty and exploitative behaviour.[40] Hence, the view that courts are simply norm elaborators, namely that they merely receive input (eg evidence, arguments, or records on appeal) and produce output (eg judgments, sanctions for non-compliance, and damages to the victims of antitrust injuries) reflects AL thinking.[41] The same applies for the view that courts should only use legal and economic technocracy to deal with law's vagueness.

From such a point of view, law's indeterminacy is a shortcoming, and its cause is the lack of either sufficiently developed case law or adequate empirical economic research. For instance, an AL-minded proponent of the consumer welfare paradigm would argue that competition law's treatment of dual distribution agreements is currently ambiguous due to the lack of economic research on the impact of such agreements on consumer welfare. If and only if there is a sufficient number of economic studies demonstrating that such behaviour is likely to harm consumers, would competition law be warranted to intervene.[42] Therefore, indeterminacy is not triggered by the plurality of values that underlie the notion of competition and, subsequently, EU competition law, but from the absence of legal precedent in conjunction with a lack of neoclassical economic measuring of the effects of certain commercial practices on consumer or total welfare.

By understanding law's indeterminacy on those terms, the AL model arrives to a clear-cut modus operandi. When legal technocracy fails to fully determine the application of the law, it is the role of economic technocracy to provide mainstream economics positions so as to pin down law's vague concepts.[43] The traditional methods of interpretation (ie grammatical, historical, systematic, teleological interpretation) coupled with the potent input of positive economics are the only tools allowed in legal reasoning and the expectation is that these tools will lead to more precise, administrable, and clear legal pronouncements, and eventually bring EU competition law's indeterminacy to an end. In this setting, the enforcers' role is to apply the law in a crime-tort fashion and the adjudicators' task consists in elaborating the norms in formal adversarial proceedings (the AL modus operandi).

It is this conceptual canvass that makes EU competition law's indeterminacy appear as a detestable source of subjective value judgments and a cradle of arbitrary policymaking that should be eliminated.[44] For the AL thinkers competition law is primary 'law' as opposed to discretion or policy, and it is not 'made', but applied when the courts interpret the law in a technocratic essentially non-political manner.[45]

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[40] J D Wright and D H Ginsburg, 'The Goals of Antitrust: Welfare Trumps Choice' (2013) *Fordham Law Review* 2405, pp 2409–16.

[41] Scott and Sturm, note 15 above, p 3.

[42] Wright, et al, note 32 above, pp 48–50, 56.

[43] P Ibañez Colomo, *The Shaping of Competition Law* (Cambridge University Press, 2018), pp 41–44.

[44] R Bork, 'Legislative Intent and the Policy of the Sherman Act' (1966) 9 *Journal of Law and Economics* 7, p 9.

[45] Ibañez Colomo, note 43 above, pp 74–76 (recognising though that policy-related matters and substantive law matters are mutually intertwined).

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In parallel, competition policy could be assessed only *de lege ferenda*, exclusively on the basis of a single, objective, quasi-scientific value, such as total or consumer welfare, and should remain unfettered as long as it falls within the confines of the rule of law.

B. EU Competition Law as Responsive Law

An alternative way to perceive competition law is as 'responsive law', namely as a relatively open normative system and a purposive interpretive practice facing constant conflicts between openness and integrity.[46] EU competition law's integrity depends on how well legal institutions manage to realise law's core objective in a rule of law compatible way. However, this core objective, namely the protection of market competition, is a multifaceted and elusive concept. Competition could be 'interbrand' or 'intrabrand', 'in the market' or 'for the market', 'dynamic' or 'static', 'price' or 'non-price', and a restriction of competition might have an impact not only on output and prices, but also on innovation, product quality, sustainability, income/wage inequalities, and employment.[47] Market players may compete not only in price or output, but also in brand positioning, choice, quality, or innovation.[48] They might even compete for better providing another 'product' that consumers value such as privacy, sustainability, environmental protection, and labour standards. To these it should be added that competition could be understood in consequentialist terms, namely as a device that maximises efficiency (defined for instance as total or consumer welfare)[49] or in deontological terms, namely as a process of rivalry,[50] as decentralised information processing,[51] or as a 'plebiscitary' coordination process for the allocation of resources resting upon the guarantee of freedom and equality of opportunity.[52] Hence, even though integrity requires that competition authorities and courts protect competition, such an ideal remains elusive and hard to pin down.

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[46] Nonet and Selznick, note 5 above, pp 73–78; Raz, note 30 above, pp 151–54 (noting that a legal system is 'an open system to the extent that it contains norms the purpose of which is to give binding force within the system to norms which do not belong to it', and that 'all legal systems are open systems' and could incorporate all sorts of right or wrong, normative or non-normative knowledge).

[47] I Lianos, *Competition Law for the Digital Era: A Complex Systems Perspective* (CLES Research Paper Series, 2019), pp 3, 15–31 (noting that digital markets call for a 're-conceptualisation of the goals of competition law in the digital era, as competition law moves from the calm and predictable waters of consumer welfare, narrowly defined, to integrate considerations of income/wealth distribution, privacy and complex equality').

[48] N Averitt and R Lande, 'Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law' (1998) 10(1) *Loyola Consumer Law Review* 44.

[49] Posner, note 28 above, p 73; Bork, note 33 above, p 91.

[50] O Black, *The Conceptual Foundations of Antitrust* (Cambridge University Press, 2005), pp 8–16.

[51] F A Hayek, 'Competition as a Discovery Procedure' (2002) 5(3) *The Quarterly Journal of Austrian Economics* 9.

[52] F Böhm, 'Freiheit und Ordnung in der Marktwirtschaft' [1971] in Nils Goldschmidt (ed), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck, 2008), p 305.

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To ensure its integrity, EU competition law must be and remain open. Openness, namely normative flexibility, conceptual elasticity, and factual sensitivity, allows for readjustments and recalibrations of the law and enables it to adapt to new knowledge, different values, and market contexts.[53] In other words, openness enables EU competition law to adapt to conceptual, policy, and factual developments, and, thereby, secure its integrity. Without openness, EU competition law would become a less resilient legal tool; it would become fixed and unable to adapt to changing intellectual and factual circumstances. However, this normative and conceptual openness may blur the boundaries of the law and undermine its integrity. Excessive openness can destabilise the Rule of Law or incite competition law's instrumentalisation, ie its opportunistic use for the attainment of competition-unrelated policy objectives.[54] Integrity, therefore, requires openness, but if excessive the latter can diminish the former. Figure 1 below summarises this dynamic interplay between openness and integrity.

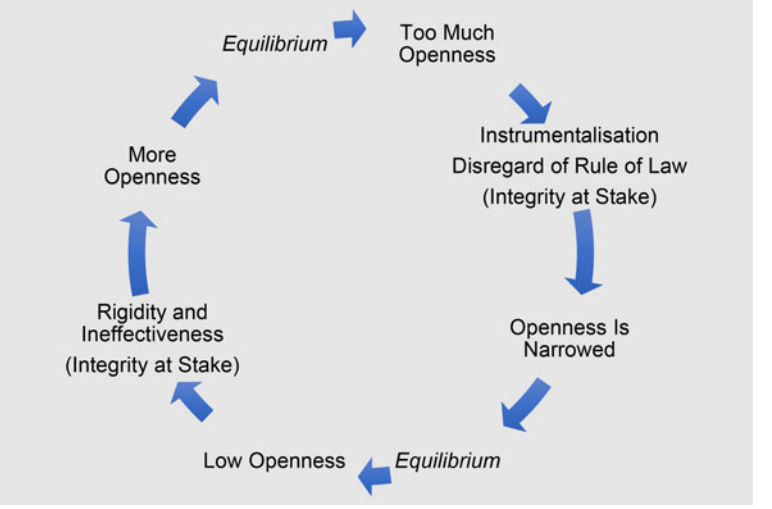


Figure 1. An evolutionary process of dynamic equilibria

Openness and integrity could be perceived as communicating vessels. Openness ensures and promotes law's integrity when law's interpretation has become too narrow or rigid. On the other hand, openness could be inimical to law's integrity as it could undermine the rule of law or transform EU competition law into an unguided set of contradictory policy objectives and interests. Thus, openness and integrity are in a complementary and antithetical relationship. Complementary because up

[53] Ezrachi, note 9 above, pp 30–31. See also *Appalachian Coals, Inc. v. United States*, 288 US 344, 359–60 (1933) ('As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions').

[54] Nonet and Selznick, note 5 above, pp 38, 51, 94.

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to a point the more open the law is, the more integrated it is likely to be, and antithetical because beyond or below a critical point, openness can clash with integrity. The relationship between openness and integrity could be represented as an inverted U-curve (see figure 2 below). Openness, represented in the horizontal axis, has up to a point 'increasingly positive returns' in terms integrity. Beyond this point it brings 'decreasing positive returns' to law's integrity (represented in the vertical axis).

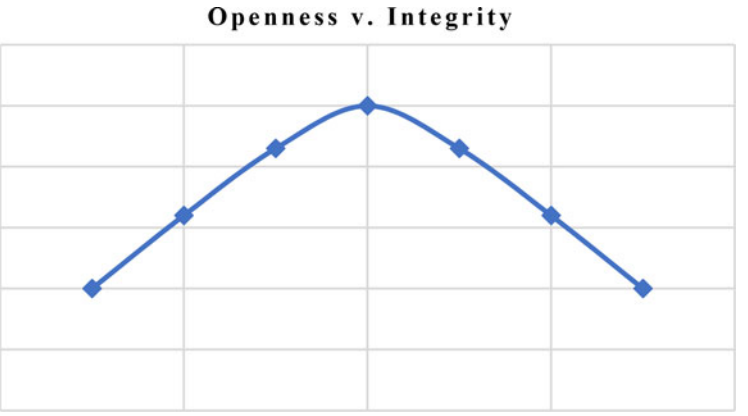


Figure 2. A complementary and antithetical relationship

When legal institutions recognise EU competition law as a form of RL, they operate in a starkly different way from what AL prescribes. Instead of viewing it as a single-value technocratic tool, they consider it as a relatively open normative system and a purposive interpretive practice oscillating between openness and integrity. As a result and in order to realise its core objective they utilise a mixture of legal reasoning, technocratic non-legal knowledge (eg positive economics) and value-laden judgments (eg moral reasoning, normative economics analysis).[55] They understand the law not as a single-value scientific endeavour insulated from value judgments, but as a deliberative process where different actors give, assess and accept *reasons for action or inaction* and trace out their practical implications so as to reach practical judgments.[56] Hence, responsive legal institutions perceive EU competition law not merely as a set of legal propositions, but as a 'practiced discipline of practical

[55] Hart's distinction between concept and conception accounts for the fact that rational and well-informed members of the antitrust community reasonably disagree about which key criteria or principles should define the concept of competition. See Hart, note 20 above, pp 157–60. His discussion of the open-textured nature of law supports the thesis proposed here that in the penumbra of uncertainty of competition rules, legal institutions exercise rule-making powers and inevitably make value judgments. Ibid, pp 124–36.

[56] G J Postema (ed), *Matthew Hale: On the Law of Nature, Reason, and Common Law* (Oxford University Press, 2017), pp 159–60.

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reasoning' shaped by the need to align broad principles and previous case law with a refined understanding and appreciation of market affairs.[57]

When this shift in perspective occurs legal institutions abandon the traditional methods of interpretation and engage in interpretive struggles so as to distil from prior cases a common logic that can extend to new circumstances.[58] Such struggles involve plaintiffs', defendants' and courts' attempts to: (1) give purpose to the law by articulating a conception of competition; (2) operationalise the law by proposing analytical criteria for assessing whether a practice has led to harm to competition; and (3) choose among conflicting sets of logic on a well-reasoned basis. Furthermore, when such shift in perspective occurs, legal institutions instead of viewing the legal provisions as normatively closed binary switches, they perceive them as reasons for action, as tools for guiding behaviour and as a problem-solving device.[59]

Consequently, considering that EU competition law is essentially an open-textured, problem-solving device has a direct impact on how legal institutions operate. Enforcers go beyond the narrow, crime-tort enforcement model and enforce the law 'responsively'.[60] They utilise a bundle of different enforcement techniques and strategies and focus not only on sanctioning but also on persuading and guiding.[61] They also invest in epistemic authority, and put forward participatory, learning-based proceedings so as to tame law's openness for the sake of its integrity.[62] They also organise network-based institutional structures that allow for peer pressure, experimentation, and 'regulatory conversations'.[63] In parallel, adjudicators stop operating simply as norm elaborators and become catalysts.[64] This means that courts function as platforms for interpretive struggles about the content of the law and become increasingly interested in institutional concerns so as to keep enforcers responsive.

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[57] G J Postema, 'The Data of Jurisprudence' (2018) 95(5) *Washington University Law Review* 1083, p 1094. See also H Hovenkamp, *Economics and Federal Antitrust Law* (West Publishing Co, 1985), p 52 (observing that 'in short, the Sherman Act can be regarded as 'enabling' legislation—an invitation to the federal courts to learn how businesses and markets work and formulate a set of rules that will make them work in socially efficient ways. The standards to be applied always have and probably always will shift as ideology, technology and the American economy changes').

[58] A Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1998), pp 8–9.

[59] Hart, note 20 above, pp 89–91, 242–43, 254.

[60] T Prosser, 'Regulatory Agencies, Regulatory Legitimacy, and European Private Law' in F Cafaggi and H Muir Watt (eds), *Making European Private Law* (Edward Elgar Publishing, 2008), p 236 (noting that EU competition law cannot unequivocally be classified as either public or private in nature).

[61] Ayres and Braithwaite, note 14 above, pp 19–53.

[62] Y Svetiev 'Networked Competition Governance in the EU: Delegation, Decentralization, or Experimentalist Architecture?' in C F Sabel and J Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press, 2010), p 79.

[63] J Black, 'Regulatory Conversations' (2002) 29 *Journal of Law and Society* 163. For examples of regulatory conversations in the EU context, see C A Dunlop, et al, 'The Many Uses of Regulatory Impact Assessment: A Meta-analysis of EU and UK Cases' (2012) 6 *Regulation & Governance* 23.

[64] Scott and Sturm, note 15 above, pp 10–25.

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Yet, recognising EU competition law's capacity to be a form of RL, does not mean that it is actually or fully responsive. Its openness gives it the ability to be responsive by adapting to changing circumstances, however, whether it is *really* responsive depends on whether the relevant legal institutions manage to tackle effectively conflicts between openness and integrity. Responsiveness, thus, is not a static state of affairs, but a process of bounded adaptation limited by the law's 'code of integrity', namely by its substantive mission goal, the fundamental rule of law principles, the pressure of the existing case law and the acceptance of its users.[65] This process of adaptation could be also perceived as a quest for finding dynamic equilibria between openness and integrity. Such equilibria could not be found under the AL model, since this model denies that EU competition law is a relatively open normative system and a purposive interpretive practice and, thereby, ignores the dynamic interplay between openness and integrity.

C. Comparing and Contrasting the Two Models

The AL and RL models mark two distinct ways to view and apply EU competition law. Essentially, AL and RL are two strategies for dealing with law's indeterminacy.[66] Autonomous EU competition law views such indeterminacy as a source of frictions and uncertainties and seeks to eliminate it through legal or economic technocracy; by internalising expert knowledge (ie positive economics) or by delegating legal questions to experts (ie economists).[67] In contrast, responsive EU competition law views indeterminacy as the by-product of value disagreements—ie conflicts between openness and integrity—and acknowledges that such disagreements are endogenous in this field of law and also that they can, despite their destabilising effects, serve as an important driver of change and adaptation.

AL thinking would consider that the more technocratic EU competition law is, the more sound or rational it would be. For instance, from an AL perspective injecting more legal technocracy to EU competition law can and will eventually eliminate any frictions and lead to substantively better outcomes.[68] Alternatively, such improvements could be achieved by introducing more economic technocracy into the law.[69] Such view is held for example by scholars who consider that introducing

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[65] Feldman, note 31 above, p 86 (noting that 'law is bounded by two significant constraints: the pressure of precedent and the discipline of acceptance' as 'the final act of the art of law is persuasion and acceptance' and involves 'distilling common logic that can extend to new circumstances' and articulating 'that common logic in a way that can gain general acceptance').

[66] Nonet and Selznick, note 5 above, p 76 (noting that 'all institutions experience a conflict between integrity and openness').

[67] H Hovenkamp, 'Positivism in Law & Economics' (1990) 78 *California Law Review* 815.

[68] This view is held by the so-called legal process scholars. B Bix, 'Positively Positivism' (1999) 85 *Virginia Law Review* 889, p 898.

[69] For a critique of this view, see M Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987), p 244.

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more economics will make EU competition law more rational or efficient.[70] On the contrary, from an RL point of view the fact that EU competition law is a field in constant epistemic change does not entail a process of perfecting what has gone before, but a process of adapting to the new.[71]

Furthermore, if legal institutions conceptualise EU competition law within the contours of the AL model, they will operate in an utterly different manner compared to what the RL model suggests. Specifically, if the AL modus operandi is adopted: (1) both competition authorities and courts will use the traditional methods of interpretation coupled with input from positive economics to interpret the relevant prohibitions; (2) competition authorities will enforce the law in a crime-tort fashion; and (3) courts will only elaborate the legal provisions, punish infringers and compensate victims. On the contrary, if the RL modus operandi is adopted: (1) both competition authorities and courts will use constructive interpretation to interpret the norms; (2) competition authorities will behave as responsive enforcers; and (3) courts will operate as catalysts.[72]

Thus, using the one or the other model has practical implications. For instance, AL enforcers would narrow their responsibilities and search for bureaucratic havens or outsource their decisionmaking to experts (eg economists), and AL adjudicators would deny the normative openness of EU competition law and shelter themselves within a technocratic and single-value interpretive paradigm.[73] In contrast, responsive enforcers and adjudicators would accept that EU competition law cannot remain hermeneutically autonomous or insulated from value conflicts and contextual changes without losing its integrity. As a result they would broaden the field of 'what is competition law relevant' so as to incorporate not only micro-economic insights, but also input from other economic schools (eg ecological economics) or even other domains of knowledge (eg environmental studies), and they will engage in normative evaluations about the purposes and effects of legal action.[74] Consequently, responsive legal institutions would recalibrate their understanding of the law's goal, revise their analytical framework to incorporate new knowledge and invest in their institutional and epistemic capacities so as to be sensitive to law's context and cope with new contingencies.[75]

This shift in attitude and practices will be triggered by the fact that responsive enforcers and adjudicators, will set aside AL's traditional methods of interpretation and employ constructive interpretation to deal with law's indeterminacy. How does this method of interpretation differ from AL's hermeneutics? Constructive interpretation is a 'matter of imposing purpose on an object or practice in order to make it the

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[70] See below in Part IV how the so-called More Economic Approach reflects this line of thinking.

[71] Feldman, note 31 above, p 83.

[72] For a detailed analysis of the RL modus operandi coupled with examples from Commission's and EU Courts' practice see Part III below.

[73] Nonet and Selznick, note 5 above, pp 76–78.

[74] L Fuller, 'American Legal Realism' (1934) 82 *University of Pennsylvania* 429, p 434.

[75] Nonet and Selznick, note 5 above, pp 78–86.

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best possible example of the form of genre to which it is taken to belong'.[76] This method of interpretation suggests that legal institutions should recognise plaintiff's and defendant's argumentation as parts of interpretive theories about the law, namely as argumentative attempts to reconstruct the object of the law in virtue of its purpose. Then they should choose (or construct on their own) the interpretive theory that presents the law in its best light and generates legal outcomes that both *fit* and *justify* it.[77] The 'fit' element implies that the interpretive theory must account for the paradigmatic aspects of EU competition law. The 'justification' component consists in putting competition norms in their best light by taking into consideration their purpose, functions and effects.[78]

Such a method of interpretation opens a dialogue about the purpose, the operational legal tests, the value and the effects of the law, and advocates in favour of a purposive, principle-based and results-oriented interpretive attitude.[79] What is considered as legally irrelevant or impermissible under AL (e.g. making value judgments) becomes relevant under this method of interpretation since interpretive theories involve a mixture of legal reasoning, technocratic non-legal knowledge and value-laden judgments, and reconstruct the purpose of the law in light of its effects.[80] Within this frame, the AL traditional methods of interpretation can still play out, yet not as tools to uncover some true or fixed meaning of certain rules, but as sources of inspiration for arguments which would fuel interpretive theories. A clarification is in order here. Constructive interpretation differs from the traditional teleological interpretation because instead of searching for some 'true and fixed intent or objective', it recognizes that legal interpreters often need to engage in value judgments, make normative choices, and *(re)construct* a conception of a rule's purpose to apply it.[81] In this regard, constructive interpretation without

[76] Dworkin, note 6 above, pp 49–53, 421–22.

[77] Ibid, pp 1–44, 52.

[78] S Shapiro, *The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed* (Public Law and Legal Theory, 2007), Working Paper Series 77, p 35 (noting that a purpose 'fits' the object to the extent that it recommends that the object exists or that it has the properties it has. A purpose is 'justified' to the extent that it is a purpose worth pursuing).

[79] Dworkin, note 6 above, pp 45–86, 225–27. It should be noted though that I deviate here from Dworkin's distinction between principles (ie propositions associated with rights) and policies (ie propositions that describe goals). This distinction commits adjudicators to deontic logic and policy makers to consequentialist reasoning. Thus it cannot be very useful in competition law enforcement or adjudication where competing interest- and rights-claims oblige the decisionmaker engage in trade-offs.

[80] C N Kakouris, 'Use of the Comparative Method by the Court of Justice of the European Community' (1994) 6 *Pace International Law Review* 273 (stating '[t]he Court constantly uses teleological interpretation….[and] seeks to apprehend the meaning of law in the light of its purpose').

[81] N Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20(3) *Fordham International Law Journal* (arguing that 'the object of all interpretation lies in the true intention of the lawmakers'). However, constructive interpretation could be understood as a special form of teleological argumentation. Ž Harašić, 'More about Teleological Argumentation in Law' (2015) 31(3) *Pravni vjesnik* 23.

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cancelling AL's traditional methods of interpretation reorganises them in a way that could tame EU competition law's openness to secure its integrity.

The table below summarises the key features of the two distinct conceptualisations of EU competition law discussed above.

Two Ideal Types of EU Competition Law

	Autonomous EU Competition Law	Responsive EU Competition Law
Goal	Application of competition rules.	Protecting competition.
Legitimacy	Rule of law (formal and procedural principles).	Integrity of law (rule of law-compliant mission-realisation).
Legal Hermeneutics	Traditional methods of interpretation coupled with mainstream economic positions. Use of positive economics (scientific, non-normative knowledge) only, through an internationalisation or an externalisation strategy.	Constructive interpretation: use of the traditional methods of interpretation to construct interpretive theories that fit and justify the norms. Use of both normative and positive economics and other sources of non-legal knowledge. Use of moral principles and normative facts to determine the content of competition norms.
Competition Norms	Prohibitions, 'binary switches', or 'traffic lights'.	Multifaceted screens for assessing complex, novel, or mixed behaviour. Reasons for action.
Methodological Foundation	Separation thesis: whether a given norm is legally valid depends on its sources and not its merits. Thus, the existence of law is independent and separate from its merit.	Integration thesis: institutional input alone never determines whether a given norm is legally valid. Reference to moral or substantive normative facts is necessary for identifying what the law is.
Enforcer's Discretion	The rule of law sets the boundaries of enforcer's discretion.	Integrity sets the boundaries of enforcer's discretion.
Enforcement Style	Crime-tort model: enforcer's role is to sanction competition law's infringers.	Responsive Enforcement: enforcer's role is to protect and promote competition in a rule of law compatible manner.
Institutional Cooperation	Rules for cooperation (uniformity and unchecked discretion).	Uniformity and modest experimentalism. Institutional cooperation through regulatory conversations.
Judicial Review	Courts are norm elaborators: they clarify the content of given non-normative social facts.	Courts are catalysts: they determine the content of the law by being umpires and participants in interpretive struggles and they are in constant communication with enforcers so as to keep them responsive.

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II. THE RESPONSIVE LAW MODEL AS A DESCRIPTIVE DEVICE

It follows from the discussion above that a major reason to conceptualise EU competition law as RL instead of AL lies in the fact that the former can explain away law's indeterminacy. Instead of considering EU competition law's indeterminacy as a failure of legal or economic technocracy to deliver, the RL approach argues that it is a by-product of conflicts between openness and integrity, which are endogenous in this field of law and generate value disagreements. To demonstrate this point, I analyse here certain features of EU competition law which suggest that this corpus of norms is *de facto* and by design open and, thereby, bound to experience conflicts between openness and integrity. EU competition law relies on a fuzzy mandate, and is written in a conceptually elastic language. In addition, EU enforcers and adjudicators have always used a blend of rules and standards to interpret the laconic Treaty provisions. To these it should be added that the most important extra-legal input of EU competition law, economics, is an 'ideological science',[82] which is composed by a normative-ethical side and a positive-engineering side,[83] includes various schools of thought and experiences its own 'scientific revolutions'.[84] Therefore, economics cannot eliminate conflicts between openness and integrity and transform competition law into AL. On this basis, I argue here that EU competition law is bound to be open and relatively indeterminate. If the RL model explains better than the AL model such a pervasive phenomenon as EU competition law's indeterminacy, it could be argued that it offers a better framework to describe how this field of law functions and changes.

A. Fuzzy Mandate

Arguing that EU competition law relies on a fuzzy mandate is hardly contentious.[85] Gerber argues that competition law's goal is to remove distortions of competition, while Schweitzer maintains that it consists in protecting the competitive process, and Behrens supports the view that ordoliberal ideas have accompanied the drafting as well as the interpretation and application of EU competition law since its

[82] H Hovenkamp, *Economics and Federal Antitrust Law* (West Publishing Co, 1985), pp XV, 44–45 (distinguishing between positive descriptive economics that address verifiable or falsifiable questions and normative economics that relate to issues which are not amenable to final answers, eg whether a merger should be approved because it lowers consumers prices or condemned because it harms competitors).

[83] A Sen, *On Economics and Ethics* (Blackwell, 1988), pp 2–7 (arguing that the normative side of economics involves inquiries into human ends and motivations and inevitably uses moral concepts to construct their various paradigms, while the positive-engineering side is concerned primarily with logistical issues (ie 'instructions on material prosperity') rather than ultimate ends).

[84] T S Kuhn, *The Structure of Scientific Revolutions*, 2nd ed [1962] (University of Chicago Press, 1970), pp 111–35, 171–73.

[85] R Baldwin, M Cave, and M Lodge, *Understanding Regulation* (Oxford University Press, 2012), pp 27–28.

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inception.[86] On the contrary, Akman contends that the historical purpose of EU competition law was to increase efficiency.[87] In a similar vein, Nazzini argues that the goal of Article 102 of the Treaty on the Functioning of the European Union ('TFEU') is to maximise total social welfare through productivity growth.[88] Townley maintains that consumer welfare is the proper objective of EU competition law even though certain public policy considerations play out in its application,[89] and Odudu supports the view that modern EU competition law has endorsed the consumer welfare paradigm.[90] On the other hand, Lianos argues that EU competition law pursues a plurality of values and is situated between economic policy and social regulation,[91] and Monti argues that it promotes disjointed objectives such as efficiency, consumer welfare, economic freedom, market integration, and rivalry.[92] Along similar lines, Ezrachi contends that the goals of EU competition law are of 'dynamic nature'[93] and include consumer well-being, effective competition structures, efficiency and innovation, fairness, economic freedom, plurality, democracy, and market integration.[94] On this basis, it is argued here that the objective of EU competition law is solely the protection and promotion of competition yet this objective is multifaceted and multi-layered and hosts a multiplicity of values, constituting this corpus of norms inevitably open.

In recent decades, the Commission appears to have endorsed a narrower reading of the purpose of the law. In several documents and decisions the Commission has casted EU competition law as a consumer welfare prescription.[95] In reality, though, policy concerns related to industrial policy, public health, social protection, consumer protection, sustainability, environmental protection, investment, transportation, and regional development have always found their way into the

[86] D J Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (Oxford University Press, 2010), p 232; H Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' in C-D Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing, 2008); P Behrens, 'The ordoliberal concept of 'abuse' of a dominant position and its impact on Article 102 TFEU' in F Di Porto and R Podszun (eds), *Abusive Practices in Competition Law* (Edward Elgar Publishing, 2018), p 5.

[87] P Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (2009) 29 *Oxford Journal of Legal Studies* 267.

[88] R Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford University Press, 2011), pp 107–54

[89] C Townley, *Article 81 EC and Public Policy* (Hart Publishing, 2009), pp 13–43.

[90] O Odudu, 'The Wider Concerns of Competition Law' (2010) 30(3) *Oxford Journal of Legal Studies* 559, 605–12.

[91] Lianos, note 34 above, pp 178–94.

[92] G Monti, *EC Competition Law* (Cambridge University Press, 2007), pp 25, 51–52.

[93] Ezrachi, note 9 above, pp 2, 6–8.

[94] A Ezrachi, *EU Competition Law Goals and the Digital Economy* (Oxford Legal Studies, 2018), Research Paper 17, pp 21, 27.

[95] For more details see Part IV below.

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Commission's decisional practice.[96] As Stylianou and Iacovides observed, after a textual analysis of 1,015 Commission decisions, from the 1960s until today the Commission has pursued in varied degrees the goals of efficiency, welfare, economic freedom, market structure, fairness, European integration, and competitive process.[97] Hence, a careful examination of the Commission's decisional output reveals that its enforcement practices have 'been guided by a multitude of aims, including individual economic freedom, fairness, the internal market, and a rather vague and generalised notion of economic welfare'.[98]

In addition, the Court of Justice of the European Union has not endorsed an unequivocal position with regards to the purpose of the law. Illustrative in this respect is the dialogue between the General Court ('GC') and the European Court of Justice ('ECJ') in *GlaxoSmithKline*. In this case the GC seemed willing to embrace the Commission's consumer welfare approach holding that the objective of Article 101 TFEU was to prevent undertakings from reducing the welfare of the final consumer by restricting competition.[99] However, the ECJ disagreed with the GC and noted that 'there is *nothing* in that provision to indicate that *only* those agreements which deprive consumers of certain advantages may have an anti-competitive object'.[100] More than this, the ECJ held that the objective of competition rules laid down in the Treaty is 'to protect *not only* the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition *as such'* (emphasis added).[101]

In light of the above, it is safe to say that the mandate of EU competition law is fuzzy.[102] This conclusion is also supported by the empirical investigation conducted

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[96] Case IV/33.814, *Ford/Volkswagen* Commission Decision No 93/49/EEC [1993] OJ L20/1993, pp 14–22, Rec 36; Case IV.F.1/36.718 *CECED* Commission Decision of 24 January 1999 (2000/475/EC), paras 55–57, 62–63; Minutes from the Commission's meeting on 7 November 2012, PV(2012) 2022 final, p 14 (noticing that many industrial sectors, such as stainless steel, operate 'in an environment that was becoming increasingly global', hence Community policies need 'to actively facilitate the creation of large European groups').

[97] K Stylianou and M Iacovides, 'The Goals of EU Competition Law – A Comprehensive Empirical Investigation' (4 December 2020), p 26, https://ssrn.com/abstract=3735795 (noting that 'the Commission assigns more value to welfare and to the protection of competitors and commercial freedom but less value to efficiency than the Court and AGs. And even in terms of competition process, the Commission is only half as concerned with that goal compared to the Court and AGs'.).

[98] A Witt, 'Technocrats, Populists, Hipsters, and Romantics – Who Else Is Lurking in the Corners of the Bar?' (2019) *Antitrust Chronicles* 4.

[99] *GlaxoSmithKline v Commission*, T-168/01, ECLI:EU:T:2006:265, paras 118–19.

[100] *GlaxoSmithKline v Commission and Commission v GlaxoSmithKline*, C-501/06 P, C-513/06 P, C-515/06 P, C-519/06 P, ECLI:EU:C:2009:610, para 63 (italics added).

[101] Ibid (stating 'Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price').

[102] S Makris, 'Applying Normative Theories in EU Competition Law: Exploring Article 102 TFEU' (2014) 3 *UCL Journal of Law & Jurisprudence* 30 (arguing that neither consequentialist nor deontological thinking cannot fully explain the Article 102 TFEU case law. This failure lies to the fact that both lines of thinking seek to be holistic and reduce Article 102 TFEU case law in one, single objective or goal).

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by Stylianou and Iacovides who found that EU competition law as interpreted by the Court of Justice of the European Union is not monothematic, but pursues a multitude of values, while it prioritises the process of competition rather than certain outcomes.[103] On this basis, it is maintained here that EU competition is by design and *de facto* an open normative system.[104]

B. Conceptually Elastic Vocabulary

The second element of EU competition law supporting the endogeneity of openness versus integrity clashes, lies on the conceptually elastic language of most of competition law terms. All core competition rules contain open-textured concepts.[105] For instance, concepts such as 'undertaking', 'restriction by object or effect', 'effect on trade', and 'abuse of dominant position' do not have clear-cut meaning and have been defined by the EU courts on many occasions in a functional or teleological way. Judicial definitions of even the word 'competition' have gone through an evolution.[106] Therefore, applying such 'essentially contested concepts' has always required significant interpretive efforts, involving attempts to define the semantic core and the penumbra of the concept as well as attempts to articulate and evaluate different conceptions of the concept at stake.[107] Hence, legal interpretation in EU competition law has always triggered argumentative struggles about the values, interests, purposes, and principles that competition law is supposed to ensure. Such argumentative struggles cannot but involve value judgments about what competition law is supposed to do.

C. Rules and Standards

The third reason supporting the endogeneity of conflicts between openness and integrity in EU competition law could be traced to the fact that this field of law regulates markets which are prone to constant change. To effectively do so, the Commission and the EU courts regularly interpret the key competition norms as including both rules and standards.[108] Rules 'establish legal boundaries based on the presence or absence of well-specified triggering facts', have formal realisability and, thus, maximise clarity by constraining discretion.[109] Rules, in

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[103] Stylianou and Iacovides, note 97 above, pp 5, 26–30.

[104] Makris, note 1 above, pp 12–23 (showing why different stakeholders *can* reasonably disagree about what the goals of the law are and should be).

[105] Hart, note 20 above, p 123.

[106] R Whish and D Bailey, *Competition Law* (Oxford University Press, 2012), pp 1, 19–24.

[107] W B Gallie, *Essentially Contested Concepts* (1955) 56 *Proceedings of the Aristotelian Society* 167, pp 179, 189, 191 (arguing that such concepts require value-judgments to be applied).

[108] Ibañez Colomo, note 43 above, pp 29–32. For a more general discussion on the distinction between rules and standards, see L Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 *Duke Law Journal* 557.

[109] Monti, note 92 above, pp 16–18.

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addition, provide concrete guides for decisionmaking geared to narrow categories of behaviour and prescribe narrow patterns of conduct. An example of a rule could be: a dominant position cannot be found if an undertaking has market share below 40%. However, an undertaking with 60% market share may be unable to exercise substantial market power due to a maverick or an equally economically strong buyer, while on the other hand an undertaking with a market share as low as 38% could be dominant in an oligopolistic market with high barriers to entry and increased transparency when holding a bottleneck. Hence, even though rules can maximise legal clarity and certainty by eliminating discretion, they can also generate false positives (type I errors) and false negatives (type II errors).[110]

Standards, on the other hand, require the decision-maker to engage in a wide-ranging inquiry and take into consideration the actual or potential effects of a specific practice. Standards could deliver more precise results and reduce type I and type II errors.[111] Yet, they cannot fully eliminate error costs, they could themselves be a source of error costs, and usually they bear higher administrative costs compared to rules.[112] Thus, in principle, rules should be chosen when the marginal benefits of assessing more case-specific evidence are lower than the marginal cost of additional information. For example, if past experience or economic knowledge suggests that a specific type of conduct is likely to be anticompetitive, innocuous, or procompetitive, it would be preferable to use a rule for dealing with such a conduct. In contrast, standards should be chosen when the marginal benefits of adding a layer of case-specific analysis outweigh the marginal costs associated with acquiring and assessing that information, or when the cost of implementing the standard is less than the error cost of a rule.[113] Notably, the difference between rules and standards lies in 'how much we need to know' before reaching a conclusion about a specific practice.

Given that certain commercial practices or competition problems could be better treated by a rule while others by a standard, it is not surprising that the Commission and the EU Courts have always sought to identify an optimal balance between rules and standards when interpreting the Treaty provisions. The debate on 'restrictions by object v. restrictions by effect', or the 'forms v. effects' dispute show that competition law analysis necessarily operates with rules and standards.[114] In fact, both EU enforcers and adjudicators have never endorsed an entirely effects-based or a fully formalistic approach. They have always relied—in varied degrees—on economically informed

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[110] A Christiansen and W Kerber, 'Competition Policy with Optimally Differentiated Rules Instead of "Per Se" vs Rule of Reason' (2006) 2(2) *Journal of Competition Law and Economics* 215.

[111] R A Posner, *The Problems of Jurisprudence* (Harvard University Press, 1993), pp 42–53.

[112] B H Kobayashi and T J Muris, 'Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century' (2012) 78 *Antitrust Law Journal* 505, pp 515–20.

[113] Ibañez Colomo, note 43 above, pp 35–38; S Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (2017) *Georgetown Law Faculty Publications and Other Works*, https://scholarship.law.georgetown.edu/facpub/2007.

[114] B Orbach, 'The Durability of Formalism in Antitrust' (2015) 100 *Iowa Law Review* 2197, pp 2203–06.

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and outcome-sensitive legal forms.[115] In this respect, the 'restrictions by object v. restrictions by effect' and the 'forms v. effects' debates could be viewed as disputes on how far legal institutions should take account of the effects of a practice to sustain a legal inference.[116] Hence, such debates indicate that EU competition law is a conceptually open legal system and constantly seeking to ensure its integrity.

D. Economics: An Ideological Science

The last feature of EU competition law suggesting that conflicts between openness and integrity are inevitable could be traced to the fact that this field of law heavily relies on economics to pursue its mission. However, contrarily to what AL claims, economics cannot eliminate EU competition law's openness, first of all, due to its institutional constraints and juridical structure. As recognised by the Commission, requiring a full-fledged economic analysis of each restriction of competition in every individual case would make enforcement overly costly and unmanageable.[117] The reason behind this statement of the Commission is that 'measurement, for all practical purposes, is impossible'.[118] Consequently, the Commission and the EU courts have used various legal constructions to avoid quantifying, measuring, and balancing competition gains and harms.[119]

Nonetheless, there is a more crucial reason why economics cannot eradicate the dynamic interplay between openness and integrity that characterises (even when it is not explicitly recognised) EU competition law. Economics is a discipline composed of various paradigms, schools of thought, and methods, and an epistemic field that constantly changes and evolves as new knowledge is produced at a theoretical and empirical level.[120] Even though microeconomics comprise the backbone of modern economics, there are other paradigms within the discipline—such as behavioural, experimental, environmental, ecological, and complexity economics—that contest microeconomics' omnipotence.[121] In addition, microeconomics cannot provide an answer to the question whether total or consumer welfare, rivalry, fairness, or some

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[115] Ibid, 2206–14, 2221–22.

[116] R Posner, 'The Rule of Reason and the Economic Approach: Reflections on *Sylvania* Decision' (1977) 45(1) *University of Chicago Law Review* 1, pp 14–15 (stating that 'in fact, all legal analysis operates under per se rules').

[117] COM (96), *Green Paper on Vertical Restraints in EC Competition Policy*, p 721, para 86.

[118] R Bork, 'The Rule of Reason and the Per Se Concept: Price Fixing and Market Division' (1996) 75 *Yale Law Journal* 373, 387–90 (Bork's hostility to balancing was also grounded in the assumption that the great majority of business conduct is efficient and thus antitrust institutions should simply opt for erring on the side of non-intervention in grey areas, while forging clear-cut rules for the few hard-core restrictions.).

[119] G Monti, *EU Competition Law and the Rule of Reason Revisited* (TILEC, 2020–2021) Discussion Paper, pp 13–22, https://ssrn.com/abstract=3686619 or http://dx.doi.org/10.2139/ssrn.3686619.

[120] W Wils, 'The Judgment of the EU General Court in Intel and the So-Called "More Economic Approach" to Abuse of Dominance' (2014) 37(4) *World Competition: Law and Economics Review* 405.

[121] A M Hussen, *Principles of Environmental Economics and Sustainability* (Taylor & Francis, 2018); H Daley and J Filey, *Ecological Economics* (Island Press, 2003).

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other value, should provide the litmus test for assessing whether a practice amounts to harm to competition. Therefore, the multiplicity of paradigms within economics and the absence of an economics meta-theory prevent economics from being a unified, single-value science capable of delivering axiological absolutes.[122]

But, even if we ignore this complication and assume that microeconomics is the only valid scientific paradigm, still (micro)economics would not be able to provide enforcers and adjudicators with a definitive answer to the question whether competition rules *should* be read as protecting dynamic, static, perfect, workable, or effective competition. Even if only efficiency mattered in EU competition law, economists would still disagree on how, for instance, to identify the level of competitive prices, what should be the appropriate test for specific types of anticompetitive prices (eg predatory pricing) or what is the suitable price-cost test for defining anticompetitive foreclosure.[123] Therefore, even using exclusively microeconomics in EU competition law *necessarily* involves choosing between different normative orderings and making value judgments, not only at a certain initial point of adoption, but continuously as the law is interpreted and implemented.[124]

Consequently, economics cannot postulate comprehensive criteria for eradicating EU competition law's normative openness. As Jacobs notes 'far from having marginalised the role of value choice in antitrust, the ascendancy of economics underscores its enduring importance'.[125] Accordingly, instead of perceiving economics as technocracy, as the AL framework suggests, it might be more appropriate to view them as an 'ideological or moral science'. This shift of perspective implies that instead of a homogenous discipline and a source of incontestable truths, economics are essentially a source of openness and a toolbox for shaping and testing interpretive theories about the law. From this angle, as long as EU competition law utilises economics is bound to remain open, because the use of economics necessitates making certain (often implicit) value judgments and choosing one economic school, paradigm or model over another.

III. THE RESPONSIVE LAW MODUS OPERANDI

The previous analysis suggested that, according to the RL model, EU competition law's indeterminacy is the by-product of the dynamic interplay between its openness and integrity, and due to this reason is inevitable. Contrarily to the AL, the RL approach considers that indeterminacy is what makes EU competition law on one hand an occasionally unclear and uncertain field of law, but on the other hand a

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[122] Alan Devlin and Michael Jacobs, 'Antitrust Error' (2010) 52 *William & Mary Law Review* 75 (discussing the epistemological limitations of economic analysis in antitrust).

[123] L Coppi and M Walker, 'Substantial Convergence or Parallel Paths? - Similarities and Differences in the Economic Analysis of Horizontal Mergers in the US and EU Competition Law' (2004) 49(1) *Antitrust Bulletin* 101, p 121.

[124] In a similar line, Allensworth, note 3 above, pp 55–67.

[125] M Jacobs, 'An Essay on the Normative Foundations of Antitrust Economics' (1996) 74 *North Carolina Law Review* 219, pp 225 238.

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flexible and effective tool for dealing with market problems. Against this background, this Section shows how the RL approach, by prescribing a specific modus operandi, could help legal institutions, not to eliminate, as the AL model falsely promises, but to *deal* with the problem of indeterminacy. This modus operandi consists in: (1) constructive interpretation; (2) enforcers behaving responsively; and (3) courts functioning as catalysts, namely as platforms for argumentation and as responsiveness motivators.[126] To show how the RL modus operandi could work, instead of engaging in an abstract normative discussion, I use some exemplar cases of constructive interpretation, responsive enforcement, and catalytic adjudication from EU competition law.

A. Constructive Interpretation

Consider the question whether a selective distribution agreement constitutes a restriction of competition. Let us assume that neither the letter of the relevant provision nor a historical investigation of some original intent can provide an answer to this question. Let us also assume that the courts have not dealt with a similar case, therefore a systematic treatment of the case law cannot provide a clear-cut solution by transposing another strand of case law to the present case. In such a case, if we follow AL's teleological interpretation, we would have to examine the objective purpose of Article 101 TFEU yet such an inquiry would be confined by the methodological commitments[127] of AL and would face perhaps insurmountable difficulties.

Then, AL's suggestion would be to utilise the best extra-legal, non-normative knowledge, but such a suggestion would not be of great help as we do not know under what criterion such knowledge should be selected.[128] Should we for example decide that case on the basis of the best political economy approach, the best neoclassical approach or the best behavioural economics approach? And, should the relevant criterion be the impact of a selective distribution agreement on consumer welfare, total welfare, freedom to compete or on the competitive process? Hence, if legal institutions operate within the AL framework and employ the traditional methods of interpretation, they are likely to not be able to tackle this ostensibly ordinary question.

However, when confronted with the said question in 1977, the European Court of Justice ('ECJ') held in *Metro I* that selective distribution agreements, even though they restrict a form of price competition, they could be compatible with Article 101(1) TFEU (at the time Article 85(1) of the European Economic Community

[126] To be clear, the original work of Nonet and Selznick does not include a modus operandi. I propose here this modus operandi as a way to operationalise the notion of RL. See Nonet and Selznick, note 5 above, pp 8–17.

[127] These are the following: categorical separation of questions of legal validity from questions of law's merit, categorical distinction between rule making and rule application, and normative autonomy of legal hermeneutics.

[128] J Raz, 'Legal Principles and the Limits of Law' (1972) 81(5) *Yale Law Journal* 823, pp 847–48 (discussing the problem and suggesting, contrary to the usual positivistic stance, that on such occasions decisionmakers should make a decision on the basis of the best moral reasons).

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Treaty) as long as the properties of the product necessitate a selective distribution system; resellers are chosen on the basis of objective criteria of a qualitative nature which are determined uniformly for all potential resellers and applied in a non-discriminatory manner; and the restrictions do not go beyond what is necessary.[129] Noticeably, the Court stated that 'although price competition is so important that it can never be eliminated it does not constitute the *only effective form* of competition or that to which *absolute priority* must in all circumstances be accorded' (emphasis added).[130] The Court also noted that the said Article protects 'workable competition', namely competition that is necessary to ensure the observance of the Treaty objectives and especially the creation of a single market, and that such workable competition may be reconciled with the safeguarding of objectives of a different nature.[131] On this basis, the Court observed that restrictions on competition are permissible, provided that they are 'essential to the attainment of those objectives and do not result in the elimination of competition for a substantial part of the Common Market'.[132] Under this reasoning, the Court concluded, an agreement that restricts certain forms of inter-brand price competition could be compatible with Article 101(1) TFEU if it improves another dimension of competition (eg inter-brand, quality competition).[133]

This core idea was reiterated in *AEG-Telefunken* (1983) where the Court held that if a selective distribution agreement is capable of improving competition in relation to factors other than prices, such as the maintenance of a specialist trade capable of providing services with regards to high quality and high technology products, it could escape the clutches of EU competition law.[134] Consequently, selective distribution agreements 'in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price, constitute an *element* of competition which is in conformity with Article 85 (1)' (emphasis added).[135] In a similar vein, the Court held in *Pierre Fabre* (2011) that even though selective distribution agreements can restrict competition by object in the absence of objective justification, there may be legitimate requirements 'which may justify a reduction of price competition in favour of competition relating to factors other than price'.[136] In the recent *Coty* (2017) case, the Court followed once more this line of reasoning and considered that if a selective distribution agreement is designed to preserve the luxury image of a product and meets the *Metro* criteria is compatible with Article 101(1) TFEU.[137]

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[129] *Metro SB-Großmärkte* v *Commission*, Case 26/76 [1977] ECR 1875, para 20.

[130] Ibid, para 21.

[131] Ibid, paras 20–21.

[132] Ibid, para 21.

[133] Ibid, paras 21–22.

[134] *AEG-Telefunken* v *Commission*, C-107/82, ECLI:EU:C:1983:293, para 33.

[135] Ibid.

[136] *Pierre Fabre Dermo-Cosmétique*, C-439/09, EU:C:2011:649, paras 39–40.

[137] *Coty Germany GmbH v Parfümerie Akzente GmbH*, C-230/16, ECLI:EU:C:2017:941, para 29 (Therefore, a supplier of luxury products can prohibit authorised sellers from selling its product on third party platforms.).

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Such interpretive moves, which include value choices, are hard to explain from an AL point of view, as the latter conceives competition law as a neutral or a single-value technocratic enterprise insulated from value conflicts. Yet, they are understandable from an RL perspective. In these cases, the ECJ calibrated law's openness and integrity by engaging in constructive interpretation. Specifically, the Court examined what is the object of the agreement within its legal and economic context with the intention to assess whether such an agreement could reduce or enhance certain forms of competition in the market.[138] Simultaneously, the Court reconstructed the purpose of Article 101 TFEU and put forward its own understanding of competition as multifaceted ideal. This is evident by two common features of these decisions: first, the central question that the Court sought to answer was whether the agreements in question harm or improve certain dimensions of the competitive process, and, second, the Court did not explore (or ask the referring court to explore) via an economic impact assessment what would be the impact of the relevant agreements on total or consumer welfare; it merely asked whether the agreements in question improve some non-price related aspect of competition while restricting certain forms of price competition. Thus, these cases suggest that ECJ at least on certain occasions, treats EU competition law as a relatively open normative system and engages in value judgments emanating from its own understanding of what is meaningful competition in the market. In other words, these cases could be read as the Court's response to the question: what forms of competition deserve to be protected by competition law?

The jurisprudence of EU courts is abundant of such examples of constructive interpretation. When the ECJ was asked whether a restriction of competition derives from an 'agreement' or a 'concerted practice', it clarified that the two concepts overlap and noted that there is no need for a clear-cut distinction since Article 101 TFEU 'is *intended* to apply to all collusion between undertakings, whatever the form it takes' (emphasis added).[139] It is, thus, the purpose of Article 101 TFEU (as reconstructed by its interpreters) what guides how concepts such as 'agreement' or 'concerted practice' will be applied.

Similarly, when confronted with the question 'what is an undertaking' the ECJ noted that 'the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed'.[140] Instead of focusing on the legal form of the entity, the Court investigated whether the nature, aims, and function of the entity's activity warrant the conclusion that it engages in an economic activity. The Court followed such an interpretive strategy because it was concerned about materialising the purpose of Article 101(1) TFEU. For this reason it implicitly advanced an understanding of what EU competition law

[138] Monti, note 92 above, p 2 (stating 'it is hard to provide a definition of 'competition' everyone will agree with, or to obtain consensus about the reasons for having competition law').

[139] *Commission v Anic Partecipazioni SpA*, C-49/92 P [1999] ECR I-4125, para 108.

[140] *Höfner and Elser v Macrotron GmbH*, C-41/90 [1991] ECR I-1979, para 21; *Wouters and Others*, C-309/99 [2002] ECR I-1577, para 57.

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ought to do and on this basis it gave a certain meaning to the concept of undertaking so as to not counteract, but instead promote, that purpose.[141]

Another example is the concept of dominance. Even though the term 'dominant' will not be found in economic textbooks, from early on the Court relied on economics to interpret it.[142] It quickly accepted that dominance means some degree of market power, yet it did not clearly define the precise content of the latter. Nevertheless, the Court rejected the static definition according to which dominance is identified primarily or exclusively in virtue of an established market share threshold.[143] In some seminal cases, the Court conceptualised dominance as commercial power,[144] and as '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 effect independently of its competitors, customers and ultimately of consumer',[145] while in others it defined it as 'substantial market power', namely as 'the ability to profitably raise prices above the competitive level for a significant period of time'.[146] Hence, dominance evolved from a static and structural conception, focused on market shares or commercial power, to a more behavioural and neoclassical, in economic terms, conception emphasising power over price and the ability to neglect the competitive pressure.[147]

Accordingly, even though concepts such as 'restriction of competition', 'agreement', 'undertaking' and 'dominance' seem fairly 'legal' or 'economic', and 'technical', they have been interpreted by the ECJ in ways that cannot be explained away by the traditional methods of interpretation even when these are coupled with economic technocratic reasoning (ie the AL method of interpretation). The European judges did not determine the content of the law on these occasions by solely

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[141] See *Höfner and Elser v Macrotron*, note 140 above, paras 23, 26 (holding that 'the Treaty requires the Member States not to take or maintain in force measures which could destroy the effectiveness of that provision'), 34 (stating that 'a public employment agency engaged in employment procurement activities is subject to the prohibition contained in Article 86 of the Treaty, so long as the application of that provision does not obstruct the performance of the particular task assigned to it'). In this case, the Court was asked whether a public employment agency engaged in employment procurement activities is subjected to the Article 101(1) TFEU prohibition.

[142] Monti, note 92 above, p 124.

[143] *Hoffmann-La Roche & Co. AG v Commission*, Case 85/76 [1979] ECR 461, paras 41–49.

[144] *United Brands v Commission*, Case 27/76 [1978] ECR 207; *Hoffmann-La Roche & Co. AG v Commission*, Case 85/76 [1979] ECR 461, 41; *British Airways v Commission*, C-95/04 P, Opinion of 23 February 2006, para 69.

[145] *United Brands v Commission*, Case 27/76, ECLI:EU:EU:C:1978:22, para 65. But see Coppi and Waler, note 123, p 121 (arguing that 'this definition makes little sense from an economic standpoint').

[146] Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Guidance Paper), OJ C45, 24.2.2009, para 11 (note that the expression 'increase prices' is used as 'shorthand' and includes the various ways in which market power can negatively affect other 'parameters of competition — such as prices, output, innovation, the variety or quality of goods or services'). *Intel* could be read as a moderate confirmation of this conception of dominance. *Intel v Commission*, C-413/14 P, ECLI:EU:C:2016:788, paras 136–40.

[147] Whish and Bailey, note 106 above, pp 179–89.

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using the traditional methods of interpretation or 'purely scientific', non-legal input (eg positive economics). Instead they viewed EU competition law as a relatively open normative system, engaged in constructive interpretation and made value judgments.

B. Responsive Enforcement

The second element of the RL modus operandi is responsive enforcement. Responsive enforcement means that enforcers escalate or de-escalate their intervention depending on the market players' response;[148] that they are not only preoccupied with punishing and deterring, but also with compliance, learning, and trust-building;[149] that they intervene after understanding the context and the motivations of those involved,[150] and that they re-visit their performance and understanding of the law. A legal framework that provides for a variety of compliance and enforcement tools and sets up a network-based structure that allows the various nodes to have access to localised knowledge, test different solutions, and learn from each other, sets the institutional preconditions for responsive enforcement.[151] But, of course, enforcers become *really* responsive when they use properly the various proscriptive and prescriptive, proactive and reactive enforcement tools and strategies enabled by the law, 'learn by doing' and 'from difference', and invest in epistemic competence.[152] Hence, responsive enforcement requires not only a certain institutional design but also a set of institutional practices.

A good example of what exactly responsive enforcement implies could be found in certain features and practices of the European Commission. In particular, the internal structure of the Commission, namely its division into problem-solving task forces, and the creation of the office of Chief Competition Economist in 2003 demonstrate its concern about epistemic capacity and delivering results.[153] Moreover, the Commission is *primus inter pares* in a decentralised yet hierarchical network of enforcers which relies on information exchanges, peer pressure, and coordination.[154] In addition, the Commission disposes of a wide range of enforcement tools of varied intensity. Therefore, the design of EU competition law's institutional structure and

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[148] Ayres and Braithwaite, note 14 above, pp 36–40 (presenting pyramidic escalation as a key element of responsive enforcement). See, however, N Gunningham and P Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998), pp 5–19 (arguing that there are occasions where a graduated response is inappropriate. For instance where there is a serious risk of imminent irreversible loss, the risks are too high, and there is no relationship involving continuing interactions between the parties).

[149] F Haines, *Corporate Regulation: Beyond 'Punish or Persuade'* (Clarendon Press, 1997).

[150] Ayres and Braithwaite, note 14 above, pp 7–15.

[151] M De Visser, *Network-Based Governance in EC Law* (Hart Publishing, 2009), pp 7–14.

[152] Ayres and Braithwaite, note 14 above, pp 35–38, 54–60.

[153] M Cini and L Mcgowan, *Competition Policy in the European Union* (Palgrave, 2008), pp 15–37.

[154] W Wils, *Competition Authorities: Towards More Independence and Prioritisation?* (King's College London Law School, 2017), Research Paper 39, 110–11.

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certain organisational principles adopted by the Commission provide a good example of responsive enforcer.

Equipped with such institutional tools, it is not surprising that the Commission regularly goes beyond the crime-tort enforcement style, and uses sector inquiries to explore the market context, and a wide array of tools—ranging from sunshine and soft to hard enforcement—to secure compliance.[155] There are also many occasions where the Commission has intervened in a continuous manner and with both a restorative (ie to repair harm to competition) and prophylactic (ie to eliminate practices that are likely to result in distortions of competition in the future) attitude.[156] Furthermore, the Commission on many occasions applies competition rules contextually and by taking into consideration the existing regulatory framework and other relevant policies.[157] In this sense, there are plenty of actual examples showing the Commission behaving responsively.

It is also common for the Commission to revisit its performance by conducting *ex post* surveys and to issue reports describing the actual consequences of its enforcement practices.[158] What is even more remarkable, though, is that the Commission on many occasions has adopted a reflective attitude. For instance, the Commission changed its attitude towards vertical restraints[159] after taking into consideration certain criticisms related to the strictness of its previous approach, as well as the findings of economic analysis according to which vertical restraints on most occasions are procompetitive or competitively neutral.[160] Of course this reflective attitude is not a feature of the past; the Commission still remains open to improve or reconsider its analytical framework. For example, following many scholars' key observation that digital markets may change the parameters of competition,[161] the Commission sought, and still seeks, to advance its knowledge on what is actually happening in digital markets and how it

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[155] N Petit and M Rato, 'From Hard to Soft Enforcement of EC Competition Law – A Bestiary of Sunshine Enforcement Instruments' in C Gheur, N Petit, and J-F Bellis (eds), *Alternative Enforcement Techniques in EC Competition Law* (Bruylant, 2009), p 183.

[156] P Ibañez Colomo, 'On the Application of Competition Law as Regulation: Elements for a Theory' (2010) *Yearbook of European Law* 261.

[157] European Commission, XXIInd Report on Competition Policy 1992, p 13 ('competition policy cannot be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context').

[158] Indicatively, European Commission, Staff Working Document Report on the application of the Union competition rules to the agricultural sector SWD (2018) 450 final; European Commission, Ex-post analysis of mobile telecom mergers, https://op.europa.eu/en/publication-detail/-/publication/0ba81733-f193-11e5-8529-01aa75ed71a1; European Commission, A review of merger decisions in the EU: What can we learn from ex-post evaluations?, https://ec.europa.eu/competition/publications/reports/kd0115715enn.pdf.

[159] European Commission, Guidelines on Vertical Restraints, OJ [2000] C291/1 (now OJ [2010] C130/1).

[160] B Hawk, 'System Failure: Vertical Restraints and EC Competition Law' (1995) 32 *Common Market Law Review* 973.

[161] A Ezrachi and M Stucke, *Virtual Competition* (Harvard University Press, 2016), pp 27–33; N Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (Oxford University Press, 2020).

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affects competition.[162] It explored the options for a 'new competition tool' and *ex ante* regulation of gatekeeper platforms while opened various investigations in digital markets, and it recently proposed a ground-breaking 'Digital Markets Act'.[163]

Another feature of the Commission's institutional practice that showcases what responsive enforcement means and can be a source of inspiration in this regard, is the following: the Commission regularly employs constructive interpretation and engages in interpretive struggles. For instance, in the late 1990s the Commission decided to orchestrate a wide-ranging programme for the substantive, procedural, and institutional reform of EU competition law that has been labelled as the More Economic Approach ('MEA'). The clashes between the Commission and the US antitrust authorities in the 1990s and early 2000s, the annulment of three merger decisions in early 2000s by the EU Courts, and the influence of the International Competition Network pushed the Commission to rethink its understanding of the rules and redesign its competition policy.[164] On the substantive level the reform started with vertical restraints and progressively moved to horizontal restraints,[165] merger analysis,[166] and the abuse of dominance.[167] The official objective of this approach was to anchor Commission's analysis on sound economics.[168] Essentially, though—as will be shown in Part IV—the MEA approach was an interpretive theory about EU competition law presented in an AL disguise.

Besides the MEA, two recent decisions are quite suggestive of the Commission's institutional practice of harnessing law's openness and engaging in constructive interpretation so as to ensure its integrity. In *Dow/Dupont* and *Bayer/Monsanto* without contravening EU Merger Regulation[169] or departing from the Horizontal Merger Guidelines ('HMG'), the Commission managed to go beyond a price/output analysis

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[162] J Crémer, Y-A de Montjoye, and H Schweitzer, *Competition Policy for the Digital Era*, Report prepared for the Commission, https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[163] For more information, see https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977; https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html; https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers; https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

[164] A Witt, *The More Economic Approach* (Hart Publishing, 2016), pp 7–39, 181–90.

[165] European Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 14 January 2011, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF.

[166] European Commission, Guidelines on the Assessment of Non-horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, Official Journal C 265, 18/10/2008.

[167] Commission, Guidance Paper note 146 above, paras 1–31.

[168] M Monti, 'A Competition Policy for Today and Tomorrow' (2000) 23 *World Competition* 1.

[169] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance), OJ L24, 29.1.2004, pp 1–22.

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and developed a robust innovation-based theory of harm.[170] Even though some criticise the Commission as engaging in a 'quantum leap',[171] its analysis is anchored on the HMG's explicit statement that 'increased market power' is defined not only as the ability to profitably increase prices, but also as the ability to profitably diminish innovation or affect negatively other parameters of competition.[172] Based on such a brief statement and its previous practice, the Commission considered that the merging of two close competitors with significant overlaps in a number of innovation spaces in a structurally oligopolistic, innovation-driven industry could lead to a significant impediment of effective *innovation competition*.[173] The underlying idea was that in markets where innovation is an important competitive force, a merger between close competitors may decrease their ability and incentive to innovate, as well as the competitive pressure on rivals to innovate. To reach such a conclusion, the Commission reconstructed the goal of EU Merger Regulation, articulated its own understanding of (innovation) competition and spelled out a rather rich conception of innovation that includes innovation incentives, capabilities, and efforts in various innovation spaces.[174]

In light of the above, it could be argued that the Commission regularly utilises EU competition law's openness and operates in a multifaceted way so as to secure its integrity. It invests in epistemic capacity to persuade the market players to comply, but also to signal to other competition authorities within or outside the EU that it applies competition law in a sound manner. The Commission also organises its intervention in a continuous and varied way; deliberates with national competition authorities, experts, and stakeholders; revisits its performance; employs constructive interpretation; and remains open to reconsider its understanding of competition rules. Had the Commission adopted the AL thinking or the AL-inspired crime-tort enforcement model it would not be up for such a task.[175]

C. *Courts as Catalysts*

To conclude our analysis, a last example should be given of how the courts could behave as catalysts. One way to behave as catalysts is to orchestrate and participate in interpretive struggles by utilising constructive interpretation as described above

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[170] Case M-8084, *Bayer/Monsanto, European Commission Decision* C(2018) 69, 2018; Case M-7932, *Dow/Dupont, European Commission Decision* C(2017) 2001-9, 2043-48, 3017-22.

[171] N Petit, 'Significant Impediment to Industry Innovation: A Novel Theory of Harm in EU Merger Control?', https://ssrn.com/abstract=2911597.

[172] European Commission, Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings [2004] OJ C31/ 03, paras 8, 38.

[173] By using the notion of innovation spaces, the Commission overcame the problems that innovation competition raises to market definition in *Dow/Dupont*, note 170 above, paras 283, 342–402, 1956–58, 2008–34.

[174] *Bayer/Monsanto*, note 170 above, paras 103, 1025-29, 1036; *Dow/Dupont*, note 170 above, para 2122.

[175] Note that the reason that the RL approach emphasises a type of enforcement that goes beyond the crime-tort model is because it understands competition law as a purposive and relatively open normative system, and thereby recognises that legal hermeneutics alone cannot always ensure law's integrity.

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in Section III.A. Another way courts could operate as catalysts is by facilitating or motivating responsive enforcement. An illustrative example in this respect could be traced in the way the ECJ progressively recalibrated its standard of review pushing the Commission to behave responsively.

The question 'how can a judge tackle competition problems that are at least economic in nature?' arose in the early years of EU competition law and led the EU Courts to formulate a doctrine of judicial deference.[176] According to this doctrine, EU courts would engage in a comprehensive review of a Commission decision, unless that decision contains a 'complex economic assessment'.[177] This meant that in principle EU courts, in recognition of the existing institutional balance and the relevant division of labour, would apply two different standards when assessing Commission decisions. They would exercise marginal or limited review over technical economic issues, and full, comprehensive review over any other non-technical, general legal issues.[178]

Yet, the establishment of the GC in 1988 (at that time called 'Court of First Instance') led to an intensification of judicial review.[179] Without dismissing the formulation of the doctrine, the GC went beyond what the doctrine implied and engaged in an increasingly more meticulous review of the Commission decisions. On many occasions the ECJ upheld this approach. Progressively, both courts departed from the initial doctrine and reviewed more thoroughly issues that in the past were considered as 'complex economic assessments'. For instance, in *Clearstream*, the GC questioned Commission's market definition,[180] and in *Airtours*, *Tetra Laval*, *Microsoft*, and *Ryanair*, it reviewed new economic theories and detailed econometric studies.[181] In *AstraZeneca*, the ECJ recognised that Commission's assessments of technical matters are not immunised from judicial review due to their technical nature.[182] In

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[176] *Consten and Grundig v. Commission* Cases 56 and 58/64 [1966] ECR, paras 229, 343, 347

[177] This formulation has been repeated in voluminous case law. See *BAT and Reynolds v Commission*, Joined Cases 142/84 and 156/84 [1987] ECR 4487, para 62; *Deere v Commission,* C-7/95 P [1998] ECR I-3111, para 76; *Groupement des Cartes Bancaires 'CB' and Europay International SA v Commission*, T-39/92 and T-40/92 [1994] ECR II-49, para 109; *Métropole Television and Others v Commission*, T-112/99 [2001] ECR II-2459, para 114.

[178] M Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?' (2011) 2(4) *Journal of European Competition Law & Practice* 296.

[179] See especially, *European Night Services*, T-374/94, T-375/94, T-384/94, T-388/94, ECLI:EU:T:1998:198, paras 51–53, 162; *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission of the European Communities,* T-528/93, T-542/93, T-543/93 and T-546/93 [1996] ECR II-00649, paras 114–23; *Tetra Laval v Commission*, T-5/02 [2002] ECR II-4381, paras 124, 128–32, 135–41, 188–336; *Microsoft v Commission,* T-201/04 [2007] ECR II-3619, paras 87–88.

[180] *Clearstream Banking AG and Clearstream International SA v Commission*, T-301/04 [2009] II-03155, paras 47–74.

[181] *Airtours v Commission*, T-342/99 [2002] ECR II-2585, paras 17–48, 158–181; *Tetra Laval v Commission*, note 186, paras 23, 119; *Commission v Tetra Laval*, C-12/03 P [2005] ECR I-987, para 19; *Microsoft v Commission*, note 186 above, at para 482; *Ryanair v Commission*, T-342/07, ECLI:EU:T:2010:280, paras 30, 139–95, 447–525.

[182] *AstraZeneca v Commission*, C-457/10 P, ECLI:EU:C:2012:770, paras 36–52.

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Woodpulp, the ECJ reviewed a substantial body of complex economic arguments and it even appointed its own economic experts to assess whether the market structure and the characteristics of the product and the industry at issue would support the Commission's analysis that collusion was the only rational explanation for the observed parallel conduct.[183] In *Deutsche Telekom,* both Courts assessed the Commission's calculations for finding a margin squeeze.[184]

These cases suggest that even though the shell of the doctrine survived, the functioning of judicial review gradually changed.[185] Both EU courts kept scrutinising more thoroughly the complex assessments of Commission decisions, while they did not hesitate to annul a decision if they remained unconvinced about the Commission's assessment of economic data. As economic analysis was becoming more and more prominent in EU competition law and the Commission was unfolding its MEA, the Courts increased their expectations and level of inquiry so as to ensure that the Commission instead of using economic expertise to shield its practices from scrutiny remained responsive and focused on safeguarding law's integrity.

IV. FRAMING DISCURSIVE PRACTICES

The previous two Parts touched upon the descriptive and prescriptive value of the RL model using examples from EU competition law. The purpose of this Part is to illustrate the discursive value of this model. In other words, this Part intends to show how the RL approach can recast the way the competition law community frames and debates over certain issues and, thereby, increase the likelihood of constructive debate, instead of polarisation. For this purpose, I focus here on a well-known discursive practice in the context of EU competition law to show how this debate could be reconfigured if the various interlocutors adopt the RL point of view.

As already mentioned, in the late 1990s, due to internal and external criticism, the Commission devised its MEA.[186] The key premise of this approach was that the aim of EU competition law is or should be to eliminate practices that could impair effective competition, thus having an adverse impact on consumer welfare.[187] Harm to competition was interpreted as meaning harm to consumer welfare and consumer welfare was defined in rather broad terms as including output, quality, innovation, and, to some extent, consumer choice, while the internal market aim remained relevant. Undoubtedly, the MEA constituted a significant departure from the

[183] *Alhstrom Osakeyhtio and Others v Commission*, Cases C-89/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 [1993] ECR I-1307, paras 101–63 (the experts suggested that this was not the case).

[184] *Deutsche Telekom v Commission*, T-271/03 [2008] ECR II-477, para 185; *Deutsche Telekom v Commission*, C-280/08 P, ECLI:EU:C:2010:603, para 143.

[185] A Kalintiri, 'What's in a Name? The Marginal Standard of Review of "Complex Economic Assessments" in EU Competition Enforcement' (2016) 53(5) *Common Market Law Review* 1283.

[186] Witt, note 164 above, pp 4c7.

[187] Commission, Guidelines, note 166 above, paras 13, 24.

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Commission's previous interpretive practice, while it was also not fully in line with ECJ's case law.[188] Two were its organising ideas: (1) EU competition law's goal is or should be to promote rivalry as a means for enhancing consumer welfare;[189] and (2) neoclassical economics could provide all the necessary tools and methods for EU competition law analysis.[190]

From an AL perspective, the MEA could be either a technocratic statement of the law or an inappropriate usurpation of legislative power. Note that within the AL framework value judgments are not permissible for enforcers. The law has a fixed goal which enforcers should simply enforce in a scientific and technocratic manner, while making value judgments would 'politicise' them and lead them to undertake tasks beyond their mandate and institutional legitimacy. Due to these reasons, the Commission introduced the MEA little by little over a period of ten years or more, and carefully framed it in value neutral and scientific terms. For instance, this new faith was called the 'more economic' and not the 'consumer welfare' approach. The Commission also sought for mainstream economic positions and expert opinions[191] and engaged in wide ranging public consultations with all the stakeholders.[192] Furthermore, to articulate its MEA, the Commission used statements of the law (ie infringement decisions),[193] as well as softer enforcement mechanisms (ie commitments, settlements, sector inquiries), and most importantly soft law tools, such as non-binding Notices, Communications, Guidelines, and Guidance papers. Even the Commission's omissions (eg the Commission made it clear that it will not focus on exploitative pricing) contributed to setting out its new understanding of law.[194] The official narrative was that the MEA is merely a policy that injects modern scientific or technocratic economic thinking into the Commission's interpretation to rationalise it and does not prejudice the interpretation of the EU Courts.[195]

However, in many of these documents, the Commission was torn between providing a restatement of the law on the one hand and offering innovative solutions on the other.[196] Certainly, the MEA is not merely a statement of the law, but an interpretation

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[188] D Gerber, 'Two Forms of Modernisation in European Competition Law' (2007) 31(5) *Fordham International Law Review* 1235, 1248–50.

[189] European Commission, Guidelines on the Application of Article 81(3), OJ [2004] C101/9713, para 13 ('The objective of Article [101 TFEU] is to protect competition on the market *as a means* of enhancing consumer welfare and of ensuring an efficient allocation of resources'.).

[190] Gerber, note188 above, p 1247.

[191] Report by the EAGCP, An Economic Approach to Article 82 (July 2005), p 4, https://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf.

[192] Witt, note 164 above, pp 49–52.

[193] European Commission, COMP/C-3 /37.990 – Intel, D (2009) 3726 final.

[194] Commission, Guidance Paper, note 146 above, paras 2, 3 7.

[195] Monti, note 168 above, p 1 (describing the MEA as a shift from 'a legalistic based approach to an interpretation of the rules based on sound economic principles' leading to an antitrust policy 'fully compatible with economic learning').

[196] G Monti, 'The Concept of Dominance in Article 82' (2006) 9 *European Competition Journal* 32.

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of it, and not an interpretation within the meaning of the AL model, but an RL-type of interpretation, an interpretive theory about the purpose of the law. Specifically, to articulate the MEA the Commission went beyond the traditional methods of interpretation and combined normative and positive legal and economic claims, reconstructed the goal of the law and proposed a way for understanding EU competition law that fit existing case law and presented it in its best light by justifying its function.

Accordingly, the Commission used the disguise of AL to earn legitimacy. This is the reason why it casted the MEA as a statement of the case law, as a way to prioritise cases or as the one and only means to bring EU competition law up to speed with mainstream economic thinking. Rhetorically it remained within the AL worldview, yet in reality it operated responsively as it sought to incorporate new learning and improve its capacity to tackle market problems. It could be thus argued that the Commission's underlying objective was to tame law's openness, so as to ensure its integrity. Such interpretive move was possible because of EU competition law's relative indeterminacy. If, nonetheless, the MEA is not seen through these favourable lenses, as an interpretive theory in AL disguise, it should be considered as a methodologically problematic and doomed-to-fail (for the reasons provided in Part II above) attempt to eliminate competition law's relative indeterminacy.

For some, the MEA was a 'legal and cultural revolution',[197] a 'radical reform' heralding the 'dawn of a new era',[198] the European equivalent of the US 'antitrust revolution', or a 'Chicago-light' approach.[199] For others, it was a scientific attempt to modernise competition law and bring it closer to modern economic thinking.[200] According to some more critical voices, the MEA was nothing but a neoliberal interpretation of the law leading to light-weighted enforcement.[201] Still today, the debate around the MEA is rarely about the merit or demerit of the MEA as an interpretive theory. On most occasions, its supporters present it as a neutral statement of the case law or as an economically technocratic restatement of it, whereas its opponents claim that it is incoherent with the case law or value laden.

However, this is far from a constructive debate. Indeed, the MEA is not 'purely scientific'[202] or value neutral, but an articulation of the consumer welfare paradigm

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[197] C Ehlermann, 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37 *Common Market Law Review* 546.

[198] L Garzaniti, et al, 'Dawn of a New Era? Powers of Investigation and Enforcement Under Regulation 1/2003' (2004) 72 *Antitrust Law Journal* 159, 207.

[199] E Fox, 'Monopolization, Abuse of Dominance, and the Indeterminacy of Economics: The U.S./E.U. Divide' (2006) *Utah Law Review* 799; Witt, note 98, p 3.

[200] M Monti, 'A Reformed Competition Policy: Achievements and Challenges for the Future', Speech at the Center for European Reform (Brussels, 28 October 2004).

[201] A Wigger and H Buch-Hanse, 'Competition, the Global Crisis, and Alternatives to Neoliberal Capitalism: A Critical Engagement with Anarchism' (2013) 35(4) *New Political Science* 604; H Buch-Hansen and A Wigger, 'Revisiting 50 Years of Market-Making: The Neoliberal Transformation of European Competition Policy' (2010) 17(1) *Review of International Political Economy* 20.

[202] For an insightful analysis of how science is often misunderstood or oversimplified by the legal community in its quest for certainty and objectivity, see Feldman, note 31 above, pp 97–101, 133–38.

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in the context of EU competition law.[203] Simply claiming that it is value-laden, though, does not qualify as a reason for its dismissal since—as the RL approach suggests—every interpretation in this area of law involves normative choices. Similarly, simply pointing to the fact that it deviates from the case law does not justify its dismissal as the case law might have become obsolete and unable to ensure law's integrity. Hence, both camps of this debate operate under the AL assumptions and sweep the real issue under the carpet. The key issue is not whether the MEA is a value-laden, creative interpretation of the case law, whether it disregards some strands of the case law or whether it has a juris-generative character, but whether it promotes or undermines law's integrity. This question becomes *relevant* only if we adopt the RL point of view.

Framed in this way, the proponents of the MEA would need to spell out what version of the consumer welfare paradigm has been adopted and practiced by the Commission, and whether there is any deviation between theory and practice.[204] They would also have to explain why consumer welfare should bear greater weight than the welfare of producers and why it should be considered as the sole and only way to conceptualise EU competition law's mission, marginalising or replacing other aspects of competition such as the promotion of freedom of opportunity or the protection of a decentralised process of rivalry. They would, additionally, need to explain whether consumer welfare should be interpreted in narrow price-centric terms, or more broadly so as to include, for example, innovation, privacy or even sustainability concerns.

Most importantly, though, the proponents of the consumer welfare centred MEA would have to clarify to what vision of the European economy their approach is conducive. Is the MEA an approach that orientates the economy towards growth, green growth or sustainable growth? In the last decades of the twentieth century we might have taken for granted that the sole purpose of the economy is growth, and such a fundamental assumption might have found its way in EU competition law and policy as a focus on allocative efficiency and consumer surplus.[205] Nonetheless, at the beginning of twenty-first century there is rising awareness that growth-focused

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[203] See for instance, Commissioner Kroes' SPEECH/05/512 of 15 September 2005 (stating that 'consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources'.).

[204] It should be noted that a supporter of total or consumer welfare or any other standard could fall within either the AL or the RL category. The classification would depend on how she understands and argues in favour of the specific standard. For example, an AL-minded advocate of consumer welfare would propose that this standard is value-neutral, or implementable without value judgments. An RL-minded advocate of consumer welfare would accept that this standard is simply a candidate among others equally permissible ones, accept competition law's open-texture, propose a particular conception of its purpose, and argue that it leads to a better interpretive theory than its rivals. Hence, there is no necessary connection between such standards and the two conceptual models articulated here.

[205] K Raworth, *Doughnut Economics* (Random House Business Books, 2016), pp 31–40.

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economies might transgress planet's ecological ceiling and simultaneously fail to ensure the basics of life for the majority of the population.[206] Considering, thus, whether growth should be 'sustained', 'balanced', or 'smart, sustainable and inclusive', or whether our economies' goal should be circularity and inclusivity or even de-growth has moved out from university classrooms to mainstream political forums and institutional venues.[207] The supporters of the consumer welfare paradigm, therefore, need to address the question 'what should be the goal of our economies' as this question finds its way to many theories of harm.[208]

On the other hand, the opponents of the MEA would have to show what aspects or parameters of competition this approach leaves aside. They would have to show why the MEA should be dismissed or complemented with a 'more behavioural economics', 'more democratic',[209] a 'greener',[210] or a 'holistic' approach.[211] They would also have to show how these dimensions of competition could be translated into clear and operational legal rules and standards that respect rule of law and promote EU competition law's integrity. Furthermore, when they consider that competition is the problem and not the solution, they would have to articulate criteria and implementation techniques for competition law derogations and exemptions.[212] Of course, when necessary, they would have to show that the theory of harm they propose links up with a vision of economy's goal that is more compelling than the one proposed by their adversaries.

CONCLUSION

The purpose of this article was to articulate two ways of thinking about EU competition law. The AL and the RL frameworks were proposed as a way to uncover and bundle certain fundamental assumptions, patterns of thought and widespread views on what EU competition law is and how it operates. Contrarily to the AL model that considers competition law as a closed normative system and attempts to reduce competition to a single value (eg consumer or total welfare, freedom to compete, rivalry), the RL approach understands competition law as a relatively open normative field that strives to secure its integrity and considers competition

[206] Ibid, pp 43–53.

[207] See for instance, European Commission's, New Circular Economy Action Plan, https://ec.europa.eu/environment/circular-economy; Europe's Green Deal, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

[208] For instance, the notion of competition as an output-maximisation device presupposes a growth mindset and might be refined or change if another goal is identified as the purpose of the economy.

[209] E Deutscher, *Of Masters, Slaves, Behemoths and Bees – The Rise and Fall of the Link between Competition, Competition Law and Democracy* (on file with the author).

[210] G Monti, 'Four Options for a Greener Competition Law' (2020) 11(3–4) *Journal of European Competition Law & Practice* 124.

[211] Lianos, note 34 above, pp 177–97.

[212] A Ezrachi and M Stucke, *Competition Overdose* (Harper Business, 2020), pp 506–81.

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as a multi-faceted and multi-layered concept which cannot be reduced to one single value.

A major conceptual advantage of the responsiveness approach lies to the fact that it can explain away law's indeterminacy as the by-product of conflicts between openness and integrity. Contrarily to the AL model that views such indeterminacy as temporary and eradicable, the RL model stresses that it is endogenous and plays a dual role in EU competition law: it may generate uncertainty and unpredictability, but it may also allow the law to be flexible, adaptive and effective in incorporating new knowledge and dealing with new market challenges.[213]

Moreover, conceptualising EU competition law as RL does justice to certain key elements of this field of law. EU competition law disposes certain in-built flexibility traceable in its fuzzy mandate, conceptually elastic vocabulary, rules-and-standards mode of analysis, and reliance on both positive and normative economics. This in-built flexibility is hardly surprising as this field of law seeks to regulate a complex and constantly changing factual matrix, the European market.[214] If capitalism is 'an evolutionary process', 'a form or a method of economic change' then the law that operates as the residual regulator of this process cannot but be open.[215] Nevertheless, even though we cannot legitimately redesign or merely imagine EU competition law as a closed or rigid set of rules, its openness inevitably poses challenges to its integrity.

The RL approach, however, does not confine itself in simply conceptualising EU competition law as a field in constant epistemic evolution, open to value disagreements where legal and economic technocracy cannot answer every question. It proposes, additionally, a modus operandi to ensure that conflicts between openness and integrity will continue to be law's 'combustion engine' without any serious 'side effects'. This modus operandi revolves around (1) constructive interpretation; (2) responsive enforcement; and (3) catalytic adjudication. Of course, EU competition law's actual responsiveness depends on how well legal institutions use this modus operandi.

The proponents of the AL model for EU competition law may object that the use of constructive interpretation could make the application of the law similar to policy and push enforcers and adjudicators to go beyond the confines of the rule of law by making value choices. Nonetheless, even though there is no scientific way for making value judgments, there are several methods to address value conflicts in legal reasoning.[216] Consequently, by openly recognising the inevitability of value judgments in

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[213] T Endicott, 'Law Is Necessarily Vague' (2001) 7(4) *Legal Theory* 379 (arguing that vagueness is both an important and an unavoidable feature of law because: (1) precision is not always desirable; (2) law is systemic, and therefore enactments formulated in precise language may not lead to precise laws; and (3) law must perform functions that can only be performed by means of vague standards).

[214] P A Hall and D Soskice, *Varieties of Capitalism* (Oxford University Press, 2001), pp 3–21.

[215] Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (Harper and Brothers 1942), pp 82–83.

[216] G Sartor and H Prakken (eds), *Logical Methods of Legal Argumentation* (Springer, 1997), pp 43–-118, 119–40; R Alexy, *A Theory of Legal Argumentation* (Oxford University Press, 1989), pp 211–86.

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legal interpretation, we do not turn EU competition law into a less technocratic or arbitrary field of law. We simply dismiss the pretence of scientific objectivity that does not even characterise modern science.[217]

Modern philosophy of science has recognised that normative substrata underlie the foundation of scientific theories, and that any scientific theory hinges unconsciously, but to a significant degree, upon its correspondence with the value system of the theory-builder.[218] Yet, such an admission has not led to the end of empirical inquiry, nor does it counsel against the continued pursuit of objective knowledge.[219] Hence, the responsiveness approach by admitting the role of value judgments in EU competition law explains not only why indeterminacy persists, but also why it cannot be fully eradicated; why it can only be tamed by calibrating openness with integrity through economically informed, data-based, and value-laden legal hermeneutics.[220]

This is why, the responsiveness approach suggests that value judgments, being inevitable, should not be swept under the carpet but brought out in the open air and stress tested through their proxies. In so doing, this approach avoids the uncertainty associated with encrypted policy discussions and could stimulate compliance. It also allows for endogenous legal change without undermining the integrity of the law. European enforcers or adjudicators can revisit a doctrine that relies on a misguided or ineffective interpretive theory, and, thereby, improve the state of the law. Moreover, this approach could lead to legitimate and effective normative elaborations and enable interactions between different legal institutions and other stakeholders.

If legal institutions view EU competition law as a form of RL, they might become more able to make value judgments, incorporate new knowledge and apply the law contextually without diminishing its integrity. Such an attitude could make EU competition law more responsive to intellectual and factual change. Apart from that, if the competition law community adopts the RL lenses it might become more able to avoid some of the of pitfalls of the AL patterns of thought, and engage in more constructive discursive practices.

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[217] See also, Feldman, note 31 above, pp 139–58 (showing how modern views of science have passed largely unnoticed in law and how 'our failure to understand the limitations of science creates distortions in the legal system').

[218] Kuhn, note 84 above, pp 107–15, 320–29.

[219] For a distinction between moral and scientific objectivity, see J Reiss and J Sprenger, 'Scientific Objectivity' (2020) *The Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/archives/win2020/entries/scientific-objectivity.

[220] L Alexander & E Sherwin, *Demystifying Legal Reasoning* (Cambridge University Press, 2008), pp 9–30; N Stavropoulos, *Objectivity in Law* (Clarendon Press, 1996), pp 125–64.

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