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THE TESTS OF ILLEGALITY UNDER ARTICLES 101 AND 102 TFEU

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INTRODUCTION

The two-volume *ECONOMICS AND THE INTERPRETATION AND APPLICATION OF U.S. AND E.U. ANTITRUST LAW* by Richard Markovits is without doubt one of the most impressive academic commentaries on US and EU Antitrust Law. It goes well beyond the usual superficial comparison of US and EU antitrust laws and together with its forthcoming policy-sequel *THE WELFARE ECONOMICS OF ANTITRUST POLICY AND U.S. AND E.U. ANTITRUST LAW: A SECOND-BEST-THEORY-BASED ECONOMIC-EFFICIENCY ANALYSIS* will constitute a monumental research study on US and EU antitrust law and policy. It demonstrates levels of analytical thinking seldom found in textual analysis of antitrust laws. It is indeed one of the few studies of antitrust law that goes beyond the provisions and case law in order to establish coherent principles that operationalise the law.

The aim of the current article is to assess one of the many contributions of the study to our understanding of US and EU antitrust laws, namely the tests of illegality adopted in *ECONOMICS AND THE INTERPRETATION AND APPLICATION OF U.S. AND E.U. ANTITRUST LAW* to interpret Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), as well as the claim that none of these tests is an economic-inefficiency test of illegality. In order to do this, this article first comments on the “specific-anticompetitive-intent test” that Markovits proposes to be the test of illegality under the object branch of the prohibition of Article 101 and under the abuse prohibition of Article 102 TFEU before moving onto separate discussions of the tests of illegality in the specific contexts of Article 101 TFEU and subsequently of Article 102 TFEU. Finally, the article offers some concluding thoughts.

THE SPECIFIC-ANTICOMPETITIVE-INTENT TEST

According to Markovits, many antitrust economists, often influenced by misguided legal scholars, assume that US and EU antitrust laws promulgate an economic-inefficiency test of illegality.¹ In contrast, according to Markovits, the test of illegality that the Sherman Act

¹ *ECONOMICS AND THE INTERPRETATION AND APPLICATION OF U.S. AND E.U. ANTITRUST LAW*, Vol I (hereinafter *MARKOVITS I*) at xxviii (Springer, 2014). According to Markovits, *ibid.*, many experts also assume that increases in competition always tend to increase economic efficiency as a result of their ignoring the General Theory of Second Best.

promulgates and that Markovits believes also to be the test for the object branch of Article 101 TFEU and for the exclusionary-abuse branch of Article 102 TFEU is the “specific-anticompetitive-intent test.”² Under this test, a seller commits an anticompetitive act if and only if its ex ante perception of its choice’s profitability was ceteris paribus critically affected by its belief that the conduct might benefit the seller by increasing the demand curve that it would face in future by reducing the absolute attractiveness of the offers against which it would have to compete.³ According to Markovits, such acts have to be committed with the “specific intent” to reduce the absolute attractiveness of the offers against which the undertaking will have to compete—that is, they are acts that would not have been committed but for the perpetrator’s belief that they would or might have this effect, in circumstances in which the effect in question would ceteris paribus critically inflate the profitability of the acts concerned.⁴

Several general points can be made in relation to the specific anticompetitive intent test. First, the introduction of the reduction in the attractiveness of rivals’ offers as a central component of what makes a practice anticompetitive is highly valuable and attractive: it provides an essential conceptual basis for establishing what makes any given conduct anticompetitive. Such clear, conceptual bases are seldom found in academic or practitioner commentaries on antitrust, or even in the case law on issues concerning what exactly makes any given conduct anticompetitive. It is an attractive proposition to understand acts that distort or harm competition as those by which one undertaking reduces the attractiveness of its rivals’ competing offers which would not be profitable for the perpetrator but for this reduction in the attractiveness of rivals’ offers. Such a conceptualisation provides one with a principled basis using which one can distinguish between aggressive commercial practices that harm one’s rivals on the merits and anticompetitive practices that harm one’s rivals by a distortion of the competitive positions of the perpetrator and its rivals. Second, the use of “intent” as part of the test of anticompetitiveness is not uncontroversial in the US or in the EU. There is indeed a sharp divide amongst commentators regarding the use of intent particularly in unilateral conduct cases (i.e., cases that would fall within the scope of Sherman Act Section 2 or Article 102 TFEU).⁵ This section will discuss the use of intent in the context of Article 102 TFEU.

² MARKOVITS I at 69.

³Id.

⁴Id. at 69-70.

⁵ Pinar Akman, The Role of Intent in the EU Case Law on Abuse of Dominance 39 EUROPEAN L. REV. 316, 318 (2014). For a related discussion is what exactly “intent” refers to in this context, and particularly whether it refers to objective or subjective intent, see, e.g., Ronald A. Cass and Keith N. Hylton, Antitrust Intent, 74 SO.CAL.L. REV. 657 (2001), distinguishing between subjective and objective intent. Cf. RENATO NAZZINI, THE FOUNDATIONS OF EUROPEAN UNION COMPETITION LAW: THE OBJECTIVE AND PRINCIPLES OF ARTICLE 102 at 58

The discussion of intent in the context of Article 101 TFEU is left for the next section since Article 101 TFEU explicitly prohibits practices with the “object” to restrict, distort or prevent competition, and the role of intent under Article 101 TFEU has to be considered in this specific context alongside the discussion of practices with the “effect” to restrict, distort or prevent competition as an alternative to practices with the “object” to do so.

Concerning the use of intent in unilateral conduct cases, whereas some authors have argued that the intent of the undertaking evidenced by, for example, the language used in internal documents should be irrelevant for the competition inquiry,⁶ other commentators suggest that anticompetitive intent can be a proxy for anticompetitive effects, since the firm itself is in the best position to know the effects of its conduct.⁷ Interestingly, some jurisdictions in fact require their competition authority to prove intent (usually understood as the “purpose” of the act) as a legal element of the general test of anticompetitiveness for unilateral conduct.⁸ In the context of Article 102 TFEU, the current author argued elsewhere that there is no role for intent in the EU prohibition of abuse of dominance for several reasons some of which will be discussed immediately below.⁹

First, according to the ultimate arbiter of EU law, namely the Court of Justice (CoJ), “abuse” is an “objective concept” relating to the behaviour of a dominant undertaking which is such as to influence the structure of a market where, as a result of the very presence of that undertaking, the degree of competition is weakened and which, through recourse to methods different from

(Oxford Univ. Press, 2011), arguing that “objective intent” defined as such is a test of effect and not intent, and in any case, any subjective intent test is always also objective since the “intent” to cause competitive harm must be complemented with acts that are objectively capable of causing the harm in question to be found abusive.

⁶ See, e.g., Geoffrey A. Manne and E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609 (2005); Herbert Hovenkamp, *The Monopolization Offense*, 61 OHIO STATE L. J. 1035 (2000); Antonio Bavasso, *The Role of Intent under Article 82 EC: From “Flushing the Turkeys” to “Spotting Lionesses in Regent Park,”* EUROPEAN COMPETITION L. REV. 616 (2005).

⁷ Marina Lao, *Reclaiming a Role for Intent Evidence in Monopolization Analysis*, 54 AMER. UNIV. L. REV. 151, 157 (2004). See also Eirik Osterud *IDENTIFYING EXCLUSIONARY ABUSES BY DOMINANT UNDERTAKINGS UNDER EU COMPETITION LAW: THE SPECTRUM OF TESTS* at Ch. 5 (Kluwer Law International, 2010) for intent-based tests of abuse. Similarly, it has been argued that intent evidence can be very helpful when defendants are not primarily motivated by profits and objectively determining the relevant restraint’s welfare effects is difficult; Maurice E. Stucke, *Is Intent Relevant?* J. OF LAW, ECON. & POLICY 801, 831 (2012).

⁸ Turkey and Canada are two examples. In Turkey, the provision regulating the abuse of a dominant position prohibits, *inter alia*, practices that aim at complicating the activities of competitors in the market—see Act No 4054 on the Protection of Competition, Article 6. In Canada, although not required in the legislation, the Federal Court of Appeal has found that an anticompetitive act is to be defined by reference to its purpose, and the required anticompetitive purpose is an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary—see *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, [66]. For further information, see *Competition Bureau Canada Enforcement Guidelines on The Abuse of Dominance Provisions* 10 et seq. (2012).

⁹ See Akman, *supra* note 5.

those which condition normal competition, has the effect of hindering the maintenance of the degree of remaining competition or the growth of that competition.¹⁰ This definition suggests that a subjective element such as intent has no role to play in the assessment of whether the conduct is anticompetitive. Nevertheless, a closer look at the Court’s own jurisprudence indeed reveals that the concept of abuse might not be as “objective” as the CoJ suggests: there are cases across different types of abusive conduct in which the intent of the dominant undertaking was found to be relevant.¹¹ In fact, some decisions of the European Commission and judgments of the European Courts (General Court and the CoJ) refer to the “object” or “purpose” of the dominant undertaking as an alternative to analysing the “effects” of a practice on the market, and these cases appear to use “intent” and “object” synonymously.¹² One problem with such usage is that using (subjective) intent to find a practice anticompetitive, sometimes to the extent of disregarding evidence of lack of effects, poses serious risks for legal certainty.¹³ Using intent is particularly problematic under an effects-based approach: such usage begs the question why intent matters if its role is not to act as proxy for effects.¹⁴ Yet, if the concern is indeed with the effects of conduct on the market, then what the added value of establishing intent is as opposed to directly establishing the existence or lack of effects on the market is unclear.¹⁵ Moreover, the question also remains even where the conduct of an (dominant) undertaking cannot be explained by anything other than the intention to eliminate competitors, why this should matter so long as competitive harm (in the form of effects on the market) cannot be demonstrated.¹⁶ In turn, if competitive harm can be demonstrated, intent becomes superfluous since the proof of anticompetitive effects should suffice for a finding of abuse regardless of the benign intentions of the perpetrator.¹⁷ The opposite is also true: where the objective market factors in themselves do not demonstrate the existence of abuse, what the dominant undertaking intended should be irrelevant since doubt should benefit the accused and if there is not a

¹⁰ Case 85/76 *Hoffmann-La Roche & Co AG v. EC Commission*, ECR 461, [91] (1979).

¹¹ See Akman, *supra* note 5 at 316-317. Intent is explicitly relevant for the test of predation when the price is between Average Variable Cost (AVC) and Average Total Cost (ATC)—see Case C-62/86 *AKZO Chemie BV v. EC Commission*, ECR I-3359, [72] (1991). Intent is also specifically relevant for the test of vexatious litigation—see Case T-111/96 *ITT Promedia NV v. EC Commission*, ECR II-2937, [60]; [55] (1998). The relevance of intent for other types of abusive conduct is, in contrast, implicit in the decisional practice and case law.

¹² See Akman, *supra* note 5 at 317. Some examples of using intent terminology interchangeably with “object” and/or “purpose” can be found in Commission Decision (Case COMP/A.37.507/F3) *AstraZeneca OJ L332/24*, [327]; [628]; [632]; [648]; [763] (2006); *AKZO*, *supra* note 11 at [71]; Case C-202/07 P *France Télécom v. EC Commission*, ECR I-2369, [107], [110] (2009). For further discussion and examples from case law, see Akman, *supra* note 5 at 334 et seq.

¹³ *Id.* at 317.

¹⁴ *Id.* at 331.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

credible theory of harm that can be explained on the basis of objective market factors going beyond what the undertaking allegedly intended, there must be doubt.¹⁸ Thus, intent is superfluous in this scenario as well.

Under the EU case law on Article 102 TFEU, once intent is equated with object, this means that in the presence of intent (which is sufficiently established by subjective intent in the case law) the absence of effects can be disregarded in the finding of abuse because the jurisprudence does not require proof of effects to establish abuse.¹⁹ Thus, potentially, abuse can be established on the basis of intent (which in turn can be established on the basis of internal documents) without having to demonstrate even likely effects if current case law is followed. Crucially, the EU decisional practice and case law lack a fundamental element contained in the test of illegality proposed by Markovits, which makes it particularly problematic to use intent in the EU given the current formalistic approach of the authorities. This problem may not pose a danger were the EU approach to change to involve this additional element of the test proposed by Markovits. This additional element relates to efficiency and will be discussed next.

Notwithstanding the fact that Markovits suggests that the relevant tests of illegality that he argues to be correct as a matter of law are not based on economic inefficiency, the tests still contain an important element of economic efficiency. Particularly for those better informed on the case law and discussions concerning EU antitrust law than US antitrust law, it is important to elaborate on the proposition that the correct tests of illegality are not based on economic inefficiency. What follows and the role that efficiency plays in the EU case law further explain why making intent a central factor in establishing anticompetitive conduct for the EU antitrust provisions might be less desirable than doing so in US law.

¹⁸ Id. For the principle of doubt benefitting the accused in the competition context, see, e.g., Case C-457/10 P *AstraZeneca v. EC Commission*, ECR 0000, [199] (2012).

¹⁹ There are cases in which anticompetitive object or potential restrictive effects were deemed sufficient to prove an abuse—see, e.g., Case T-203/01 *Michelin v. Commission (Michelin II)* ECR II-4071, [239] (2003); Case T-219/99 *British Airways plc v. Commission* ECR II-5917, [293] (2003); Commission Decision of 21 May 2003 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-1/37.451, 37.578, 37.579 — *Deutsche Telekom AG*) [2003] OJ L263/9, [179]-[180]. There are also several cases where the effects of a practice were not deemed relevant such as *Michelin II* and *Irish Sugar* where the GC held that, for the purposes of applying Art.102, establishing anti-competitive object and anti-competitive effect are one and the same thing; *Michelin II*, *ibid* [241]; Case T-228/97 *Irish Sugar plc v. Commission* ECR II-2969, [170] (1999). Although recently in Case C-209/10 *Post Danmark A/S v Konkurrencerådet* ECR I-0000, [24] (2012) the CoJ appeared to require effects to the detriment of consumers for Article 102 to be infringed, in a more recent judgment, namely *AstraZeneca* the same court clearly reiterated its earlier position that the required effect is a potential anticompetitive effect, not necessarily concrete or “current and certain anticompetitive effects”; *AstraZeneca*, *supra* note 18 at [112]. For cases that equate intent with object, see note 12 *supra*.

For Markovits, under the proposed test of illegality, profits resulting from a given choice are “inflated” if they exceed that choice’s economic efficiency and they are “critically inflated” if the relevant profit-inflation caused the choice to be profitable despite the fact that it is economically inefficient.²⁰ The profits that the choice yields are “ceteris paribus critically inflated” if nothing else exists that might cause the profits to diverge from the choice’s economic efficiency.²¹ Thus, Markovits appears to suggest that an anticompetitive act involves a firm making a choice that results in profits exceeding that choice’s economic efficiency where this increase in profits renders the choice profitable even though the choice is not otherwise economically efficient and there is no other factor that would render such an economically inefficient choice profitable than the reduction in the attractiveness of the rival’s offerings. Moreover, the firm in making that choice does so believing that this would be the outcome as a result of the reduction its choice will lead to in the attractiveness of its rivals’ offerings. Thus, there is a clear, discernible element of efficiency in the centre of this test even though it is not the inefficiency of conduct (i.e., the reduction in efficiency) that renders the conduct illegal.

Incorporating a distinct element testing the efficiency of conduct for the undertaking adopting the conduct into the legal test of anticompetitiveness represents a significantly different approach to the EU approach in which efficiency is only a secondary concern—if taken into account at all. This is because particularly under Article 102 TFEU that the conduct increases efficiency can only be argued and has to be proved as a defence by the perpetrator.²² Thus, efficiency is not taken into account in the proof of abuse itself and thus, is not included in the test of what makes conduct anticompetitive despite arguments to this effect in the literature.²³ Consequently, if the defendant fails to prove to the requisite standard that the efficiency enhancing aspects of its conduct outweighs the distortive effects on competition (and that consumers will benefit from the efficiency gains), it can be found to have abused its position

²⁰ MARKOVITS I at 70.

²¹ *Id.* at 70.

²² See Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (hereinafter EC Abuse Guidance) [2009] OJ C45/7, [28]-[31].

²³ See, e.g., Pinar Akman, Searching for the Long-Lost Soul of Article 82EC, 29 OXFORD J. OF LEG. STUD. 267, 288-289 (2009); Denis Waelbroeck, The Assessment of Efficiencies under Article 102 TFEU and the Commission’s Guidance Paper in COMPETITION LAW AND THE ENFORCEMENT OF ARTICLE 102 at 103 (FEDERICO ETRO AND IOANNIS KOKKORIS, eds.) (Oxford Univ. Press, 2010); PINAR AKMAN, THE CONCEPT OF ABUSE IN EU COMPETITION LAW: LAW AND ECONOMIC APPROACHES 282-283 and 316 et seq. (Hart Pub. Co., 2012). Part of the problem with accepting efficiencies to be an “objective justification” and therefore a defence is that, as expressed by Advocate General Jacobs in Syfait, the two-stage analysis suggested by the distinction between “abuse” and “objective justification” is somewhat artificial: the more accurate view is that “certain types of conduct on the part of a dominant undertaking do not fall within the category of abuse at all”—see AG Jacobs Opinion in Case 53/03 Syntetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v. GlaxoSmithKline A EVE ECR I-4609, [72] (2005).

without the claimant or the court ever having to establish whether the conduct increases the efficiency of the perpetrator.²⁴ Similarly, under Article 101 TFEU, efficiency can only be taken into account under Article 101(3) TFEU as one of the four criteria that would “except” (prior to Regulation 1/2003, “exempt”) a given practice from breaching Article 101 TFEU despite falling foul of the prohibition found in Article 101(1) TFEU. The burden of proof is similarly on the defendant to prove that the conditions of Article 101(3) TFEU are met.²⁵ Failing such proof, conduct can be found to breach Article 101 TFEU without the claimant or the court ever having to establish whether the conduct increases efficiency or not. Thus, under the standard EU approach whether the perpetrator’s conduct would be efficient and profitable irrespective of the effect on the attractiveness of rivals’ offers is not taken into account save for as a defence by the perpetrator. In this respect, the test proposed by Markovits is far more receptive to the possibility that increasing efficiency may prevent a given conduct from breaching antitrust law than the current EU approach and the treatment of efficiency thereunder. This important difference needs to be borne in mind in order to appreciate the concern of European commentators regarding the assessment of efficiency by the EU authorities,²⁶ as well as to appreciate the implications of accepting the test proposed by Markovits as the correct test of illegality under the EU provisions. Consequently, accepting the test of illegality as proposed by Markovits might actually imply for the EU authorities to adopt a more efficiency-based approach than is currently the case, notwithstanding the proposition that the test itself is not one based on economic inefficiency.

THE TEST OF ILLEGALITY UNDER ARTICLE 101 TFEU

Article 101(1) TFEU prohibits, as incompatible with the internal market, all agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between Member States and that have as their object or effect the prevention, restriction or distortion of competition within the internal market. Article 101(2) TFEU then lists particular types of prohibited conduct before Article 101(3) TFEU exempts conduct that falls foul of Article 101(1) TFEU but satisfies four specific criteria found in Article 101(3)

²⁴ For the CoJ’s holding that consumers must benefit from the efficiencies, see Case C-95/04 *British Airways v. Commission* ECR I-2331, [86] (2007).

²⁵ See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, Article 2.

²⁶ See, e.g., ROBERT O’DONOGHUE AND JORGE PADILLA, *THE LAW AND ECONOMICS OF ARTICLE 102 TFEU* 286 et seq. (2nd ed.) (Hart Pub. Co., 2013); Jean-François Bellis and Tim Kasten, *Will Efficiencies Play an Increasingly Important Role in the Assessment of Conduct under Article 102 TFEU?* in *COMPETITION LAW AND THE ENFORCEMENT OF ARTICLE 102* at 129 (FEDERICO ETRO AND IOANNIS KOKKORIS, eds.) (Oxford Univ. Press, 2010); see also sources in note 23 supra.

TFEU. On Article 101 TFEU, Markovits argues that the provision promulgates tests of prima facie illegality. In this context, Markovits first notes that it is not correct to separate the test of “preventing or restricting competition” from the concept of “conduct that has preventing or restricting competition as its object or effect.”²⁷ This is to be contrasted with the argument that Markovits notes to be adopted by several EU antitrust experts in interpreting the rule such that (i) conduct should be said to prevent or restrict competition whenever it inflicts a net-Euro loss on the customers of its perpetrators and the customers of their rivals, regardless of the perpetrators’ motive for engaging in the conduct and regardless of the way in which that outcome is generated, and (ii) this interpretation should control the interpretation of “conduct that has as its object or effect the prevention or restriction of competition.”²⁸ The alternative test of illegality that Markovits puts forward is that conduct should be deemed to have as its “object” the prevention or restriction of competition only if it manifests the perpetrators’ specific anticompetitive intent and that conduct should be deemed to have as its “effect” the prevention of restriction of competition only if it would impose a net-equivalent-monetary loss on the customers of the perpetrators and the customers of their product rivals combined by reducing the absolute attractiveness of the best offer they respectively receive from any inferior supplier if it would not benefit those buyers by increasing the perpetrators’ organizations’ proficiency.²⁹ Thus, Markovits interprets the effect branch of the prohibition of Article 101 TFEU to prohibit conduct that would inflict a loss on relevant buyers by reducing the absolute attractiveness of the best offer they respectively receive from any inferior supplier if the perpetrators would take full advantage of the reductions their conduct generated in the attractiveness of the best offer that relevant buyers received from any inferior supplier and the conduct would not generate any relevant efficiencies.³⁰ Thus, for conduct to breach Article 101 TFEU by having the effect of preventing, restricting, or distorting competition, it must be the case that it would impose a loss on the buyers of the relevant product by reducing the attractiveness of the offers of the second-placed suppliers if it did not generate any efficiencies for the perpetrators.

As for the interpretation of “object,” Markovits notes that “their object” in Article 101(1) TFEU could refer to “an object” or to “a critical object” (i.e., an object that critically affected the perpetrators’ decision to engage in the relevant type of conduct covered by Article 101(1)

²⁷ MARKOVITS I at 113.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 117.

TFEU).³¹ Under the first interpretation, Article 101 TFEU would render prima facie illegal any conduct that was motivated at all by the perpetrator's wish to prevent/restrict competition even if they would have engaged in the conduct in question had they not perceived ex ante that it would/might prevent/restrict competition.³² Thus, this interpretation relies on the motivation of the perpetrators in establishing the scope of the provision. Under the second interpretation, which is the one favoured by Markovits, Article 101 TFEU would render prima facie illegal conduct that violates the Sherman Act's specific-anticompetitive-intent test of illegality—i.e., conduct whose perpetrators' ex ante perceived profitability was critically affected by their belief that it would/might secure the object of restricting/preventing competition in some way that would render conduct profitable though economically inefficient in an otherwise-Pareto-perfect economy.³³ Since this proposition is also based on the belief of the perpetrators, the factor that distinguishes this interpretation from the former is the addition of the element of whether the perpetrators would have engaged in the conduct but for the prevention/restriction of competition that would render an otherwise inefficient conduct profitable. Thus, in Markovits' interpretation, the object branch of Article 101 TFEU's test of illegality adds to the effect branch of that test by rendering prima facie illegal conduct that was ill-motivated even if it did not succeed in preventing or restricting competition.³⁴ These interpretations imply that (i) conduct that imposes a loss on relevant buyers but does not manifest the perpetrators' specific anticompetitive intent would not violate the object branch of the test of illegality under Article 101 TFEU even if the buyers did suffer a loss and that (ii) conduct that imposes a loss on relevant buyers because it prevents the perpetrators from erroneously charging them unprofitably low prices, enables them to prevent their independent distributors from charging prices lower than those that would maximise the profits of the products and distributors, or enables the perpetrators to profit by using "fancy pricing techniques" to extract buyer surplus do not violate the effect branch of the test of illegality under Article 101 TFEU.³⁵

According to Markovits, the interpretation of the EU antitrust experts provided above concerning the test of illegality under Article 101 TFEU³⁶ is based on the argument that the 1957 Treaty's competition law provisions manifest pro-consumer distributive preferences as demonstrated by both the fact that Article 101(3) TFEU exempts economic-efficiency-

³¹ Id.

³² Id.

³³ Id.

³⁴ Id. at 119.

³⁵ Id. at 113.

³⁶ See text to which note 28 supra is attached.

generating conduct that breaches Article 101(1) TFEU's test of prima facie illegality only if consumers secure a fair share of the benefit generated by the conduct and by the fact that Article 102 TFEU prohibits dominant firms from abusing their positions not only by exclusionary but also by exploitative conduct.³⁷ Second, the EU experts' interpretation is arguably based on the argument that the prohibition in Article 101(1)(e) TFEU of making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts, displays the assumption of the Treaty's drafters that tie-ins, RPM agreements, vertical territorial restraints, etc. prevent or restrict competition in the Article 101(1) TFEU sense of that expression even when they do not reduce inter-brand competition.³⁸

Markovits argues that the first interpretation fails on two grounds. The first is that some of the ways in which conduct can harm customers cannot be attributed to its preventing or restricting competition even if the concept involved intra-brand competition as well as inter-brand competition.³⁹ This must indeed be correct. The current author would also argue that conduct must entail more than harming customers to make it anticompetitive under Article 101 TFEU. As argued elsewhere, the competition rules of the Treaty are not rules of "consumer protection law."⁴⁰ This is supported by historical research that demonstrates that the drafters of the original Treaty did not use the term "consumer" in the technical sense of that term to refer to final customers.⁴¹ The other reason Markovits provides is that his interpretation is not incompatible with the distributive preferences the Treaty manifests. The current author would indeed take this further and argue that the Treaty does not necessarily manifest distributive preferences, at least in favour of "consumers" due to the meaning given to that term in the original Treaty, and due to the lack of consumer protection rules therein.⁴² In any case, according to Markovits, his interpretation would not be incompatible with any distributive preferences of the Treaty because the Treaty drafters appear to think that firms with dominant positions have special obligations to their customers, and there is an important difference between profiting by better

³⁷ MARKOVITS I at 114.

³⁸ *Id.*

³⁹ *Id.* The examples provided include mergers that enable the merged firm to increase prices as a result of discovering that they had been underestimating their profit-maximising price; tie-ins or reciprocity agreements that impose a loss on customers without altering the absolute attractiveness of the offers against which the sellers have to compete by allowing the seller to profit by extracting surplus from the buyers that would have been otherwise unprofitable for the seller to extract.

⁴⁰ See PINAR AKMAN, *THE CONCEPT OF ABUSE IN EU COMPETITION LAW: LAW AND ECONOMIC APPROACHES* 307-308 (Hart Pub. Co., 2012).

⁴¹ See Pinar Akman, *Searching for the Long-Lost Soul of Article 82 EC*, 29 OXFORD J. OF LEG. STUD. 297 (2009).

⁴² See PINAR AKMAN, *THE CONCEPT OF ABUSE IN EU COMPETITION LAW: LAW AND ECONOMIC APPROACHES* 101-102 (Hart Pub. Co., 2012).

utilisation of competitive advantages secured through skill, industry, etc. and profiting by committing acts with the specific intent of reducing competition the undertaking faces or profiting at customers' expense by committing acts that the undertaking knows will reduce the competition it faces even if the same act would have been committed anyway.⁴³

Regarding the second interpretation found in the EU experts' argument provided above (that Article 101(1)(e) TFEU implies that practices that reduce intra-brand competition, as opposed to inter-brand competition, are *prima facie* illegal under Article 101 TFEU's test of illegality),⁴⁴ Markovits is not convinced for several reasons. Some of these reasons are that (i) this interpretation is not inconsistent with Markovits' proposed test of illegality to the extent that practices reducing intra-brand competition as per Article 101(1)(e) TFEU sometimes also reduce inter-brand competition⁴⁵ and that (ii) Markovits is not convinced that the drafters/ratifiers of the original Treaty or even of its amended versions appreciated the difference between distributive and economic-efficiency effects of conduct that reduces intra-brand competition as opposed to reducing inter-brand competition.⁴⁶ Markovits suggests that the freedom-based approach to Article 101(1)(e) TFEU, which protects the freedom of business people that the conduct falling under Article 101(1)(e) TFEU constrains even where only intra-brand competition is reduced, is ill-conceived: such businesspeople accept those constraints exercising their free will and the assumption that they have a true freedom interest in making those choices that contractual clauses falling foul of Article 101(1)(e) TFEU prohibit is incorrect.⁴⁷ Moreover, Markovits argues that prohibitions of the contract clauses under Article 101(1)(e) TFEU will lead businesses to adopt other lawful conduct that is at least as restrictive as the clauses covered under (e) and that efforts to promote inter-state trade by using (e) to prohibit intra-brand competition are likely to be counterproductive because businesspeople are likely to respond to them by integrating forward into distribution, increasing prices in poorer Member States, or stopping selling in these Member States.⁴⁸ All in all, Markovits rejects the interpretation that Article 101 TFEU's test of *prima facie* illegality covers conduct that reduces intra-brand competition without reducing inter-brand competition.⁴⁹

⁴³ MARKOVITS I at 115.

⁴⁴ See text at note 28 *supra*.

⁴⁵ MARKOVITS I at 115.

⁴⁶ *Id.* at 115-116.

⁴⁷ *Id.* at 116.

⁴⁸ *Id.*

⁴⁹ *Id.* at 117.

The interpretation of Article 101(1)(e) TFEU by Markovits is certainly an interesting one. First, Markovits appears to suggest that the prohibition of intra-brand restrictions is incorrectly established to be found in Article 101(1)(e) TFEU. Second, Markovits also appears to argue that de lege ferenda restrictions of intra-brand competition should not be covered by the prohibition of Article 101 TFEU if they do not also comprise restrictions of inter-brand competition. Third, de lege lata restrictions of intra-brand competition are not covered by the prohibition of Article 101 TFEU if they do not also comprise restrictions of inter-brand competition.⁵⁰ Regarding the first argument, it should be noted that the list of practices in Article 101 TFEU is not exhaustive⁵¹ and, even if it were exhaustive, at least some (if not, many) vertical restraints can be deemed to fall under Article 101(1)(a) TFEU’s prohibition of directly or indirectly fixing purchase or selling prices or any other trading conditions; as well as Article 101(1)(c) TFEU’s prohibition of sharing markets or sources of supply. Thus, the argument proposed by Markovits that intra-brand restrictions are not covered by Article 101 TFEU goes much further than the interpretation of Article 101(1)(e) TFEU as such. Interestingly, this third point raised by Markovits concerning whether de lege lata Article 101 TFEU covers vertical, intra-brand restrictions of competition or whether it is limited to horizontal, inter-brand restrictions of competition was an issue that had to be resolved by the CoJ. In the seminal case of *Consten and Grundig*, the Court had to adopt a decision to clarify that Article 101 TFEU does indeed apply to vertical restraints.⁵² This suggests that originally conceived it was at least ambiguous whether Article 101 TFEU would apply to these restraints at all, which supports the position adopted by Markovits.⁵³ Finally, regarding the second point raised concerning whether Article 101 TFEU should be interpreted to cover intra-brand restraints, the criticism of the freedom-based approach by Markovits is indeed compelling. A study of the entire case law of the EU courts by the current author spanning over fifty years revealed that the concept of “freedom” indeed plays a role in the case law, albeit perhaps not as significant as one might think.⁵⁴ The problems that Markovits identifies with the freedom-

⁵⁰ Markovits also argues that intra-brand restrictions should not be deemed to violate the Sherman Act either; See MARKOVITS I at 83 et seq.

⁵¹ For the holding that the list in Article 101(1) applies to all types of collusion, whatever form it takes, see, e.g., Case C-49/92P *Commission of the European Communities v. Anic Partecipazioni SpA* [1999] ECR I-4125, [108] (1999).

⁵² Case 56 and 58/64 *Etablissements Consten SA and Grundig-Verkaufs-GmbH v. Commission* ECR 299, 339 (1966).

⁵³ Interestingly, the Italian Government as well as the German Government as interveners in *Consten and Grundig* appear to have respectively argued that Article 101 is not applicable to vertical agreements or inter-brand restrictions of competition if intra-brand competition is not restricted—see *Consten and Grundig*, supra note 52 at 308-309; 325.

⁵⁴ See Pinar Akman, *The Role of “Freedom” in EU Competition Law*, 34 *Legal Studies* 183 (2014).

based approach are undoubtedly correct. Yet, it is also undoubtedly correct that—as acknowledged by Markovits—the EU Commission and courts have been driven by the concern to integrate the markets within the EU by taking a very strict stance towards conduct that hampers parallel imports and thereby threatens the integration of the markets. What is noteworthy is that Markovits’ argument that such prohibitions will only lead to businesses’ adopting similar clauses that are lawful but at least as restrictive/ or choosing to vertically integrate or even to potentially stop selling in certain Member States is compelling in establishing the position that, even with the market integration motive, the prohibition of intra-brand restrictions under Article 101 TFEU may not be justified. Having said that, it must also be pointed out that restrictions of intra-brand competition are not categorically exempted under other antitrust laws than that of the EU where market integration is not necessarily a concern, most notably under US antitrust law. It should be noted that Markovits indeed argues that restrictions of intra-brand competition that do not also constitute restrictions of inter-brand competition should not be deemed anticompetitive under US antitrust law either.⁵⁵

Comments on the test of illegality under Article 101 TFEU

Several points can be made in response to the test of illegality proposed to be correct under Article 101 TFEU by Markovits whilst also noting some of the implications of this test. The first point concerns the interpretation of “object” under Article 101 TFEU by the EU Courts and how that fares against the test of illegality proposed by Markovits, which is based on specific anticompetitive intent. The assessment of “object” under Article 101 TFEU by the EU Courts usually involves an assessment of the practice (agreement, concerted practice, etc.) having regard to the content of its provisions, the objectives that it seeks to ascertain and the legal and economic context of which it forms part.⁵⁶ As will be further discussed below, this line of case law suggests that the perpetrators’ motive is neither critical nor determinative for the decision whether the conduct can be categorised as an object restriction. This implies that the specific anticompetitive intent test may not be able to rationalise the EU courts’ thus-far application of the prohibition of object under Article 101 TFEU and accepting it to be the correct test of illegality would cause some difficulty in terms of consistency within the case

⁵⁵ MARKOVITS I at 83-86.

⁵⁶ See, e.g., Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ International Belgium and Others v. Commission ECR 3369, [25] (1983); Case C-209/07 Beef Industry Development Society and Barry Brothers ECR I-8637, [16], [21] (2008); C-501/06 GlaxoSmithKline Services Unlimited v Commission ECR I-9291, [58] (2009).

law.⁵⁷ Recently, the CoJ has also noted that restrictions can be considered to be by object where they have the potential to have a negative impact on competition, having regard to the specific legal and economic context,⁵⁸ and in order to establish such likelihood, the court should take into consideration the structure of the market, the existence of alternative distribution channels, their importance, the market power of the companies concerned, etc.⁵⁹ Admittedly and indeed as has been noted in the literature, such an expansive interpretation of the object branch of Article 101 TFEU is not only rather “worryingly broad and vague” but also blurs the distinction between the object and effect branches of Article 101 TFEU due to its ambiguity as to how much market analysis is required before a conclusion can be reached that the practice is restrictive by object and before a full effects-analysis must be conducted.⁶⁰ This position is aggravated by the fact that, since the object branch of Article 101 TFEU does not require any analysis of the effects of the practice, the category of object restrictions should be defined narrowly.⁶¹ Indeed, Markovits argues that the EU courts and officials have been unclear about the meaning of the object versus effect distinction in the same way that the US authorities and courts have obfuscated the relevant issues.⁶²

The second comment that can be made on the test of illegality is that the interpretation by Markovits shifts the focus of the assessment of the effect-branch of the prohibition of Article 101 TFEU to the effect of the conduct on customers and rivals’ customers. This is interesting not least because Article 101 TFEU covers horizontal as well as vertical anticompetitive agreements and similar conduct. The interpretation provided by Markovits focuses on the effects on customers even for horizontal restrictions since such restrictions may also be examined as restrictions by effect. Thus, the focus on effects on customers excludes any concern for the effects on competitors not party to the agreement, concerted practice, etc. as well as those potential competitors that might be prevented from entering the market as a result of such practices. Although the effect on the former (i.e., the competitors outside the practice) may not be significant in terms of establishing anticompetitiveness (because these might be

⁵⁷ Having said that, it should also be noted that there is no rule of precedent in the EU, so legally there is nothing to prevent the courts from changing their interpretation of the test of illegality under Article 101 TFEU. On the lack of rule of precedent, see Anthony Arnall, *Owning up to Fallibility: Precedent and the Court of Justice*, 30 CMLR 247, 248, 262 (1993); ALISON JONES AND BRENDA SUFRIN, *EU COMPETITION LAW: TEXT, CASES AND MATERIALS* (hereinafter JONES AND SUFRIN) 231 (5th ed.) (Oxford Univ. Press, 2014).

⁵⁸ Case C-8/08 *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* ECR I-4529, [31] (2009).

⁵⁹ Case C-32/11 *Allianz Hungária Biztosító Zrt. and Others v. Gazdasági Versenyhivatal* ECR I-0000, [48] (2013).

⁶⁰ JONES AND SUFRIN at 212-213.

⁶¹ *Id.* at 213.

⁶² MARKOVITS I at 120.

benefiting from umbrella effects), the effects on potential competitors may be significant. Indeed, in *Delimitis* the CoJ noted that while establishing whether the agreement restricts competition by effect, two cumulative conditions must be met:⁶³ first, it must be determined whether having regard to the economic and legal context of the agreement in question, it is difficult for competitors who could enter the market or increase their market share to gain access to the relevant market; and second, where there is a network of similar agreements on the market, the agreement in question must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. Thus, although ultimately the main concern might indeed be the effects on customers, there might be circumstances in which the effects on potential competition might also be relevant in establishing a restriction by effect under Article 101 TFEU, particularly (but not limited to cases) where there is a network of similar agreements on the same market.⁶⁴

A third comment that can be made on the test of illegality noted to be correct by Markovits under Article 101 TFEU is that the specific anticompetitive test somewhat renders the “object” branch of Article 101 TFEU “subjective” because the criterion for the existence of object becomes the existence or lack of specific intent on the part of the perpetrators. Whether the existence of “object” under Article 101 TFEU can be established on the basis of subjective intent is indeed an area of debate in EU antitrust commentary. One commentator has argued that the “object” criterion in Article 101 TFEU can be satisfied by a demonstration of “subjective intention.”⁶⁵ Odudu suggests that this “subjective intention” is actually objectively determined on the basis of external manifestations, such as circumstantial evidence.⁶⁶ The suggestion appears to be the use of a test akin to the “reasonable person” test and ask whether a reasonable third person situated as the defendant would have acted in the way the defendant acted without the intention imputed to her.⁶⁷ Thus, the question is what the “actions show about

⁶³ Case C-234/89 *Stergios Delimitis v. Henninger Bräu AG* ECR I-0935, [27] (1991).

⁶⁴ The importance of potential competition was also mentioned in Case T-374/94 *European Night Services Ltd and others v. Commission* ECR II-3141, [137] (1998). See also Case T-504/93 *Tiercé-Ladbroke SA v. Commission* ECR II-923, [158]-[159] (1997); Case T-461/07 *Visa Europe Ltd v. Commission* ECR II-1729, [68] (2011).

⁶⁵ See Okeoghene Odudu, *Interpreting Article 81(1)*, 26 *EUROPEAN L. REV.* 60, 71 (2001) and *Interpreting Article 81(1): The Object Requirement Revisited*, 26 *EUROPEAN L. REV.* 379 (2001). See also Nicolas Petit, *The “Oligopoly Problem” in EU Competition Law* in *RESEARCH HANDBOOK IN EUROPEAN COMPETITION LAW* IOANNIS LIANOS AND DAMIEN GERADIN, eds.) (Edward Elgar, 2013), proposing an intent-based criterion for proof of “tacit collusion.”

⁶⁶ Okeoghene Odudu, *Interpreting Article 81(1)*, 26 *EUROPEAN L. REV.* 60, 69-70 (2001). See RENATO NAZZINI, *THE FORMATION OF EUROPEAN COMPETITION LAW: THE OBJECTIVE AND PRINCIPLES OF ARTICLE 102* at 58 (Oxford Univ. Press, 2011) for the argument that a test that looks at the objective tendency of the conduct of a dominant firm to achieve a certain purpose is not a test of intent but a test of effect.

⁶⁷ Okeoghene Odudu, *Interpreting Article 81(1)*, 26 *EUROPEAN L. REV.* 60, 70 (2001).

the state of mind.”⁶⁸ Such an interpretation would presumably be in line with the test proposed by Markovits. On the other hand, other commentators argue that “object” under Article 101 TFEU does not refer to subjective intention but rather to the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied.⁶⁹ Thus, it has been noted that a subjective intent to restrict competition by object or to infringe Article 101 TFEU is not a necessary condition for violating Article 101 TFEU despite the fact that, where an intent to restrict competition can be found, this may be relevant for determining that the restriction is by object.⁷⁰ In the same vein, the lack of an intention to restrict competition and to infringe Article 101 TFEU will not deprive an agreement of anticompetitive object either.⁷¹ There is also jurisprudence from the EU courts that rejects the position that the lack of an anticompetitive purpose or intent should immunise conduct from breaching Article 101 TFEU.⁷² With reference to this EU case law that interprets object as not the subjective intention of the parties but the objective meaning and purpose of the agreement, Markovits finds this distinction “clearly obscure and probably incoherent” because the “objective meaning and purposes of the agreement” cannot be equated with its “effect.”⁷³ Although, as noted above, there is indeed a problem with the case law that has increasingly blurred the distinction between restrictions by object and by effect by expanding the actual market analysis involved in establishing an anticompetitive “object” following an expansive interpretation of “object” as the potential or capability or likelihood to restrict competition,⁷⁴ this problem can also be alleviated by adopting a more restrictive interpretation of object that involves neither any market analysis nor any subjective element of intent. This could be achieved by reserving the category of restrictions by object only for those clear-cut practices such as hard-core cartel agreements that experience as well as economics demonstrate to be practically always harmful

⁶⁸ *Id.* at 70 and note 60.

⁶⁹ RICHARD WHISH AND DAVID BAILEY, *COMPETITION LAW* 118-119 (7th ed.) (Oxford Univ. Press, 2012).

⁷⁰ JONES AND SUFRIN at 215 and 215 note 110, referring to Case T-368/00 *General Motors Nederland and Opel Nederland v. Commission* ECR II-4491 (2003). See also C-67/13 P *Groupement des cartes bancaires (CB) v. European Commission* ECR I-0000, [88] (2014); *Allianz Hungária*, supra note 59 at [37] and the case-law cited therein.

⁷¹ JONES AND SUFRIN at 215.

⁷² See, e.g., Case C-209/07 *Competition Authority v. Beef Industry Development Society Ltd (BIDS)* ECR I-8637, [21] (2008). See also *Groupement des cartes bancaires* supra note 70 at [70] where the Court held that pursuing a legitimate objective does not preclude the conduct from also having the object to restrict competition. The same goes for Article 102—there are cases in which the Courts have found the intention to compete on the merits not to prove absence of abuse—see, e.g., C-549/10 P *Tomra Systems ASA v. European Commission* ECR I-0000, [22] (2012).

⁷³ MARKOVITS I at 120.

⁷⁴ See *T-Mobile*, supra note 58 at [103] and *Allianz Hungaria* supra note 59 at [48].

to the functioning of competition irrespective of market context.⁷⁵ Arguably, this might have been the intention in the first place behind having object and effect as alternative bases for the competition law assessment that should take place under Article 101 TFEU. The more elaborate the assessment of “object” restrictions, the more ambiguous the distinction between object and effect restrictions—this may indeed be an aspect of EU competition law for which a formalistic approach is more desirable than an effects-based approach since, by definition of the Treaty provision, restrictions by object are posed as alternatives to restrictions by effect, and an “effects-based approach” is logically not suitable for the categorisation of restrictions as “object” restrictions.

THE TEST OF ILLEGALITY UNDER ARTICLE 102 TFEU

According to Markovits, monopolising conduct is considered to be bad both because it is presumptively economically inefficient and because, from any plausible conception of distributive justice, it is unfair.⁷⁶ Thus, monopolising conduct is economically inefficient (i) because it would be unprofitable but for its tendency to reduce the absolute attractiveness of the offers against which the perpetrator must compete and (ii) because its tendency to reduce the absolute attractiveness of rivals’ competing offers will generally reduce economic efficiency at the same time as it yields the perpetrators profits.⁷⁷ Moreover, the reason such conduct is distributively unjust is that (i) it rewards the perpetrator for conduct that is economically inefficient and has no other redeeming consequence and (ii) it imposes losses on the perpetrator’s customers (in case of predation, on the targets of the perpetrator) for no good reason at all.⁷⁸ This understanding of monopolising conduct implies that conduct should not be characterised as monopolising if its perpetrator believed *ex ante* that it would be at least normally profitable by enabling the perpetrator to (i) make its own product more attractive and/or reduce its costs; (ii) take better advantage of a given demand/marginal cost combination, (iii) secure a tax benefit, and/or (iv) liquidate assets on terms that were not critically affected by any tendency that the sale had to reduce the absolute attractiveness of competing offers of rivals.⁷⁹ Consequently, conduct that can be deemed to be monopolising include practices such as “contrived oligopolistic conduct”⁸⁰ whose *ex ante* profitability perceived by its perpetrator

⁷⁵ See, in this vein, JONES AND SUFRIN at 213 and Bernd Meyring, T-Mobile: Further Confusion on Information Exchanges between Competitors, *J. OF EUROPEAN COMP. LAW AND PRACTICE* 30, 31 (2010).

⁷⁶ MARKOVITS I at 70.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Markovits defines “contrived oligopolistic conduct” as that where the initiator induced the responder to believe that the initiator would or might react to its response in a way that would render unprofitable for the responder a

is critically affected by its deterring rivals from making as attractive offers to the perpetrator's customers as they would have otherwise made and predatory conduct, whose ex ante profitability perceived by its perpetrator is critically affected by its driving a rival out, etc.⁸¹ Finally, Markovits defines exclusionary conduct as conduct that manifests the perpetrator's specific anticompetitive intent.⁸² Markovits argues that this is how US courts, enforcement agencies and scholars have implicitly defined the concept although there are some cases in which conduct was found to have foreclosed (or would foreclose) competition when it did not manifest specific anticompetitive intent but would induce exit or deter entry without rendering the perpetrator's business more efficient than the business of the foreclosed rivals.⁸³ All in all, according to Markovits, the test of illegality under Article 102 TFEU is the same as the test of illegality under the object branch of Article 101 TFEU.

Regarding the test of illegality argued to be correct by Markovits for the application of Article 102 TFEU, several points have already been made concerning the "specific- anticompetitive-intent test" above.⁸⁴ Although it is attractive to adopt—at least conceptually—the same test of illegality under Articles 101 and 102 TFEU, the potential problems with using intent as the central concept of such a test explained above are arguably more significant in the case of Article 102 TFEU than in the case of Article 101 TFEU. This is because, in the context of Article 102 TFEU, the conduct at issue is unilateral and therefore involves no mental element that makes it objectionable in and of itself in contrast to prohibited practices under Article 101 TFEU where the mental state of parties having, for example, agreed to distort, reduce or prevent competition might matter. Moreover, the costs of a Type-I error that might result from the inability of an enforcement agency or court to distinguish the intent to win competition from the intent to distort competition are possibly higher and/or more important due to the potential adverse effect on investment and innovation incentives of the undertaking under scrutiny. Furthermore, unlike the US Sherman Act Section 2, there is no prohibition of attempted abuse (or monopolisation) under Article 102 TFEU, which further supports the

non-cooperative response the responder would have otherwise found profitable by promising to reciprocate to the responder's otherwise-unprofitable cooperation and/or by threatening to retaliate against a responder that made a non-cooperative response—see MARKOVITS I at xxxii-xxxiii and 344.

⁸¹ MARKOVITS I at 70-71.

⁸² *Id.* at 71, 130.

⁸³ *Id.* at 71.

⁸⁴ See the text following footnote 1 *supra*.

position that analytically there is no need or place for the intent of the dominant undertaking to be taken into account.⁸⁵

In its Guidance on enforcement priorities under Article 102 TFEU, the Commission noted that the aim of its enforcement in applying Article 102 TFEU to exclusionary conduct is “to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.”⁸⁶ The Commission will normally intervene under Article 102 TFEU when, on the basis of cogent and convincing evidence, the conduct is likely to lead to anticompetitive foreclosure.⁸⁷ In turn, “anticompetitive foreclosure” describes a situation in which effective access of actual or potential competitors to the market is hampered or eliminated due to the conduct of the dominant undertaking whereby the undertaking is in a position to profitably increase prices to the detriment of consumers.⁸⁸ This author has argued elsewhere that the way the Commission expresses its enforcement aim by stating that the concern is to ensure that dominant undertakings do not impair effective competition by foreclosing rivals in an anticompetitive way and thus having an adverse impact on consumer welfare is equivocal.⁸⁹ This is because it is unclear whether the “adverse impact on consumer welfare” is an assumed/expected consequence of “foreclosing rivals in an anticompetitive way,” in which case “anticompetitive” would not be tantamount to the “adverse impact on consumer welfare.”⁹⁰ Then, one would need a separate definition and proof of “anticompetitive,” which the Guidance does not provide.⁹¹

Regarding so-called “price-based exclusionary conduct,” the Commission will normally only intervene to prevent anticompetitive foreclosure when the conduct concerned has already been or is capable of hampering competition from competitors that are considered to be as efficient as the dominant undertaking.⁹² It is not clear why this so-called “as efficient competitor” test

⁸⁵ See Pinar Akman, *The Role of Intent in the EU Case Law on Abuse of Dominance*, 39 *EUROPEAN L. REV.* 316, 335 et seq. (2014) for a further discussion on the role of intent.

⁸⁶ EC Abuse Guidance at [19].

⁸⁷ *Id.* at [20]. When conducting such an assessment, the Commission will consider the positions of the dominant undertaking, of its competitors, and of its customers or suppliers; the conditions on the relevant market; the extent of the allegedly abusive conduct; possible evidence of actual foreclosure; and direct evidence of any exclusionary strategy—see *id.* at [20].

⁸⁸ *Id.* at [19].

⁸⁹ See Pinar Akman, *European Commission’s Guidance on Article 102 TFEU: From Inferno to Paradiso?* 73 *MOD. L. REV.* 605, 614 (2010).

⁹⁰ *Id.* at 614.

⁹¹ *Id.*

⁹² EC Abuse Guidance at [23].

is limited to price-based exclusionary conduct and what the general test is for non-price-based exclusionary conduct in the Guidance. In any case, it must be noted that in the appeal of Intel the General Court clearly and explicitly rejected this to be the test of abuse under Article 102 TFEU by holding that the as efficient competitor test is neither necessary nor sufficient for proving an abuse.⁹³ Moreover, there are doubts that the Commission itself in practice adopts a standard taking into account efficiencies.⁹⁴

What is noteworthy regarding Markovits' conceptualisation of monopolising conduct and foreclosing conduct is that—even though he does not deem these to rely on tests of illegality based on inefficiency—as discussed above, there is an important element of efficiency built into the tests establishing the existence of such conduct.⁹⁵ This element makes the test proposed by Markovits much more attractive than the as efficient competitor test as adopted by the Commission (with the caveat relating to the use of intent as discussed above⁹⁶). This is because, under the Commission's as efficient competitor standard, the test of whether conduct is abusive depends on whether conduct would exclude competitors that are as efficient as the dominant undertaking.⁹⁷ Whether or not the conduct enhances the efficiency of the dominant undertaking is not part of the test; it is a defence that has to be proven by the dominant undertaking to practically rebut the finding of abuse that will have been established on the basis of the potential effects of conduct on the viability of the competitors on the market that are as efficient as the undertaking under scrutiny.⁹⁸ The current author has argued elsewhere that the correct test for abuse should instead be one that establishes exclusion and exploitation as well as a lack of increase in the dominant undertaking's efficiency.⁹⁹ In such a test, the fact that the conduct leads to a non-trivial increase in the dominant undertaking's own efficiency (in comparison to a situation in which the dominant undertaking either did not adopt the conduct under investigation or adopted the conduct that would be the alternative to the investigated conduct) would be part of establishing abuse as opposed to proving a defence to an allegation of abuse.

⁹³ See Case T-286/09 Intel Corp v. Commission ECR II-0000, [141], [144], [146], [151], [462], etc. (2014).

⁹⁴ See, e.g., Killick and Komninos for the argument that the Commission's approach has a tint of an efficiency offence—James Killick and Assimakis Komninos, *Schizophrenia in the Commission's Article 82 Guidance Paper: Formalism Alongside Increased Recourse to Economic Analysis*, GLOBAL COMPETITION POL. 6 (February 2009). For the demonstration of the Commission's lack of using the as efficient competitor test itself since the Guidance, see cases studied in Pinar Akman, *The Reform of the Application of Article 102 TFEU: Mission Accomplished?*, (forthcoming ANTITRUST L. J.)

⁹⁵ See above text around note 20.

⁹⁶ See above text after note 5.

⁹⁷ See EC Abuse Guidance at [23] et seq.

⁹⁸ See id. at [30]-[31].

⁹⁹ PINAR AKMAN, *THE CONCEPT OF ABUSE IN EU COMPETITION LAW: LAW AND ECONOMIC APPROACHES* at 317 et seq. (Hart Pub. Co., 2012).

The reasoning behind this is that, if the undertaking's conduct serves the purpose of increasing its own efficiency, it should be deemed as a legitimate business practice—even if it excludes competition and exploits customers.¹⁰⁰ Ultimately, this condition serves to distinguish normal commercial practices from objectionable ones and is a natural consequence of the definition of abuse this author has supported elsewhere as conduct that would not be possible but for the dominance of the undertaking.¹⁰¹ Such a definition means that abusive practices are those by which the dominant undertaking is able to advantage itself to the disadvantage of its trading partners in a manner that would not be possible in competitive conditions.¹⁰²

In some respects, this understanding of abuse is quite close to that offered by Markovits albeit expressed in different words: they both aim to catch those practices by which the dominant undertaking advantages itself to the disadvantage of rivals (Markovits' definition) or trading partners (current author's definition). In Markovits' definition, the test relates to reducing the attractiveness of the rivals' offers without increasing one's own efficiency. In the current author's preferred definition, it relates to disadvantaging trading partners without increasing one's own efficiency. The reason for referring to trading partners as opposed to rivals is that as originally intended and as demonstrated by the types of prohibited conduct, Article 102 TFEU only concerns exploitative conduct aimed at trading partners/customers and not rivals.¹⁰³ If one adopts the current author's preferred definition, then one needs to find a separate element of "harm to competition" to operationalise Article 102 TFEU as a modern antitrust rule (as opposed to, for example, a trade or consumer protection rule). This author finds this separate element in Protocol 27 (annexed to the Treaty on the European Union [TEU] and TFEU), which states that the internal market as set out in Article 3 TEU "includes a system ensuring that competition is not distorted."¹⁰⁴ The advantage of Markovits' definition is that in it, one finds both the element of harm to competition (by the reduction in the attractiveness of rivals' offers) and the element of harm to customers/consumers (the reduction in the attractiveness of rivals' offers imposes losses on customers since it is ultimately a reduction in the attractiveness of their second-best choice of product). The difficulty with adopting this definition to be the

¹⁰⁰ Id. at 316.

¹⁰¹ Id. at 94-95.

¹⁰² This is based on the historical understanding of abuse under Article 102—see id. at 94-95.

¹⁰³ See Pinar Akman, *Searching for the Long-Lost Soul of Article 82EC*, 29 OXFORD J. OF LEG. STUD. 267, 283-287 (2009) and PINAR AKMAN, *THE CONCEPT OF ABUSE IN EU COMPETITION LAW: LAW AND ECONOMIC APPROACHES* 80-85 (Hart Pub. Co., 2012).

¹⁰⁴ See id. at 307 et seq. In the original Treaty, Article 3(f) EEC (which became Article 3(g) EC in 1993 and Article 3(1)(g) EC in 1999) stipulated that the activities of the community included "the institution of a system ensuring that competition on the common market is not distorted."

correct definition of abuse under Article 102 TFEU would be the lack of textual support concerning the effect on rivals and the possibility of the effects on the attractiveness of rivals' offers being misinterpreted in enforcement practice and confusing the protection of competitors with that of competition. The lack of textual support may be alleviated by the fact that the EU courts have adopted a teleological approach.¹⁰⁵ The danger of confusing the reduction in the attractiveness of rivals' offers with protecting competitors for the sake of doing so is clearly an issue with the enforcement of Article 102 TFEU and not an issue with the text of Article 102 TFEU itself or with the test of illegality provided by Markovits.

Types of conduct and 'competition on the merits'

Markovits notes that Article 102 TFEU prohibits conduct that it covers when the conduct is either an "exploitative" or an "exclusionary" abuse.¹⁰⁶ Although this is commonly accepted in the literature and in the case law of the EU Courts, it is noteworthy that such a distinction is not found in the provision of Article 102 TFEU itself where all the examples of abuse concern exploitation. In fact, historical research into the travaux préparatoires of the negotiations of the Treaties of Rome examined by the current author suggests that the provision was intended to apply to only exploitative conduct.¹⁰⁷ According to Markovits, the list in Article 102 TFEU makes it clear that an exploitative abuse takes place when prices are unfairly high, customers are made subject to unfairly-disadvantageous terms, unfairly low prices are paid to suppliers, or production, markets, technical development are limited in ways that impose a net-equivalent-monetary loss on customers.¹⁰⁸ Markovits interestingly makes the point that it would also be a prohibited type of exploitative abuse for the dominant undertaking not to make a QV (quality or variety increasing) investment or an investment in plant-modernisation or new-plant construction when the failure to do so unfairly disadvantages customers.¹⁰⁹ There are indeed a few cases that deal with the inefficiency of dominant undertakings as a type of abusive conduct. These cases have usually—but not always—related to statutory monopolies

¹⁰⁵ Using the teleological approach, the EU courts interpret the competition provisions in light of their own conception of what was necessary to achieve the integrationist goals of the Treaty—see David J. Gerber, *The Transformation of European Community Competition Law?*, 35 HARV. INT. L.J. 97 at 109 and 116–7 (1994).

¹⁰⁶ MARKOVITS I at 130.

¹⁰⁷ See Pinar Akman, *Searching for the Long-Lost Soul of Article 82EC*, 29 OXFORD J. OF LEG. STUD. 267 at 286 and 295-297 (2009).

¹⁰⁸ MARKOVITS I at 130. Some authors interpret Article 102 (b)'s reference to limiting production, markets, technical development as a prohibition of exclusion rather than exploitation—see, e.g., ROBERT O'DONOGHUE AND JORGE PADILLA, *THE LAW AND ECONOMICS OF ARTICLE 102 TFEU* at 240 et seq. (2nd ed.) (Hart Pub. Co., 2013).

¹⁰⁹ MARKOVITS I at 130.

carrying out their business inefficiently, without adopting new technology, etc.¹¹⁰ Despite the dearth of case law on the issue, inefficiency of an undertaking can indeed be an abuse provided that, for example, it causes prejudice to trading partners by limiting production, markets or technical development. Prohibition of such exploitation would be sanctioning the “quiet monopoly life” and thus the productive inefficiency of the dominant undertaking.¹¹¹ What is questionable and what might be missing in terms of a breach of Article 102 TFEU is whether the mere inefficiency of the undertaking could/should be an abuse without proof of separate harm to competition—for example, without separate proof of exclusion.¹¹² The current author has argued elsewhere that at a principle level, without such separate harm to competition, the mere inefficiency of a dominant undertaking should not be found abusive under Article 102 TFEU.¹¹³

Markovits identifies several deficiencies in the way the EU Commission and courts have interpreted Article 102 TFEU.¹¹⁴ These include, first, the fact that the authorities have never sufficiently defined the concept of an “exclusionary” abuse of dominance.¹¹⁵ It can indeed fairly be said that they have never done this for exploitative abuse either—that is, have never set out the parameters that make conduct exploitatively abusive. Second, Markovits suggests that the authorities have been inconsistent concerning their statements about whether competition on the merits could ever constitute an exclusionary abuse.¹¹⁶ According to Markovits, “competition on the merits” cannot be an exploitative abuse of a dominant position because such competition involves behaviour whose ex ante perpetrator-perceived profitability is not critically affected by the perpetrator’s perception that the conduct would reduce the absolute attractiveness of the best offers against which the perpetrator would have to compete by deterring a rival from competing, forcing a rival out, or deterring a rival’s QV investments.¹¹⁷ Consequently, such competition cannot violate a specific-anticompetitive-test

¹¹⁰ See, e.g., Case C-179/90 *Merci convenzionali porto di Genova SpA v. Siderurgica Gabrielli SpA* ECR I-5889 (1991); Case C-41/90 *Klaus Höfner and Fritz Elser v. Macrotron GmbH* ECR I-1979 (1991); *British Telecommunications (Case IV/29/877) Commission Decision 82/861/EEC [1982] OJ L360/36; P&I Clubs, IGA and P&I Clubs, Pooling Agreement (Case IV/D-1/30.373 and IV/D-1/37.143) Commission Decision 1999/329/EC [1999] OJ L125/12.*

¹¹¹ PINAR AKMAN, *THE CONCEPT OF ABUSE IN EU COMPETITION LAW: LAW AND ECONOMIC APPROACHES* 320-321 (Hart Pub. Co., 2012).

¹¹² *Id.* at 321.

¹¹³ *Id.*

¹¹⁴ MARKOVITS I at 134 et seq. See also Irina Haracoglou, *Competition Policy Law, Consumer Policy and the Retail Sector: the Systems’ Relation and the Effects of a Strengthened Consumer Protection Policy on Competition Law*, 3 THE COMPETITION L. REV. 175, 204 (2007).

¹¹⁵ MARKOVITS I at 134.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 131.

of illegality. Similarly, regarding the relation between exclusionary conduct and competition on the merits, Markovits notes that, in US antitrust law, conduct is said to be “exclusionary” or to “foreclose” competition if and only if it manifests the perpetrator’s specific anticompetitive intent (which, according to Markovits, means that it does not constitute competition on the merits).¹¹⁸ Further, according to Markovits, “[b]ecause EC antitrust officials and scholars tend to borrow U.S. antitrust language and analyses, it is appropriate to assume that as an initial matter that they define the terms ‘exclusionary’ and ‘foreclose’ in the same way that U.S. officials do.”¹¹⁹ This author would respectfully disagree with this statement for two reasons: first, it is debatable whether the EU officials and scholars borrow US language and analyses because on occasions it almost appears to be the opposite—the EU authorities almost strive to distinguish their approach from that of the US authorities. For example, in the recent process of encouraging private actions, in its Directive on Damages Actions the EU Commission has practically rejected the adoption of all the rules and mechanisms that are associated with US private antitrust actions.¹²⁰ This is demonstrated by first, displaying the aim of private actions to be compensation rather than deterrence; rejecting treble damages; rejecting limitations of indirect purchasers’ standing and allowing for the passing on defence, etc.¹²¹ Second, and more importantly, the provisions of US and EU antitrust laws are significantly different from one another in ways that make any potential borrowing or inspiration rather limited. For example, monopolisation or attempted monopolisation is not prohibited under EU law; exploitative abuse of dominance is not prohibited under US law; the single market imperative forces the EU authorities to adopt approaches to practices such as vertical restraints that differ from those in the US; the lack of strong private enforcement in the EU and the different institutional set up (i.e., courts versus administrative agencies) require different types of analyses and approaches in handling cases. In fact, the difference in the approach adopted, particularly concerning the enforcement of Article 102 TFEU and Sherman Act Section 2, has occasionally led to very different outcomes in practically identical disputes on the two sides of the Atlantic.¹²²

¹¹⁸ Id at 134.

¹¹⁹ Id.

¹²⁰ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

¹²¹ See id. in particular Articles 3, 12, 13, 14; White Paper on Damages Actions for Breach of EC Antitrust Rules 2.4.2008 COM(2008) 165 final.

¹²² See, e.g., Case COMP/C-3/37.792 — Microsoft [2004] OJ L32/23 (summary); Case IV/D-2/34.780 - Virgin/British Airways [2000] OJ L30/1. For commentary, see, e.g., Eleanor M. Fox, Microsoft (EC) and Duty to Deal: Exceptionality and the Transatlantic Divide, 4 COMPETITION POL. INT. (2008); ANDREW I. GAVIL AND

Indeed, Markovits notes that various statements of the EU officials indicate that they are not defining “exclusionary” and “foreclose” in the same way US authorities do.¹²³ Moreover, the EU authorities’ position on the efficiency defence to Article 102 TFEU also implies that competition on the merits can constitute exclusionary abuse.¹²⁴ This is because, unlike the Sherman Act’s specific anticompetitive intent test and the organisational-economic-efficiency-defence that can be read into Clayton Act, the efficiency defence that has been read into Article 102 TFEU exonerates dominant firms whose competition on the merits has reduced competition or prevented increases in competition by improving the dominant undertaking’s operational economic efficiency if and only if the net effect of the efficiency-enhancing conduct is to create an on-balance equivalent-monetary gain for the customers of the dominant undertaking or of its rivals.¹²⁵ Thus, conduct that on balance harms customers cannot be justified on efficiency grounds, meaning—according to Markovits—that competition on the merits can be abusive.¹²⁶

It has indeed been noted by commentators that efficiencies should be incorporated into the definition of abuse under Article 102 TFEU.¹²⁷ This is, however, not the approach adopted by the EU authorities. According to the Commission, efficiency is only one type of defence and the dominant undertaking has to demonstrate that the conduct under investigation produces substantial efficiencies that outweigh any anticompetitive effects on consumers.¹²⁸ This is a reflection of the CoJ judgment in *British Airways* according to which efficiencies can only be taken into account as an objective justification if the exclusionary effect arising from the conduct that is disadvantageous for competition may be counterbalanced or outweighed by advantages in terms of efficiency that also benefit the consumer.¹²⁹ Moreover, according to the Guidance on the Commission’s enforcement priorities, “the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.”¹³⁰ Yet, the Commission never explains what the counterfactual is for this assessment: the Guidance is silent as to the alternative situation with which the comparison

HARRY FIRST, *THE MICROSOFT ANTITRUST CASES: COMPETITION POLICY FOR THE TWENTY-FIRST CENTURY* (MIT Press, 2014); R. Hewitt Pate (Department of Justice Assistant Attorney General for Antitrust), Issues Statement on the EC’s Decision in Its Microsoft Investigation, Press Release, 24 March 2004, available at http://www.justice.gov/atr/public/press_releases/2004/202976.htm.

¹²³ MARKOVITS I at 134-135.

¹²⁴ *Id.* at 136.

¹²⁵ *Id.* at 137.

¹²⁶ *Id.*

¹²⁷ See note 23 *supra*.

¹²⁸ EC Abuse Guidance [28].

¹²⁹ Case C-95/04 *British Airways plc v Commission* ECR I-2331, [86] (2007).

¹³⁰ EC Abuse Guidance [28].

will be made for the dominant undertaking's conduct to be found (in)dispensable and (dis)proportionate.¹³¹ Further, to prove an efficiency defence, the dominant undertaking has to demonstrate that the efficiencies are sufficient to guarantee that no net harm to consumers is likely to arise.¹³² One problem with this is that the Commission thereby requires the dominant undertaking to guarantee that no net harm to consumers is likely to arise due to the efficiencies,¹³³ when the Commission itself only proves likely anticompetitive foreclosure.¹³⁴ Consequently, in cases in which the Commission does not prove effects on consumers or actual foreclosure to find abuse (i.e., does not establish the harm to consumers), the undertaking has the burden to rebut a position that the Commission has not actually proven in its allegation and/or finding of abuse.¹³⁵ In such cases, the undertaking's duty is closer to establishing whether or not conduct is abusive – the burden of proving which is on the Commission—than providing a “defence” to a sufficiently established allegation of abuse.¹³⁶ An additional problem is that the requirement that the dominant undertaking demonstrates that there will be no net harm to consumers begs the question of what the counterfactual is with which the comparison is to be made to decide whether there is net harm or not.¹³⁷ The counterfactual could be the scenario in which the dominant undertaking does not engage in the practice in question or it could be the scenario in which the dominant undertaking engages in the practice(s) alternative to the investigated conduct.¹³⁸ The Guidance does not indicate which scenario is the relevant one and the handling of efficiencies in the Guidance remains incomplete for practical and conceptual purposes.¹³⁹

What Markovits' argument also reveals is that the EU authorities have never meaningfully defined what “competition on the merits” involves despite using this concept as an apparent benchmark. For example, according to the Guidance, the Commission's enforcement activity regarding exclusionary abuse is focussed on “safeguarding the competitive process in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they

¹³¹ See Akman, *op. cit supra* note 89 at 620 et seq for a detailed assessment.

¹³² EC Abuse Guidance [30].

¹³³ *Id.*

¹³⁴ Pinar Akman, *European Commission's Guidance on Article 102 TFEU: From Inferno to Paradiso?*, 73 *MOD. L. REV.* 605, 621 (2010).

¹³⁵ *Id.*

¹³⁶ *Id.* On the burden of proof, see Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, Article 2.

¹³⁷ Akman, *op. cit supra* note 89 at 621.

¹³⁸ *Id.*

¹³⁹ *Id.*

provide.”¹⁴⁰ Yet, the Guidance does not define “competition on the merits.” Neither do the judgments from the EU Courts that use “competition on the merits” as a benchmark define what exactly it means.¹⁴¹ In fact, it is a vague concept and even if it is taken to mean competing on price, quality, etc., it remains without sufficient limiting principles that would distinguish it from competition that is not on the merits.¹⁴² This is aggravated by the fact that according to the Commission “[v]igorous price competition is generally beneficial to consumers.”¹⁴³ This clearly suggests that not all price competition is acceptable, which in turn makes it more important to precisely define what “competition on the merits” refers to in order for undertakings to know *ex ante* which types of price competition do not constitute competition on the merits. Indeed, the EU courts have on several occasions held that not all price competition is legitimate.¹⁴⁴ The problem with the case law and the Commission’s approach seems to be the adoption of a piecemeal approach to competition on the merits by deciding on what does not constitute such competition on a case-by-case basis. In the context of unilateral conduct when it is not necessarily obvious from a legal or economic point of view what makes an otherwise normal, common business practice abusive when adopted by certain undertakings, using benchmarks such as “competition on the merits” that are not themselves self-explanatory is not helpful in terms of providing certainty and clarity.

CONCLUSION

Markovits’ two-volume study into economics and the interpretation and application of US and EU antitrust law makes numerous significant contributions to the literature and deserves a place in every antitrust lawyer’s library. There is no doubt that these contributions will lead to much

¹⁴⁰ EC Abuse Guidance [6].

¹⁴¹ See, e.g., Case T-229/94 *Deutsche Bahn v. Commission* ECR II-1689, [78] (1997); Case T-65/98 *Van den Bergh Foods v. Commission* ECR II-4653, [157] (2003); Case T-201/04 *Microsoft v Commission* ECR II-3601, [1070] (2007); C-280/08 P *Deutsche Telekom v. Commission* ECR I-9555, [177] (2010); Case C-52/09 *Konkurrensverket v. TeliaSonera Sverige AB* ECR I-527, [43] (2011); Case T-321/05 *AstraZeneca AB and AstraZeneca plc v. European Commission* ECR-II-2805, [354]-[355]; [672]; [824] (2010); *AstraZeneca*, *supra* note 18 at [75]; Case T-155/06 *Tomra Systems ASA and Others v. European Commission* ECR II-4361, [206] (2010); T-336/07 *Telefónica, SA and Telefónica de España, SA v European Commission* ECR II-0000, [172] (2012); Case T-286/09 *Intel Corp. v. European Commission* ECR II-0000, [132], [205] (2012); Case C-549/10 P *Tomra Systems ASA and Others v. European Commission* ECR I-0000, [22], [42] (2012).

¹⁴² ROBERT O’DONOGHUE AND JORGE PADILLA, *THE LAW AND ECONOMICS OF ARTICLE 10 TFEU 177* (2nd ed.) (Hart Pub. Co., 2013).

¹⁴³ EC Abuse Guidance [23].

¹⁴⁴ See, e.g., *Post Danmark*, *supra* note 19 at [25] referring to *AKZO*, *supra* note 11 at [70], [72]; Case C-202/07 P, *France Télécom v. EC Commission* ECR I-2369, [106] (2009); Case C-280/08 P, *Deutsche Telekom AG v. Commission* ECR I-9555, [177] (2010). See also Case T-336/07 *Telefónica and Telefónica de España v. Commission* ECR II-0000, [172] (2012). The cases in which the EU authorities have made this statement generally concern price-cutting including above-cost price cuts. On above-cost price cuts, see Einer Elhauge, *Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory – And the Implications for Defining Costs and Market Power*, 112 *YALE L. J.* 681 (2013).

academic debate and commentary in the years to come, of which the current contribution may be seen as a starting point concerning the tests of illegality proposed by Markovits to be correct under Articles 101 and 102 TFEU. This contribution has sought to provide a critique of these tests, with the hope of furthering the debate initiated by Markovits. What the study of the tests of illegality shows is that there is still considerable ambiguity concerning some of the most fundamental concepts of antitrust law at least in the EU but perhaps also in the US. The concept of “competition on the merits” is one of them but there is also significant scope for discussion and disagreement on what makes a conduct anticompetitive, irrespective of whether such conduct is of the type prohibited under Article 101 TFEU or of the type prohibited under Article 102 TFEU. The blurred distinction between object and effect restrictions under Article 101 TFEU; the potential perverse implications of prohibiting vertical restraints or pure intra-brand restrictions of competition; the somewhat half-hearted treatment of efficiencies under Article 102 TFEU; and the use of intent as a central component of the test of illegality are some of the important issues that this contribution has sought to contribute to the discussion of. Irrespective of whether one agrees or disagrees with the propositions put forward by Markovits on these fundamental issues, one must acknowledge the significance and intellectual rigour of the contribution made to this topical debate by Markovits in his study, which will no doubt become one of the seminal works on EU and US antitrust law.