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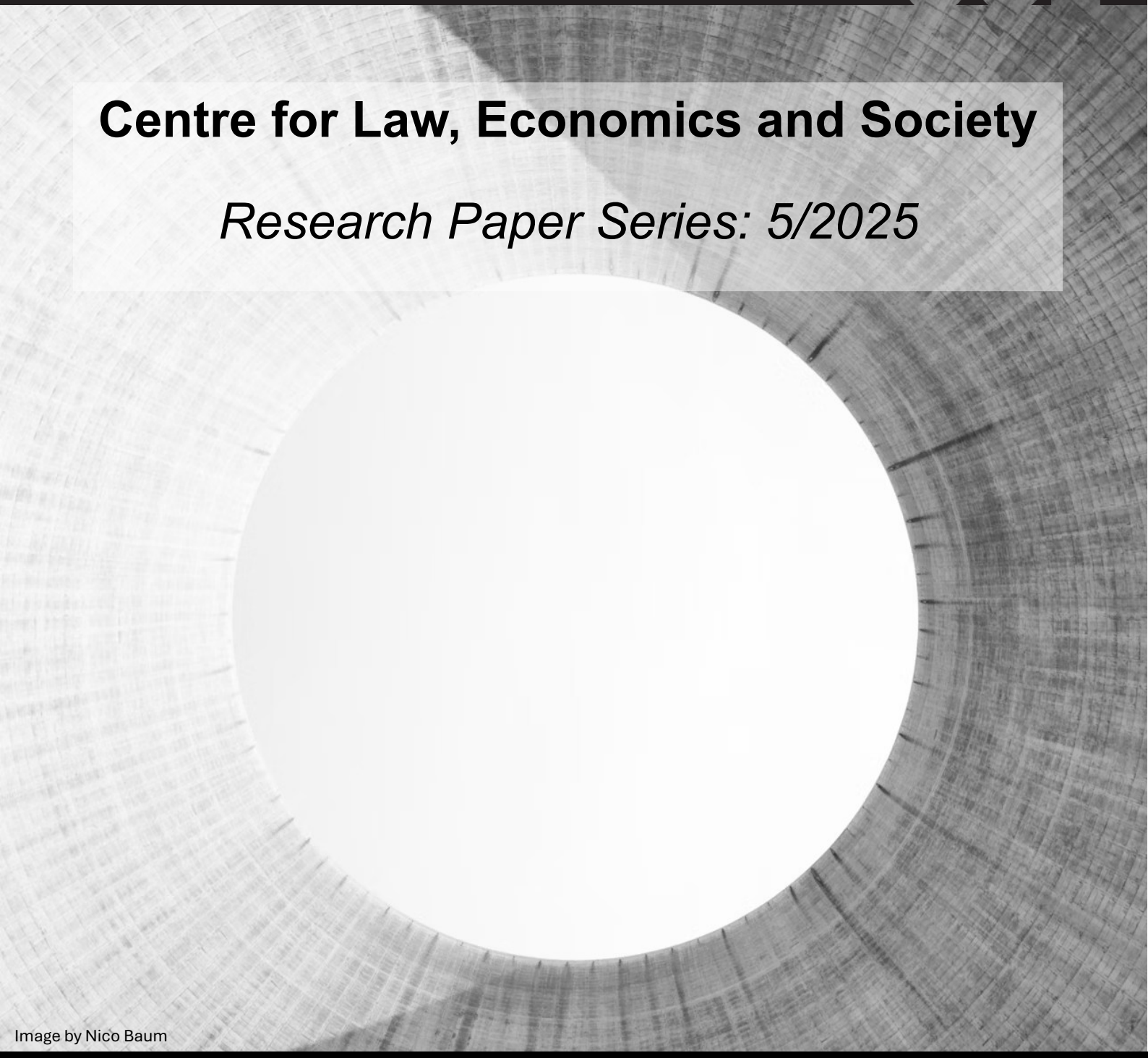

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Competition Law as an Argumentative Practice

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Faculty of Laws, UCL London,

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Centre for Law, Economics and Society

Faculty of Laws, UCL

London, WC1H 0EG

United Kingdom

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Stavros Makris[*]

Abstract

This paper contends that the indeterminacy and persistent disagreements inherent in competition law are not transitory flaws but fundamental features that enable the discipline to adapt to complex market realities and epistemic change. Traditional approaches – top-down axiomatic reasoning, which seeks a single normative anchor, and bottom-up doctrinalism, emphasizing case-by-case evolution – are both rooted in economic formalism and legal positivism, leading them to mistakenly treat indeterminacy as a technical gap to be resolved. Such models overlook the crucial role of value judgments in competition law, instead framing it as a technocratic domain governed by economic analysis and doctrinal consistency alone. Drawing on interpretivist theories, this paper introduces the Argumentative Practice Model, which reconceptualizes competition law as an inherently argumentative and interpretive field. Here, the content of legal norms evolves through ongoing deliberation among values, doctrine, and extra-legal knowledge. Rather than eliminating indeterminacy, this model regards it as intrinsic and productive—legal meaning emerges through dynamic interpretive practices that combine extra-legal knowledge, and doctrinal analysis with principled value judgments. The paper illustrates this thesis with case studies on both anticompetitive agreements and abuse of dominance, showing how the evolution of EU competition law cannot be explained by legal positivism or economic formalism alone but emerges through principled, context-sensitive adjudication. Ultimately, the paper contends that embracing competition law's argumentative character – its openness to interpretive debate and plurality of values – is essential for preserving its relevance, adaptability, and integrity in the face of digitalization, epistemic change, and shifting socio-economic priorities.

[*] Lecturer in Law at University College London (s.makris@ucl.ac.uk). I am grateful to Belle Beems, Stephen Guest, Damjan Kukovec, Justin Lindeboom, Giorgio Monti, George Pavlakos, Athina Stavrou, Konstantinos Stylianou and Bernadette Zelger for their insightful comments. The usual disclaimer applies. Pursuant to the ASCOLA Transparency and Disclosure Declaration the author declares not to have any conflicts of interests to disclose.

Introduction

The problem of reasonable disagreements has long occupied the antitrust community.[1] Judges, enforcers, practitioners, and scholars frequently describe competition law as 'amorphous'[2] or 'sponge-like',[3] highlighting its shifting boundaries[4] and relative indeterminacy.[5] In other words, well-informed and in bona fide interlocutors routinely disagree about the precise content of competition norms and the conditions under which a proposition about the law is considered valid. Under what conditions do horizontal or vertical agreements constitute a restriction of competition within the meaning of Article 101 TFEU? Does Article 102 TFEU prohibit only the exclusion of equally efficient rivals, or does it also address the exclusion of less efficient competitors? What is the meaning of pro- and anti-competitive effects, and under what conditions are these effects considered established according to the relevant legal standard? Answers to these questions may vary. Understanding the nature and sources of these disagreements is crucial for addressing law's indeterminacy as it can offer a blueprint to discern between legally valid and invalid propositions and evaluate the strength of competing legal arguments.

Efforts to tame competition law's inherent indeterminacy have produced diverse methodological responses, each aiming to stabilise the field's doctrinal boundaries. These strategies reflect contrasting visions of how legal validity and argumentative rigour can be

[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. we identified three types of reasonable disagreements and explained their analytical structure. Stavros Makris, 'Openness and Integrity in Antitrust' (2020) 17(1) *Journal of Competition Law & Economics* 1, 6-23.
[2] Sean P. Sullivan, 'Antitrust Amorphisms' (2019) *Antitrust Chronicles* 37.
[3] Ariel Ezrachi, 'Sponge' (2017) 5(1) *Journal of Antitrust Enforcement* 49.
[4] Pablo Ibañez Colomo, *The Shaping of Competition Law* (CUP 2018) 23-82.
[5] In this study we use the terms 'reasonable disagreements and 'indeterminacy' as interchangeable. It is this kind of disagreements that make the law indeterminate, and law's indeterminacy is manifested via reasonable disagreements.

anchored in a field marked by persistent disagreements. For instance, Bork and Posner exemplify a deductive, axiomatic, top-down approach,[6] positing that agreement on a single fundamental goal can resolve all indeterminacy.[7] In contrast, Ibáñez Colomo advocates for incremental, inductive case law development – what is referred to here as bottom-up doctrinalism – arguing that, over time, judicial interpretation will clarify and render the law more determinate.[8]

Despite their methodological differences, both approaches frame competition law as a technocratic discipline.[9] Each treats the field as 'applied microeconomics'; a system of rules where scientific rigour and empirical modelling can supposedly resolve normative ambiguities through objective, quantifiable welfare metrics.[10] Both place faith in economic analysis as an apolitical, objective decision-making tool capable of transforming value disagreements into factual disagreements.[11] In this view, indeterminacy is not a *normative* issue but an *empirical* one to be settled by quantifiable welfare metrics.[12]

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[6] Bork's consumer welfare standard and Posner's efficiency-focused tests (e.g., assessing whether practices exclude 'equally or more efficient competitors') aim to create predictable, economically informed decision matrices. Posner's emphasis on predation theories and unilateral competitive effects illustrates this paradigm, where economic models dictate legal outcomes rather than emerging from case-specific analysis. We refer to these approaches as 'top-down' to emphasize their central aspiration: that once the correct normative value is embedded within the framework of competition law, the resulting outcomes will be free from inconsistency or incoherence. Robert Bork, 'Legislative Intent and the Policy of the Sherman Act' (1966) 9 *Journal of Law and Economics* 7, 9; Richard Posner, *Antitrust Law* (2nd ed., The University of Chicago Press 2001) 9-12 (framing antitrust analysis as the application of economic logic to legal problems) 204, 218 (emphasizing that the relevant economic concepts are not empirical observations but logical constructs that guide legal interpretation) 172, 185-185 (starting from general economic principles and deducing their implications for antitrust law rather than relying on case-by-case, inductive reasoning).

[7] Robert Bork, *The Antitrust Paradox* (New York: Free Press 1978) 5; Posner (n 6) 11-17.

[8] Ibáñez Colomo (n 4) 3-22, 85, 152, 219, 273, 328; Pablo Ibáñez Colomo, 'Competition on the Merits' (2024) 61 *Common Market Law Review* 387; Pablo Ibáñez Colomo, 'Anticompetitive Effects in EU Competition Law' (2021) 17(2) *Journal of Competition Law & Economics* 309.

[9] Daniel Crane, 'Technocracy and Antitrust' (2008) 86(6) *Texas L Rev* 1159 (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 rationalization of the economic order requires 'the objective and detached rule of industrial and scientific experts and problem solvers').

[10] Thibault Schrepel, 'Antitrust without Romance' (2020) 13 *NYU Journal of Law & Liberty* 326, 330, 386, 418 ('several aspects of antitrust law are particularly susceptible to corruption by moral concepts'), 420 ('it is not up to antitrust authorities to take on new tasks. It follows that they cannot introduce moral concepts that allow them to claim new powers'); Roger van den Bergh, 'Chapter 1 - The More Economic Approach in European Competition Law: Is More Too Much or Not Enough?' in Mitja Kovac Mitja and Ann-Sophie Vandenberghe ((eds), Economic Evidence in EU Competition Law (Intersentia 2016) 13-42, 20-35, 40-42; Oles Andriychuk, 'Between Microeconomics and Geopolitics: On the Reasonable Application of Competition Law' 2022 (85)3 *Modern Law Review* 598, 599-600, 601-602.

[11] A value disagreement occurs when parties hold rationally incompatible evaluative judgments, reflecting substantive conflicts over core ideals like fairness or justice-not mere semantics. In law, such disputes center on legal requirements, interpretation, or authoritative sources and often persist among epistemic peers who diverge methodologically or ethically. These conflicts resist resolution when rooted in irreconcilable views on the legal system's purpose. This is particularly evident in competition law, where 'competition' is an essentially contested concept – a multi-faceted ideal open to conflicting yet reasonable interpretations. See Erich Rast, 'Value Disagreements and Two Aspects of Meaning' (2017) 27(51) *Croation Journal of Philosophy* 399; Alexander Houghton, 'Resolving Peer Disagreement about the Law' (2024) 30(3) *Legal Theory* 142.

[12] Frank Easterbrook, 'Limits of Antitrust' (1984) 63 *Texas L Rev* 1; Nicolas Petit, 'Thoughtful Competition Law: Power and Reflexivity' (2025) (3) *EUI LAW Working Paper* 2.

Both approaches share a positivist premise: legal validity derives from identifiable social facts – be they economic axioms, empirical evidence, doctrinal patterns, or technical expertise. To be sure, legal positivism holds that the existence of law is "a matter of social facts," and that whether a given norm is legally valid depends on its sources, not its merits.[13] This is also known as the sources thesis and constitutes a foundational principle of legal positivism. It asserts that the existence and content of law are determined solely by reference to its social sources, such as legislative amendments, judicial decisions or recognized customs, and not by reference to moral arguments or considerations.[14] Under this approach moral reasoning and any other extra-legal knowledge may inform the interpretative process of determining law's content only at a later stage and solely when permitted by the sources of law themselves.[15] However, even in that case the validity of a law would ultimately depend on whether it has been created through recognized social procedures or by legitimate authorities, not on whether it is just, wise, or moral. Hence, the existence of a legal proposition is matter of social facts and not of argumentation.

Due to their shared positivist premise, both the axiomatic top-down approach and bottom-up doctrinalism treat competition law's indeterminacy as a temporary deficiency solvable through better theoretical synthesis (e.g., discovering a 'universal theory' of abuse in the case of the top-down approach[16]), more comprehensive rules that close gaps[17] (in the case of bottom-up doctrinalism), or enhanced technocratic precision via input from value-neutral economics (according to both approaches). However, by seeking to anchor legal validity and argumentative rigour in objective, scientific and value-neutral criteria, both approaches suffer from a foundational flaw. By framing competition law as a *system of rules* governed by value-free or technocratic economic analysis or other extra-legal scientific knowledge, both approaches evade the core challenge of indeterminacy: they do not really address the value

[13] John Gardner, 'Legal Positivism: 5 ½ Myths' (2001) 46 *Journal of Jurisprudence* 199, 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).
[14] The social thesis entails that there is no necessary connection between law and morality. Legal rules are valid because of their source – how and by whom they were made – not because they conform to any moral standard. Hence, to determine what the law is, one needs to look to its origins not to its moral merits or demerits. Hans Kelsen, *Pure Theory of Law* (translation by Max Knight, University of California Press 1967) 1-9, 33-34, 44, 200-201; Joseph Raz, Practical Reason and Norms [1975] (OUP 1999) 37-38, 40-46 (formulating the 'social thesis' as the core of legal positivism: what is law is a matter of social fact, and law's existence and content are determined by its sources, not by its moral merits or demerits. Raz further argues that the existence and content of law are fully determined by social sources, not by moral argument) 107, 117-123 (discerning between different normative systems: systems of interlocking norms, systems of joint validity, autonomous systems and institutionalized systems).
[15] Leslie Green and Thomas Adams, 'Legal Positivism', (2003) *The Stanford Encyclopaedia of Philosophy* (2003), at https://plato.stanford.edu/entries/legal-positivism (The entry contrasts inclusive with exclusive positivism, emphasizing that, for exclusive positivists, law's content is determined by social sources alone, and moral reasoning is only relevant if the sources themselves permit it).
[16] 'Just as physicists strive to find the theory that unifies Newtonian physics and quantum mechanics, so economists strive to find the theory that unifies the various aspects of anticompetitive unilateral conduct. And the economists, just as the physicists, have not yet found it.' Philip Lowe, 'Speech' (11 September 2006) at www.ec.europa.eu.
[17] Andrei Marmor, 'Exclusive Legal Positivism' in Jules L Coleman and Scott Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 111-114.

conflicts that are inherent in such as an essentially contested legal field and cause indeterminacy.[18]

Both approaches, anchored in positivism, treat economics as an apolitical arbiter ignoring how welfare standards embed unexamined normative choices (e.g., consumer surplus vs. total welfare).[19] They reduce legal validity to social facts overlooking the *interpretive* character of competition law adjudication (the 'infinite regression problem'), and attempt to eliminate law's openness through legal or economic technocracy often creating new indeterminacies in the process (the 'false ideal paradox').[20] These limitations stem from a deeper theoretical blind spot: the inability to reconcile competition law's polycentric objectives (e.g., efficiency, fairness, rivalry, innovation, industrial liberty) and thick ideal of 'effective competition' within a positivist framework.[21] By dismissing indeterminacy as a mere technical gap rather than an inherent feature of value-laden legal reasoning, these strategies offer band-aids rather than substantive resolutions.

This Chapter contends that competition law defies confinement to any singular methodological framework whether conceived as top-down imposition of foundational values, bottom-up evolution through judicial doctrine, or technocratic economic modelling. Rather than treating the field as a codifiable set of rules that can be fully operationalised through ex ante value judgments (as per the top-down approach), incremental court-led development (as per bottom-up doctrinalism) or by relying on economic technocracy (as both approaches would suggest), this study proposes conceptualising competition law as an *interpretive argumentative practice*.[22]

Contrary to positivism, this interpretivist approach[23] posits that competition law emerges from the dynamic interplay of three elements: normative value judgments, doctrinal analysis and extra-legal knowledge (e.g. economic theory, behavioural science, ecology studies). Under this framework, legal content – i.e., determinations of what the law permits, prohibits, or requires – is not derived solely from formal sources (legislation, treaties) or social facts (positivism's

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[18] As will become clear below some variations of the top-down axiomatic approach accept that economics are not value free but still insist that competition law could be technocratic by endorsing normative singularity. This phenomenon has been described as the 'monocentric competition law model' in Ioannis Lianos, 'Polycentric Competition Law' (2018) 71 *CLP* 161, 167-177.

[19] Michael Jacobs, 'An Essay on the Normative Foundations of Antitrust Economics' (1995) 74 *N C L Rev* 219, 220-223, 232-237, 239-241.

[20] Rebecca Haw Allensworth, 'The Commensurability Myth in Antitrust' (2016) 69 *Vand L Rev* 1, 1-3, 8-16, 17-24, 44-47, 55-67, 69.

[21] Lianos (n 18) 161; Ezrachi (n 4) 49; Stavros Makris, 'EU Competition Law as Responsive Law' (2021) 23 *CYELS* 228.

[22] Ronald Dworkin, *Law's Empire* (HUP 1986) 45-46 (introducing the idea that law is an interpretive concept and distinguishing interpretivism from both conventionalism and pragmatism. Dworkin explains that interpretivism treats law not as a set of fixed rules or as a tool for achieving social goals, but as a practice that requires judges to interpret legal materials in light of principles of justice, fairness, and procedural due process), 50-53 (on the nature of interpretation in law), 87-113 (on law as integrity), (313-354 (discussing how legal interpretation is a matter of finding the best moral justification for the community's legal practices); Makris (n 21) 238-242, 249.

[23] Dworkin (n 22) 45-86, 176-225, 226-284 (Chapter 7 which addresses its normative purpose, justice); Nicos Stavropoulos, 'Interpretivism' *The Stanford Encyclopedia of Philosophy* (2014), at https://plato.stanford.edu/entries/law-interpretivist.

thesis).[24] Instead, it arises through interpretive practices that: (a) filter empirical evidence, including or excluding facts as legally relevant; (b) reconstruct analogies between precedents and novel cases through argument (not pure doctrinal logic); (c) integrate external knowledge (economics, sociology.) as *co-determinants* of law's content, not mere gap-filling tools. We refer to this approach as the Argumentative Practice Model.

This approach stands in sharp contrast to positivist theories, which emphasize the mechanical extension of prior rulings through formal logic and input from economics. Instead, it asserts that courts must engage in contextual argumentation and evaluative judgment and reason by analogy.[25] Second, according to this approach, economics (or other dsisciplines) do not simply 'inform' legal outcomes when texts or precedents 'run out' but co-determine our working out of the law, operating as partial grounds that shape the content of the law.[26] Simultaneously, values such as efficiency, consumer welfare, sustainability, fairness, rivalry, and freedom as non-domination function not as peripheral considerations but as constitutive elements of legal reasoning. Consequently, they shape the content of competition law regardless of their explicit inclusion or exclusion in judicial reasoning since both deliberate incorporation and intentional omission carry interpretive significance. Consequently, the Argumentative Practice Model rejects positivism's source-based and technocracy-laden determinism and instead views competition law as a hermeneutic process where statutes and precedents provide raw materials, interpretive arguments act as transformative mechanisms, and legal outcomes reflect contextual synthesis of competing inputs.

This shift of perspective has two major consequences. First, the Argumentative Practice Model acknowledges that concrete legal outcomes arise not from predetermined methodologies but

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[24] For example, according to Article 102(d) TFEU "the conclusion of contracts subject to acceptance by other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of such contracts" may be an abuse of dominance. However, in *Tetra Pak II* the Court ruled that "It must, moreover, be stressed that the list of abusive practices set out in the second paragraph of Article 86 of the Treaty is not exhaustive. Consequently, even where tied sales of two products are in accordance with commercial usage or there is a natural link between the two products in question, such sales may still constitute abuse within the meaning of Article 86 unless they are objectively justified" C-333/94 P *Tetra Pak v Commission* 1996 I-05951 [37]. This excerpt, employing a standard interpretive technique under Articles 101 and 102 TFEU, effectively demonstrates how statutory language alone exerts limited influence on legal outcomes, as judicial reasoning actively shapes competition law's substantive content. Hence, a general point of this study is that competition law's legal provisions act as guardrails rather than rigid rules.

[25] As Justice Scalia noted courts often reason by analogy, particularly within the common law tradition. In this tradition, judges compare new cases to prior decisions, drawing analogies to determine whether the precedent applies or should be distinguished Scalia identified this process as one of the law's principal intellectual attractions, highlighting judges' skill in 'distinguishing cases' — using analogies and disanalogies to assess which precedents are relevant to the matter at hand. Nevertheless, Scalia insisted that when interpreting statutes or constitutional provisions, judges should be guided primarily by the text's original meaning and established canons of construction, rather than by analogies that might depart from the text's intent. He championed the 'law of rules' favouring clear, principled, and inflexible rules derived from the text and the lawmaker's original intent over open-ended balancing or analogical extension. As will become evident in part V below, the argumentative practice model proposed here – drawing inspiration from Dworkin's interpretivism – stands in marked contrast to Scalia's originalism. Yet, Scalia's insight regarding the role of analogical reasoning retains its own distinct merit. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1997) 7-8, 13-14; *Smith v United States*, 508 US 223, 241 (1993) (Scalia J, dissenting).

[26] Drawing on Stavropoulos we describe this modality of determining legal validity as hybrid interpretivism. See section IV.

from structured deliberation blending value judgments, (e.g., prioritising SMEs or consumer surplus in merger review), legal technocracy (e.g. doctrinal analysis, procedural safeguards, burden-shifting frameworks), and economics as an 'ideological science' (not as technocracy). The interplay of teleological reasoning, deliberative pluralism, and epistemic hybridity provisionally determines the content of the law and drives legal evolution. From this perspective, indeterminacy is not a deficiency but the very feature that enables interpretive competition over which facts become legally relevant.[27] Adjudication, thus, becomes a forum for testing arguments against statutory purposes understood in modern contexts (e.g., data dominance as a new form of 'substantial market power'), evolving societal expectations (e.g., sustainability as a competition-relevant consideration), and institutional capacities and capabilities (e.g., courts vs. agencies balancing type I/II errors).

Second, the Argumentative Practice Model positions interpretivism (instead of top-down axiomatic reasoning and bottom-up doctrinalism) as a guiding jurisprudential framework for assessing legal validity and argumentative strength. Unlike approaches that rely on a positivist view of the law and economic formalism, interpretivism sees the law's content as the by-product of (interpretive) argumentative struggles. It rejects the positivist view that the validity of competition rules is fully determined via technocratic, value-neutral reasoning and doctrinal analysis. Instead, it recognises that value judgments are *integral* to legal interpretation and that legal propositions gain validity when an interpretive theory – one that best *fits* and *justifies* the law – convinces courts that a particular proposition upholds law's integrity – a concept encompassing both rule-of-law principles (clarity, certainty, coherence) and substantive mission-realisation (e.g. protecting 'effective competition').[28]

The Chapter proceeds as follows. Part I explains the "problem" of indeterminacy in competition law, highlighting its roots in the tension between law's adaptability and the need to secure its integrity. Part II presents the main strategies developed by the members of the antitrust community to address law's indeterminacy. Part III shows why these strategies due to their shared foundations in economic formalism and legal positivism, fail to grasp and resolve the phenomenon of law's indeterminacy. Part IV introduces the Argumentative Practice Model, which conceives competition law not as a set of rules the content of which can be determined via social facts, but as an interpretive argumentative practice. According to this model the meaning of the key competition law terms emerges from iterative debates about the law's goal(s), not from doctrinal analysis or mainstream economics alone. This Part also discusses the practical implications of this shift. The Chapter concludes with a summary of the argument.

[27] Makris (n 21) 229-232, 237, 242-246, 252-253.
[28] Dworkin (n 22) 4-11, 31-44. For the argument that autonomy of EU law provides coherence to the decision-making of the CJEU see Damjan Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' (2023) 8 *European Papers* 1403.

I. Contextualising Indeterminacy

i. Understanding indeterminacy

Reasonable disagreements permeate competition law as a systemic feature, not a transient anomaly. Rational, informed stakeholders-scholars, enforcers, judges-routinely clash over legal norms, policy priorities, and remedial responses.[29] These disputes give rise to 'hard cases':[30] scenarios where semantic ambiguity and normative complexity preclude consensus on the law's content triggering indeterminacy. By indeterminacy we refer here to the instances where the legal materials (e.g. provisions and case law) cannot fully guide the application of the law to new circumstances.[31] Crucially such indeterminacy stems not from factual intricacy (e.g. econometric modelling challenges or limited knowledge about facts) but from inherent features of competition law itself.[32]

The history of antitrust in the EU and the U.S. underscores this reality. Landmark debates – over the consumer welfare standard,[33] the as-efficient competitor (AEC) test,[34] or the meaning of procompetitive[35] and anticompetitive effects[36] and competition on the merits[37] – reveal enduring fissures over the content of competition norms. For example, does Article 102 TFEU's prohibition of 'abuses of dominance' protect only equally efficient rivals, or should it safeguard market contestability even for less efficient competitors? Similarly, do vertical restraints under

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[29] Dworkin (n 20) 6–7, 13–15, 40–44 (for an introduction and framing of theoretical disagreement in law) 45–52, 58–59, 65–66, 71, 86 (for a detailed discussion of theoretical disagreements, the distinction between concepts and conceptions, and Dworkin's argument that law is not indeterminate simply because it is disputed).

[30] Ronald Dworkin, 'Judicial Discretion' (1963) 60 *Journal of Philosophy* 624, 624-629, 629-634 (arguing that, even in such cases, judges are not free to decide based on personal preference or policy, but are instead bound by legal principles that form part of the law, even if these principles are not codified as explicit rule); H.L.A. Hart, *The Concept of Law* (OUP 1961) 124–136, 204-207 (arguing that in such situations, judges exercise a creative role by making new law); Kent Greenawalt, 'Discretion and Judicial Discretion: The Elusive Quest for the Fetters that Bind Judges' (1975) 75 *ColumLRev* 359, 391; Charles Larmore, *Pluralism and reasonable disagreement* (1994) 11(1) *Social Philosophy and Policy* 61.

[31] Andrei Marmor, *Philosophy of Law* (OUP 2011) 145 (noting that the law requires interpretation when its content is indeterminate in a particular case of its application. Marmor identifies three main sources of indeterminacy in law – conflict of norms, semantic indeterminacy, and pragmatic indeterminacy – and he argues that these phenomena create the need for interpretation). See also Andrei Marmor, *Interpretation and Legal Theory* (Hart Publishing, 2nd edn, 2005) 1-17, 18-41; Andrei Marmor, 'Defeasibility and Pragmatic Indeterminacy in Law' (2015) University of Southern California Legal Studies Working Paper Series No 157.

[32] Makris (n 2) 23-31 (providing an explanation of the phenomenon of reasonable disagreements in competition law); Makris (n 22) 246-252 (arguing that the law's fuzzy mandate, conceptually elastic vocabulary, rules and standards mode of analysis and reliance on economics as an 'ideological science' constitute essential features of competition law that makes reasonable disagreements inevitable).

[33] OECD, 'Consumer Welfare Standard: Advantages and Disadvantages Compared to Alternative Standards' (2023); Murat C. Mungan and John M. Yun, 'A Reputational View of Antitrust's Consumer Welfare Standard' (2024) 61 *Houston Law Review* 569.

[34] Martin Mandorff and Johan Sahl, 'The Role of the "Equally Efficient Competitor" in the Assessment of Abuse of Dominance (2013) *Konkurrensverket Working Paper Series in Law and Economics no 1,* 1; Damien Neven, 'The As-Efficient Competitor Test and Principle. What Role in the Proposed Guidelines?' (2023) 14(8) *Journal of European Competition Law & Practice* 565 (providing a nuanced critique of the AEC principle and test, and warning against their blanket application in EU competition law).

[35] Stavros Makris, 'Procompetitive Effects in EU Competition Law' in Oles Andriychuk and Giuliano Amato (eds), *Antitrust and the Bounds of Power – 25 Years On* (Boomsbury Publishing 2023) 117.

[36] Ibáñez Colomo, Anticompetitive Effects in EU Competition Law (n 9) 312-318.

[37] Ibáñez Colomo, Competition on the Merits (n 8) 387–403.

Article 101 TFEU require proof of consumer harm, or is harm to market structure sufficient? And crucially, how should the concept of *foreclosure* be defined and applied in this legal context? Such questions lack definitive answers, exposing the law's interpretive openness.

One might have expected that the ascendancy of neoclassical economics, the refinement of antitrust doctrines, and the rise of compliance and institutional theories would eliminate such disagreements and render the law fully determinate. The Chicago School's consumer welfare paradigm and the EU's 'more economic approach' both aimed to ground competition law in objective, quantifiable metrics.[38] Yet neither framework succeeded in eradicating indeterminacy.[39] In the US, declining competition, rising concentration, and the dominance of digital platforms have exposed the limits of price-centric antitrust.[40] Critics contend that minimalist enforcement has facilitated the consolidation of market power, to the detriment of innovation and equity.[41] Similarly, the EU's shift toward an effects-based was presented as an effort to modernize competition law, aligning it with contemporary economics and enabling the European Commission (EC) to move beyond the excessive formalism of its earlier legalistic approach.[42] In a slightly different tone, the recent draft *Guidelines on Exclusionary Abuses* acknowledge the multiple values inherent in a thick ideal of 'effective competition',[43] yet they

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[38] Lawrence A. Sullivan, 'Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships' (1980) 68 *CalLRev* 1, 3 (stating that 'free access to markets and dealer independence have been rejected as antitrust goals,' as antitrust courts have become 'expositors of applied microeconomic policy').

[39] Indicatively, Thomas J Horton, 'Rediscovering Antitrust's Lost Values' (2018) 16(2) 44 *The UNH L Rev* 179; Albert Allen Foer and Arthur Durst, 'The Multiple Goals of Antitrust' (2018) 63(4) *The Antitrust Bulletin* 494; Lina M Khan, 'The Ideological Roots of America's Market Power Problem' (2018) 127 *YLJF* 960; Joshua D Wright and others, 'Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust' (2019) 51(1) *Arizona State Law Journal* 293; Lianos (n 19) 161; Ezrachi (n 4) 49.

[40] American Antitrust Institute, 'A National Competition Policy: Unpacking the Problem of Declining Competition and Setting Priorities Moving Forward' (Report, June 2016) 7 (stating 'there is systematic evidence – ranging from the disconnect of corporate profits and corporate investment to evidence of persistent supra-normal profitability – that points to an increase in rent extraction in the U.S. economy.') Roosevelt Institute, 'Untamed: How to Check Corporate, Financial and Monopoly Power' (Report, June 2016) 18 (finding that in several industries e.g. healthcare, airlines, agriculture, markets are now more concentrated and less competitive than at any point since the Gilded Age).

[41] Robert Pitofsky, 'Does Antitrust Have a Future?' (1987) 76 *GLJ* 321, 321–22 (describing the Reagan administration's antitrust policy as 'the most lenient antitrust enforcement program in fifty years'; stating that with the exception of horizontal cartels, large horizontal mergers, and predation, 'antitrust has been consigned to a non-enforcement oblivion'; and claiming that 'the basis for this extraordinary turnaround in enforcement' is Chicago School theory).

[42] Mario Monti, 'Antitrust in the US and Europe: A History of Convergence' (Speech at the Brookings Institution, Washington DC, 14 November 2001) SPEECH/01/540 at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_01_540; European Commission, 'Guidelines on the application of Article 101(3) of the Treaty on the Functioning of the European Union' [2004] OJ C101/9.

[43] European Commission, 'Draft Guidelines on Exclusionary Abuses of Dominance under Article 102 of the Treaty on the Functioning of the European Union' (1 August 2024) https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/application-article-102-tfeu_en accessed 13 May 2025, para 1 (stating 'The Union rules on competition pursue the protection of genuine, undistorted competition ("effective competition") in the internal market. Effective competition drives market players to deliver the best products1 in terms of choice, quality and innovation, at the lowest prices for consumers2. It ensures that markets remain open and dynamic, creating new opportunities for innovative players including small and medium-sized enterprises ("SMEs") and start-ups to operate on a level playing field with other players. It also spurs innovation and ensures an efficient allocation of resources, thereby contributing to sustainable development and enabling strong and diversified supply chains, all of which contributes to the Union's resilience and long-term prosperity').

are framed as simply introducing a 'more workable, effects-based' approach grounded in case law and technocratic economic thinking.[44]

Such technocratic tools-error-cost frameworks, and the increasing use of economics merely shifted debates into procedural channels without addressing underlying value conflicts. For instance, the AEC test, designed to minimise false positives, now faces criticism for enabling false negatives in digital markets, where exclusion often stems from ecosystem lock-ins rather than price predation.[45] Similarly, the FTC's reluctance to challenge Google's and Amazon's self-preferencing (prioritising short-term prices) contrasts with the EU's proactive stance in cases such as *Google Shopping*, *Google Android*, and *Android Auto*, revealing jurisdictional divides rooted in competing normative priors.

Digital ecosystems have amplified indeterminacy by forcing courts and enforcers to grapple with non-price harms-innovation suppression, privacy erosion, and gatekeeper power-that defy traditional welfare metrics. Platforms like Google and Amazon indicated that competition's non-price dimensions – innovation, quality, privacy, and ecosystem power – could be as critical as (if not more critical than) short-term price effects.[46] This realisation spurred a re-evaluation of minimalist antitrust principles, with scholars and enforcers increasingly advocating for broader, interventionist policies.[47] The More Economic Approach has faced comparable challenges, prompting the EC to shift toward a more workable, effects-based framework.[48]

Consequently, while technocratic economic analysis reshaped US antitrust and EU competition law, it never achieved an ironclad consensus.[49] Consumer welfare and price-output metrics, though influential, were never universally accepted as antitrust's sole objectives.[50] Today, both US and EU competition law are shifting away from this narrow vision, embracing a more pluralistic framework that addresses power imbalances, innovation dynamics, and democratic concerns alongside traditional welfarist goals.[51] Accordingly, the technocratic turn in both the US and the EU masked unresolved value conflicts (e.g., total vs. consumer welfare, short-run

[44] As will be explained below, this kind of framing disguises the role of value judgments and interpretive theories play in the interpretation and application of the law.
[45] Neven (n 34) 565.
[46] Tim Wu, 'The Blind Spot: The Attention Economy and the Law' (2017) 82(3) *Antitrust LJ* 771, 775-81; Lina Khan, 'Amazon's Antitrust Paradox' (2017) 126 *Yale LJ* 710, 717–22.
[47] OECD, *Considering non-price effects in merger control – Background note by the Secretariat,* DAF/COMP(2018) 2 (6 June 2018) 5-32.
[48] Anne C Witt, The More Economic Approach to EU Antitrust Law (Hart Publishing 2016) 1-10 (on origins and motivations), 21-30 (on how the shift toward economic analysis was implemented), 88-108 (on the redefinition of the legal objectives), 110-158 (on recasting the notion of harm), 213-230 (on the development and application of new analytical tests), 231-246 (on methodology), 273-327 (on compatibility with case law); Anne C Witt, 'The European Court of Justice and the More Economic Approach to EU Competition Law – Is the Tide Turning?' (2019) 62 *Antitrust Bulletin* 172.
[49] Eleanor M Fox, 'The Modernization of Antitrust: A New Equilibrium' (1981) 66(6) *Cornell Law Review* 1140, 1154 ('In sum, the claim that efficiency has been the goal and the fulcrum of antitrust is weak at best')
[50] Ezrachi (n 3) 49; Andriychuk (n 10) 598.
[51] Daniel A Crane, 'Antitrust's Unconventional Politics' (2018) 104 *V L Rev* 118 (noting that 'antitrust law now stands at its most fluid and negotiable moment in a generation. The bipartisan consensus that antitrust should focus solely on economic efficiency and consumer welfare has quite suddenly come under attack from prominent voices calling for a dramatically enhanced role for antitrust law in mediating a variety of social, economic, and political friction points').

or long-run consumer welfare) and failed to eradicate value disagreements.[52] The result is a fragmented enforcement landscape where legal outcomes depend as much on institutional and enforcement philosophy as on policy considerations and market realities.

This "failure" stems from the inescapable nature of value disagreements in competition law. Generally, a value disagreement arises when two or more parties hold evaluative judgments whose demands are rationally incompatible.[53] In other words, accepting one party's value claim makes it impossible, from a rational perspective, for another to accept a conflicting claim at the same time. These are not mere semantic disputes, but substantive conflicts over what is considered good, right, or important.[54] In the legal context, such disagreements often concern what the law requires, how it should be interpreted, or which sources of law are authoritative.[55] They are especially pronounced when epistemic peers – those with similar expertise and access to evidence – reach incompatible conclusions due to differing methodological or value commitments.[56] These disagreements can be particularly resistant to resolution, especially when rooted in fundamentally divergent views of justice, fairness, or the aims of the legal system. This is especially true in competition law, where 'competition' itself is a multi-faceted ideal and an essentially contested concept.[57]

From this perspective, indeterminacy is not a flaw but a functional feature of competition law, enabling its adaptation to evolving market realities and epistemic conditions that necessitate diverse value judgments. The core task for competition institutions is not to eliminate or disguise value disagreements – as the former would be impossible, and the latter second

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[52] Due to the technocratic turn disagreement became intramural but it was not eradicated. As Jacobs notes 'In the contemporary debate, by contrast, the normative questions do not announce themselves. Instead, they lie embedded in technical disagreements over the means most conducive to the agreed-upon goal of consumer welfare'. Jacobs (n 19) at 261.

[53] Manuel Knoll, 'Deep Disagreements on Values, Justice, and Moral Issues: Towards an Ethics of Disagreement' (2020) 24(3) *Trames* 315, 316–18.

[54] John Rawls, *Political Liberalism* (Columbia University Press 2005) xvi, 36–37; Isaiah Berlin, 'The Pursuit of the Ideal' in Henry Hardy and Roger Hausheer (eds), The Proper Study of Mankind: An Anthology of Essays (Vintage 1998) 1, 6–16.

[55] Herman Cappelen, 'Disagreement in Philosophy: An Optimistic Perspective' in David Christensen and Jennifer Lackey (eds), *The Epistemology of Disagreement: New Essays* (OUP 2013) 64.

[56] Rast (n 12) 397.

[57] Essentially contested concepts are inherently appraisive (value-laden); internally complex (comprising multiple interrelated parts); can be described in multiple, equally plausible ways (diverse discribability); their meaning evolves with changing circumstances; and cannot be fixed once and for all (openness); all parties recognise that their use of the concept is contested and that alternative uses exist (reciprocal recognition); they stem from an original model or exemplar that all parties acknowledge even though they disagree about its interpretation (original exemplar) and there are ongoing disputes and competition among interpretations that lead to refinement and development of the concept (progressive competition). Essentially contested concepts cannot be made fully determinate or free from dispute, but their contestation can be managed productively. Gallie suggests that users of such concepts should acknowledge the inherent contestability of and ground their debates in a shared original exemplar. While interpretations diverge, this exemplar ensures debates remain grounded in a common historical or conceptual starting point. In addition, Gallie stresses that users of the concept must recognise that their interpretation is contested and engage with alternative viewpoints respectfully. 'Progressive competition', a dynamic process where rival interpretations compete can lead to gradual refinements and deeper understanding. Gallie cautions against imposing false closure or rigid definitions, advocating instead for 'practical closure', temporary, context – specific agreements, while remaining open to ongoing debate and adaptation. In this way, contestation becomes a source of conceptual development rather than confusion or stagnation. WB Gallie, Essentially Contested Concepts, (1955) 56 *Proceedings of the Aristotelian Society* 167, 179, 189,191.

counterproductive – but to structure them through transparent deliberation, harnessing these debates to safeguard the law's integrity. Of course, one can imagine a competition law that is explicitly non-open textured—for instance, a regime in which the legislator has unequivocally defined what constitutes a restriction of competition on the basis of a clear and non-contestable standard or benchmark (such as output restriction). Yet such a monocentric conception of competition law would be ill-suited to capture the complexity of competitive interactions and to offer effective solutions to market problems, and would therefore risk a rapid loss of legitimacy.

As the following section argues, the relationship between indeterminacy and legal integrity reveals that eradicating indeterminacy is a misguided objective – one that misunderstands competition law's dynamic nature. What the competition law community needs is a more honest and open deliberative process[58] – one that explicitly acknowledges the inherent indeterminacy of competition law and the inescapable role of value judgments in its development. Rather than masking these judgments behind claims of value-free doctrinal analysis or technocratic neutrality, we must consciously engage with their normative foundations.[59] The following section explains this relationship between indeterminacy and law's integrity showing that aiming to eradicate indeterminacy is, in fact, a *false ideal*.

ii. The Indeterminacy Paradox

The persistence of reasonable disagreements underscores a paradox: competition law's strength – its adaptability[60] to changing factual, societal and epistemic circumstances – is also its core vulnerability. By remaining open to new knowledge, societal preferences and evolving value judgments, competition law maintains its relevance but risks becoming unclear, uncertain or unpredictable.[61] This tension fuels today's most pressing antitrust debates, from balancing competition and sustainability goals in private sustainability agreements,[62] to redefining collusion in an age of self-learning algorithms and confronting systemic power imbalances in digital ecosystems. The lack of doctrinal consensus further exacerbates the challenge of bridging the gap between analogue-era frameworks and the complexities of data-driven markets. Unless the antitrust community accepts indeterminacy as an ineluctable feature rather than a solvable flaw, concerns about clarity, predictability, and legitimacy will persist, challenging competition law's efficacy in governing 21st-century markets.

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[58] John Rawls, *Political Liberalism* (Columbia University Press 1993) 212; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996) 287.
[59] On how to do so see part V.
[60] By adaptability we refer here to the capability of competition law institutions to harness law's normative and epistemic openness to apply the legal provisions to novel case. See Makris (n 1) 1-7, 15-18.
[61] ibid, 6-24.
[62] Simon Holmes, 'Sustainability and competition policy in Europe: recent developments' (2024) 15(8) *JECL&P* 562; Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) 11(3–4) *JECL&P* 124; Luc Peeperkorn, 'Competition Policy is not a Stopgap!' (2021) 12(6) *JECL&P* 415; Giorgio Monti, 'Implementing a sustainability agenda in competition law and policy' in Julian Nowag (ed), *Research Handbook on Sustainability and Competition Law* (Edward Elgar Publishing 2024) 249-263.

The tension between adaptability and predictability raises fundamental questions about competition law's integrity. As already mentioned, integrity is understood here as a composited ideal combining rule-of-law values with substantive mission-realization (i.e. protecting 'effective competition'). While rigid, static rules may satisfy formal rule-of law requirements, they risk rendering competition law inert in the face of changing factual, societal or epistemic circumstances.[63] This issue is particularly acute when clarify and predictability are prioritised over adaptability. For instance, the *Woodpulp* rule for tacit collusion under Article 101 TFEU requires plaintiffs to prove 'concertation' through direct evidence of communication or to show that market parallelism cannot be explained in any other way than as tacit collusion.[64] This rule imposes stringent evidentiary thresholds that arguably render the law ineffective against algorithmic collusion.[65] When pricing algorithms autonomously align behaviour through machine learning, without explicit human coordination, the *Woodpulp* rule risks allowing anticompetitive parallelism to evade scrutiny entirely.[66] Even though the text of Article 101 TFEU itself imposes certain limitations on the reach of competition authorities in addressing algorithmic collusion – for instance, the challenge of self-learning, colluding algorithms appears intractable under the current framework of Article 101 – there remains scope for a more ambitious interpretation of this provision. In particular, if the *Woodpulp* doctrine were reconsidered and replaced by a more structured judicial approach to oligopolistic interdependence, Article 101 TFEU could be mobilised more effectively to confront the emerging risks of algorithm-driven coordination.

Similarly, rigid adherence to the 'as-efficient competitor' (AEC) test in Article 102 TFEU cases highlights the trade-offs between predictability and adaptability.[67] While the AEC test (which asks whether conduct would exclude a rival as-efficient as the dominant firm)[68] provides dominant firms with clarity to self-assess their pricing conduct (e.g., low pricing, rebates), it fails to address non-price abuses central to digital markets. For example, dominant platforms may leverage data asymmetries or control over critical infrastructure to foreclose rivals – tactics that harm competition without targeting 'equally efficient' players.[69] Such conduct risks distorting innovation or entrenching market power in ways invisible to traditional price-centric analysis. This narrow focus also risks underenforcement by dismissing the exclusion of less efficient rivals that could otherwise exert competitive pressure or evolve into future

[63] Makris (n 1) 6-23.
[64] Joined Cases 89, 104, 114, 116, 117 and 125–129/85 *A Ahlström Osakeyhtiö and others v Commission of the European Communities (Woodpulp)* [1988] ECR 5193.
[65] Ariel Ezrachi and Maurice E Stucke, 'Sustainable and Unchallenged Algorithmic Tacit Collusion' (2020) 17(2) *NJTIP* 217; Ariel Ezrachi and Maurice E Stucke, 'Artificial Intelligence & Collusion: When Computers Inhibit Competition' (2017) 5(2) *Antitrust Law Journal* 1; Michal S Gal, 'Limiting Algorithmic Coordination' (2023) 38 *Berkley Tech LJ* 173; Michal S Gal, 'Algorithms as Illegal Agreements' (2019) 34(1) *Berkeley Tech LJ* 67; OECD, Algorithmic-facilitated Coordination (Background Note DAF/COMP/WD(2017)26, 2017) https://one.oecd.org/document/DAF/COMP/WD(2017)26/en/pdf.
[66] Ariel Ezrachi and Maurice E Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (HUP 2016) 112-117.
[67] Pinar Akman, 'A Critical Inquiry into "Abuse" in EU Competition Law' (2024) 44(2) *OJLS* 405.
[68] Giorgio Monti, 'Rebates after the General Court's 2022 Intel Judgment' (2023) 60(1) *CMLR* 107.
[69] Friso Bostoen, *Abuse of Platform Power: Leveraging Conduct in Digital Markets under EU Competition Law and Beyond* (Concurrences, New York 2023).

challengers.[70] For instance, marginalising emerging firms with disruptive business models (even if temporarily less efficient) may reduce long-term consumer welfare by stifling market dynamism.[71] Thus, as things currently stand the proper implementation of the AEC test is unclear while the test as such risks overlooking dominant firm conduct that distorts innovation or entrenches market power in ways not captured by traditional exclusionary frameworks.

The challenges extend to market definition. EU competition law's traditional requirement to define dominance within a precisely delineated market risks overlooking ecosystemic concerns, particularly in multi-sided platforms where free services on one 'side' (e.g., user data aggregation) subsidize market power on another (e.g., targeted advertising).[72] The EU's 2023 Market Definition Notice, acknowledges these complexities by emphasising non-price factors (e.g., innovation, sustainability) and indirect network effects.[73] However, rigid adherence to formal market boundaries may still obscure dominance rooted in cross-market leverage or platform interdependencies and preclude authorities from examining whether certain conduct reduces effective competitive constraints.[74] For example, a social media giant's dominance in user attention (even monetised indirectly) could allow them to extend their data advantage to adjacent markets like digital advertising, evading scrutiny under conventional product-market frameworks.

These examples illustrate how rigid legal rules, while promoting clarity and predictability, can inadvertently create regulatory blind spots in the face of evolving market practices and technologies, ultimately undermining the integrity of the law. The challenges posed by algorithmic collusion and non-price-based abuses highlight the limitations of attempts to fully eliminate indeterminacy from competition law. This is not only because digital technologies complicate factual determinations, but also because they demand a fundamental recalibration of value judgments, tools and methodologies originally shaped for the analogue economy, requiring their adaptation to novel and rapidly evolving contexts.[75] It is precisely this element of indeterminacy that enables the law to remain responsive and adaptable to new circumstances. Ultimately, the persistence of indeterminacy in competition law should not be viewed as doctrinal failure, but rather as a reflection of the field's 'true nature' and as an opportunity to balance competing values to respond effectively to ongoing economic and technological developments and evolving value judgments.

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[70] Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, delivered 6 October 2015 ECLI:EU:C:2015:651.
[71] Linsey McCallum and others, 'A Dynamic and Workable Effects-Based Approach to Abuse of Dominance' (2023) Competition Policy Brief No 1/2023.
[72] Stefan Holzweber, 'Market Definition for Multi-Sided Platforms: A Legal Reappraisal' (2017) 40(4) *World Competition Law and Economics Review* 563.
[73] European Commission, 'Commission Notice on the definition of the relevant market for the purposes of Union competition law' [2024] OJ C164/1.
[74] Stavros Makris, 'The Effective Competitive Constraint Standard' (ProMarket, 12 April 2023) at https://www.promarket.org/2023/04/12/the-effective-competitive-constraint-standard/.
[75] Bernadette Zelger, Restrictions of EU Competition Law in the Digital Age: The Meaning of 'Effects' in a Digital Economy (Studies in European Economic Law and Regulation, vol 25, Springer Cham 2024) 1-5, 66-75, 110-120, 185-190. 210-213.

II. Confronting Indeterminacy: The Two Main Strategies

The preceding analysis showed that competition law operates by its very design at the nexus of competing values, institutional imperatives, and contested epistemic traditions. These factors render the law inherently indeterminate. Far from a defect – it is argued here – its indeterminacy reflects an adaptive capacity essential for governing complex environments in light of changing societal preferences and epistemic knowledge.[76] Yet the antitrust community has often misdiagnosed this indeterminacy as a flaw to be cured, rather than a constitutive trait to be harnessed. This part critiques the two predominant strategies deployed to address indeterminacy: (a) top-down axiomatic frameworks, and (b) bottom-up doctrinalism. Both approaches place excessive reliance on technocratic reasoning and economic expertise, often overestimating their capacity to resolve the field's inherent uncertainties and share a positivist view of competition law that overlooks its interpretive nature (see part III).

i. The top-down axiomatic approach

The top-down axiomatic approach, epitomised by Robert Bork's 1978 manifesto, posits that competition law's indeterminacy can be resolved by anchoring the field to a singular, universal goal. Bork famously argued: "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give… Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules."[77] This vision imagines a future where competition law's 'soul' is crystallized into a lodestar – be it consumer welfare, total welfare, or dynamic efficiency – allowing the legal community to focus on refining enforcement mechanics rather than debating first principles.[78]

This economic formalism[79] is epitomised by Frank Easterbrook's error-cost framework, which assumes the existence of an apolitical, predefined value (e.g., efficiency) and seeks to minimise enforcement mistakes. Easterbrook, a key proponent of the Chicago School, argued that the essence of competition law enforcement and adjudication should be the minimisation of false positives (over-enforcement) and false negatives (under-enforcement).[80] Easterbrook prioritised minimising false positives over false negatives arguing that market self-correction mitigates the latter. Yet, what sounds like a technocratic advice presupposes a consensus on competition law's goals, relies on certain assumptions on the functioning of markets and legal institutions, masks inevitable value conflicts (e.g., short-term price effects vs. long-term innovation), and institutionalises a bias towards inaction.[81]

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[76] We call this property of competition law 'responsiveness' in previous work. Makris (n 21) 238-242.
[77] Bork (n 7) 50.
[78] Lazar Radic and Nicolas Petit, 'The Superiority of the Consumer Welfare Standard' (2024) EUI Working Paper 2024/20.
[79] For more on this see section IV.i
[80] Easterbrook (n 12) 2-3, 15-17, 20-22.
[81] Easterbrook's thesis hinges on a critical ideological assumption: markets possess inherent self-correcting mechanisms to address anticompetitive outcomes (Type II errors), while judicial errors (Type I errors) produce enduring distortions. Herber Hovenkamp, 'Antitrust Error Costs' (2022) 24 *Univ Pa J Bus L* 293; Jonathan B

Advocating *normative singularity* – the imposition of a single, overarching objective (e.g., consumer welfare, efficiency) as the definitive criterion for determining legal validity treats indeterminacy as a technical problem through doctrinal and economic precision. Discovering and refining a single comprehensive goal could announce the 'end of antitrust history'.[82] What would remain for judges, enforcers, scholars, and practitioners at this stage would be only to refine their legal reasoning, employ superior economic analysis and use the optimal enforcement standards and procedures.[83]

However, this framework fundamentally misapprehends competition law's nature. No monolithic normative vision – whether rooted in welfare economics, freedom, fairness, or rivalry – can resolve competition law's inherent value pluralism.[84] Attempts to impose a monolithic goal (e.g., consumer welfare) fail because competition law is not a univocal project but a contested arena where incommensurable values clash.[85] The persistent failure of any one goal to conclusively settle debates about competition law's purpose (e.g., total vs. consumer welfare, short-term prices vs. long-term innovation) underscores the structural indeterminacy embedded in the field.[86] These are not mere technical disputes but existential conflicts over competition law's purpose: Is it a tool for market correction, a guardian of fair rivalry, an engine for economic dynamism or a guarantee for democratic economic governance?[87] As already noted, empirical evidence corroborates this theoretical claim. As demonstrated by Stylianou and Iacovides, competition authorities and courts have never adhered consistently to any singular objective.[88] The EC's shifting focus from 'market integration' to 'consumer welfare' to 'digital fairness' exemplifies this instability, reflecting broader societal tensions rather than technocratic evolution.

This pluralism persists because competition law mediates between irreducibly diverse interests: producers vs. consumers, incumbents vs. entrants, efficiency vs. equity. To treat it as a value-neutral technocratic exercise is to ignore its role as a battleground for value disagreements. The "failure" of any one goal to dominate is not a flaw but a feature of a polycentric legal regime.[89]

An example can illustrate this point. In *Google Shopping* the Court of Justice and the EC prioritized 'contestability' over short-term consumer price effects, while the FTC in a similar investigation emphasised consumer welfare and efficiency considerations, ultimately

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Baker, 'Taking The Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Right' (2015) 80(1) *Antitrust LJ* 1.

[82] Francis Fukuyama, The End of History and The Last Man (The Free Press 1992) supra note at 58, 60, 66, 138.

[83] Bork (n 7) 50.

[84] Makris (n 1) 5-18, 18-24.

[85] Allensworth (n 20) 1-3, 8-16, 17-24, 44-47, 55-67, 69.

[86] Ibid, 1-3, 8-16, 17-24, 44-47, 55-67, 69.

[87] Elias Deutscher and Stavros Makris, 'Sustainability concerns in EU merger control: from output-maximising to polycentric innovation competition' (2023) 11(3) *Journal of Antitrust Enforcement* 350; Ariel Ezrachi and Viktoria H S E Robertson, 'Can competition law save democracy? Reflections on democracy's tech-driven decline and how to stop it' (2024) *Journal of Antitrust Enforcement* 1.

[88] Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 42(4) *Legal Studies* 620; Marios C Iacovides and Konstantinos Stylianou, 'The New Goals of EU Competition Law: Sustainability, Labour Rights, and Privacy' (2024) 3 *European Law Open* 587.

[89] Lianos (n 18) 161-165, 165-169.

concluding that Google's algorithmic adjustments constituted 'competition on the merits' and posed no antitrust violation.[90] This transatlantic divergence illustrates how indeterminacy manifests: the EC framed harm through a long-term, structural lens, while the FTC focused on immediate consumer benefits. Similarly, debates over the appropriate legal treatment of private sustainability initiatives (e.g. cartel exemptions for environmental pacts) force authorities to weigh efficiency and consumer welfare considerations against broader climate goals – a balancing act no single metric can resolve.[91]

By clinging to the fiction of normative singularity, the top-down approach misdiagnoses the symptom (indeterminacy) as the disease, rather than recognising it as the natural state of a legal regime tasked with pursuing an essentially contested objective (i.e. the protection of 'effective competition'). As a result, the top-down axiomatic approach triggers a perpetual cycle of 'soul-searching' debates that are pursuing a *false ideal*: the eradication of indeterminacy through normative singularity. Nonetheless, such normative singularity is not sustainable as epistemic consensus, even when temporarily achieved, is inherently unstable and prone to collapse under evolving market realities or paradigm shifts. Competition, as an 'essentially contested concept', resists reduction to any singular normative value capable of resolving its inherent ambiguities. Moreover, even if normative singularity were achieved, it would render competition law excessively rigid, incapable of addressing hard cases or adapting to factual and epistemic transformations.[92]

Consequently, top-down axiomatic reasoning fails to properly cognize and address law's indeterminacy because it misdiagnoses indeterminacy as a problem of *technical ambiguity* rather than as a by-product of this field's inherent *value pluralism*. By seeking to transform competition law into a closed system governed by a single goal, this approach overlooks the field's essential function: to serve as a deliberative forum for mediating competing societal interests and as a dynamic arena where diverse interpretive strategies[93] – and conflicting visions of 'competition' – continuously intersect, contend, and evolve.

ii. Bottom-Up Doctrinalism

The alternative to top-down approaches is bottom-up doctrinalism, a strategy that rejects normative singularity in favor of incremental legal development and procedural harmonization. Proponents of this approach argue that competition law's indeterminacy can be mitigated through the organic evolution of legal principles from judicial and administrative practice.[94] By prioritising precedent, procedural consistency, and institutional alignment, it aims to foster

[90] Federal Trade Commission, Statement of the Commission Regarding Google's Search Practices (3 January 2013) https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf.
[91] Hellenic Competition Commission, 'Staff Discussion Paper: Competition Law & Sustainability' (2022) https://www.epant.gr/en/information/sustainability/competition-law-sustainability.html; Netherlands Authority for Consumers and Markets, 'Policy Rule for Sustainability Agreements' (2023) https://www.acm.nl/en/publications/technical-report-sustainability-and-competition.
[92] Makris (n 21) 238-242.
[93] For the meaning of this term see part V.
[94] Ibañez Colomo (n 4) 3-22.

coherence and predictability.[95] However, this framework ultimately fails to resolve the field's inherent value conflicts, perpetuating indeterminacy through ad hoc adjudication.

Bottom-up doctrinalism posits that procedural frameworks (e.g., fining guidelines, burden-shifting standards) and incremental case law development will gradually eradicate legal ambiguities. For instance, the European Competition Network's harmonized enforcement protocols aim to standardise merger reviews and abuse-of-dominance assessments across jurisdictions.[96] Yet, while procedural harmonisation enhances consistency, it prioritizes process over substance. It cannot resolve clashes between competing values-such as efficiency versus fairness in sustainability agreements or innovation versus short-term consumer welfare in digital markets.

Bottom-up doctrinalism also sidesteps the need for explicit value weighting. Foundational concepts like 'restriction of competition' or 'exclusionary effects' remain essentially contested, their application dependent on unresolved normative judgments about what constitutes 'effective' competition. For example, under Article 102 TFEU, courts oscillate between condemning conduct that harms specific rivals (e.g., margin squeeze in *TeliaSonera*) and practices that distort market-wide dynamics (e.g., self-preferencing in *Google Shopping*). Bottom-up doctrinalism acknowledges this spectrum of harm but offers no principled framework to navigate it, leaving enforcers adrift in hard cases.

Bottom-up doctrinalism's strength lies in its adaptability.[97] The CJ's evolution from formalistic presumptions (*Hoffmann-La Roche*) to effects-based analysis (*Intel*) exemplifies how incrementalism allows doctrine to respond to new market realities and incorporate economic knowledge. However, without a cohesive normative vision, this flexibility becomes a liability. Courts and agencies face irreconcilable dilemmas, e.g., balancing environmental goals against price effects when assessing private sustainability initiatives[98] or addressing algorithmic collusion under analogue-era precedents like *Woodpulp II*. Hence, bottom-up doctrinalism's 'avoidance tactic' is likely to lead to inconsistent outcomes.

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[95] Ibáñez Colomo uses 'frictions' to refer to tensions between older, more formalistic case law (e.g., *Hoffmann-La Roche*) and newer, more context-dependent approaches (e.g., *Intel*, *Servizio Elettrico Nazionale*); ongoing ambiguities and unresolved issues in how core concepts-such as 'competition on the merits', 'abuse' and 'anticompetitive effects' are interpreted and applied; the practical and conceptual difficulties that arise as the law evolves and as courts attempt to reconcile different strands of precedent. Pablo Ibáñez Colomo, 'Competition on the merits' (2024) 61 CMLR https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4670883 (forthcoming); Ibáñez Colomo, Anticompetitive Effects in EU Competition Law (n 9) 309, 312, 355-361.

[96] Yane Svetiev, 'Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?' (2009) *EUI Working Paper (LAW)* No 2009/08 https://cadmus.eui.eu/handle/1814/11067, 1-5, 6-12, 13-18.

[97] Foer and Durst (n 39) 507 (calling this approach 'the black box strategy' and highlighting that its main strength is that it does not require a clear-cut answer to the goals debate or theoretical justification of its results. They recognisze though that this approach alone cannot ensure predictability).

[98] Giorgio Monti and Jotte Mulder, 'Escaping the Clutches of EU Competition Law' (2017) 42(5) *European Law Review* 635.

For example, the interpretation of 'exclusionary effects' under Article 102 TFEU remains contested: does it encompass rival-specific harm or market-wide harm?[99] The case law, the EC's enforcement priorities, and academic commentary reveal divergent perspectives. Some cases condemn conduct that impedes competitors' ability to enter or expand[100] whereas others target conduct that undermines dynamic competition, ultimately harming consumers.[101] The proponents of bottom-up doctrinalism recognise that exclusionary effects under Article 102 TFEU are not purely rival-centric or consumer-centric but exist on a spectrum.[102] However, they do not provide any coherent interpretive framework to resolve this tension, leaving courts and enforcers without principled guidance to navigate the spectrum of competitive harm. The absence of a unifying normative vision leaves courts and agencies without guidance when confronted with irreconcilable values, perpetuating indeterminacy through ad hoc adjudication.[103]

When doctrinal analysis alone fails, bottom-up approaches advocate supplementing legal reasoning with 'mainstream' economic insights.[104] As previously discussed, bottom-up doctrinalism acknowledges that 'rules run out'[105] and doctrinal analysis alone might fail to achieve determinacy. When this occurs, the issue of judicial or administrative discretion arises.[106] Proponents of bottom-up doctrinalism argue that such discretion must operate within Rule of Law constraints and draw upon expert-consensus economic knowledge to ensure coherence and predictability.[107] However, by anchoring discretion in mainstream economic frameworks, bottom-up doctrinalism inadvertently perpetuates the same economic formalism (see section III.i) that underpins top-down axiomatic approaches-treating economics as a neutral, technocratic tool rather than a contested field of value-laden assumptions. For example, the As-Efficient Competitor (AEC) test, while standardising assessments of rebates, sidesteps whether Article 102 TFEU should protect less efficient rivals in markets shaped by network effects or data asymmetries. Proponents argue such gaps should be filled by mainstream economic consensus, but this presumes a false neutrality, ignoring economics' role as an ideological science requiring unavoidable value judgments.[108]

Consequently, bottom-up doctrinalism, with its emphasis on incremental case law development and procedural harmonisation, offers a pragmatic response to competition law's indeterminacy by prioritising coherence and institutional consistency. By allowing legal principles to emerge organically from judicial and administrative practice (as seen in the EU's evolving abuse of

[99] Ioannis Lianos, 'The Emergence of an Epithet in EU Competition Law: "Naked Restrictions" and Article 102 TFEU' (2025) Faculty of Laws University College London Law Research Paper No. 05/25 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5166436, 6, 24-28.
[100] Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* [2021] EU:T:2021:763; Case T-604/18 *Google and Alphabet v Commission (Google Android)* [2022] EU:T:2022:541.
[101] Case C-333/21 *European Superleague Company* [2023] EU:C:2023:1011.
[102] Ibañez Colomo (n 5) 10-11, 23-47, 152-177.
[103] Allensworth (n 21) 1-3, 8-16, 17-24, 44-47, 55-67, 69.
[104] Ibañez Colomo (n 5) 23-82, 273-327.
[105] Marmor, *Philosophy of Law* (n 31) 36-40, 42-44; Justin Lindeboom, 'Formalism in Competition Law' (2022) 18(4) *JCL&E* 832, 836-840.
[106] Hart (n 30) 124-136, 204-207.
[107] Ibáñez Colomo, 'Anticompetitive Effects in EU Competition Law' (n 8) 2-6.
[108] For more on this see section IV.i

dominance tests[109]) and by relying on the harmonization of enforcement via networks of enforcers and procedural rules, this approach fosters predictability and adaptability. However, by focusing on procedural and doctrinal development, bottom-up doctrinalism ultimately fails to resolve the substantive value conflicts at the heart of competition law. While bottom-up doctrinalism may mitigate surface-level ambiguity, it inadvertently entrenches deeper indeterminacy.

III. The Shared Foundations of Top-down Axiomatic Reasoning and Bottom-up Doctrinalism: Economic Formalism and Legal Positivism

While methodologically distinct, both the top-down axiomatic approach and bottom-up doctrinalism share two key features: (i) they draw on economic formalism by treating economics not as an *ideological science* but as a technocratic tool, and (ii) they rely on a positivist conception of law as a system of rules whose validity derives from identifiable social facts such as judicial precedents, empirical metrics or (value-free) economic axioms. These shared features fuel confidence in resolving competition law's indeterminacy through economic technocracy and traditional methods of legal interpretation.[110] However, as the analysis will reveal, treating economics as a neutral tool obscures its ideological assumptions, and legal validity in competition law cannot be reduced to social facts alone, as essentially contested concepts like 'abuse' or 'restriction of competition' inherently require value judgments and interpretive arguments to become more concrete. Therefore, their shared foundations (economic formalism and legal positivism) lead both top-down axiomatic reasoning and bottom-up doctrinalism to misconstrue the nature of indeterminacy. By framing it as a temporary gap to be closed through better doctrinal analysis, empirical knowledge or value free economic knowledge, both strategies neglect the value-laden aspect of indeterminacy.[111] Arguably, this is the reason why both approaches fail to provide a coherent path for reconciling the field's inherent tensions between adaptability and predictability.

i. Economic formalism and its limitations

Technocratic thinking and economic formalism underpin both top-down axiomatic reasoning and bottom-up doctrinalism in competition law. Both approaches frame the field as a scientific, apolitical discipline, relying on economic models and quantitative metrics to resolve legal indeterminacy. Top-down approaches eliminate value judgments by advocating for normative singularity, while bottom-up doctrinalism advocates for determinacy through doctrinal analysis and the integration of mainstream economics.

At the heart of both strategies lies economic formalism: the belief that economics, as a value-neutral science, can objectively operationalize competition law's goals and concretise its open-textured substantive provisions. For instance, top-down reasoning often supports a price-cost test for predatory pricing, requiring both below-cost pricing and a dangerous probability of

[109] *Google Shopping* (n 100) 176, 178, 184, 222, 224, 284.
[110] Makris (n 21) 253-257.
[111] Interpretivism is discussed in detail in part IV.

recoupment to demonstrate predation.[112] This is justified on the premise that such conduct reduces consumer welfare, which is treated as the sole, objective value in competition law and assumed to be measurable through empirical metrics.[113] Yet, this reasoning overlooks a crucial point: economics is not a monolithic or neutral discipline, but an 'ideological science' characterized by competing paradigms and schools of thought (e.g., Chicago vs. Post-Chicago), each advancing distinct normative visions.

As a result, any adopted test for predation inevitably involves value judgments. The Chicago School requires strict proof of below-cost pricing and a high likelihood of single-market recoupment, reflecting scepticism about the rationality of predation.[114] In contrast, Post-Chicago approaches expand liability to include strategic multi-market recoupment, reputation-based predation, and exclusionary conduct above cost if rivals' survival is threatened, acknowledging the realities of strategic behavior and market imperfections.[115] Thus, it would be misleading to claim that 'the advent of the Chicago School of Antitrust (…) *showed* that sanctioning below-cost price cuts without including an examination of likely recoupment would lead to consumer harm' (italics added) as this presupposes a uniform conception of consumer harm and ignores its contested nature-whether defined by short-term price effects, long-term market resilience, static efficiency, or dynamic innovation.[116]

Moreover, requiring proof of recoupment can generate both false positives (penalising procompetitive price cuts that benefit consumers in the long run) and false negatives (permitting predatory strategies that entrench dominance through non-price means), depending on the temporal or analytical frame of 'harm' that is prioritised.[117] The Chicagoan approach also tends to sideline non-quantifiable variables such as market fairness or innovation diversity, mistakenly assuming that only quantifiable factors can serve as objective economic benchmarks.[118] The Post-Chicagoan approaches, on the other hand, are more receptive to these considerations even though they remain anchored within the welfarist framework.

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[112] Case C-62/86 *AKZO Chemie BV v Commission* [1991] EU:C:1991:286; Case T-340/*03 France Télécom v Commission* [2007] EU:T:2007:22; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

[113] Robin Feldman, *The Role of Science in Law* (OUP 2009) 1-18.

[114] Richard A Posner, 'The Rule of Reason and the Economic Approach: Reflections on Sylvania Decision' (1977) 45(1) *UChiLRev* 1, 6; Bork (n 7) 144–146, 159; Frank H Easterbrook, 'Predatory Pricing and Counterstrategies' (1981) 48(2) *UChiLRev* 263.

[115] Steven C Salop and David Scheffman, 'Raising Rivals' Costs' (1983) 73 *Am Econ Rev* 267; Herbert Hovenkamp, 'Antitrust Policy and the Social Cost of Monopoly' (1993) 78 *Iowa L Rev* 371; US Department of Justice, Predatory Pricing: Strategic Theory and Legal Policy (1993) at https://www.justice.gov/archives/atr/predatory-pricing-strategic-theory-and-legal-policy.

[116] Petit (n 12) 4-6.

[117] Herbert Hovenkamp, 'Predatory Pricing under the Areeda-Turner Test' (2015) *University of Pennsylvania Law School, Faculty Scholarship Paper* 1825 (noting that the difficulty of proving both below-AVC pricing *and* the likelihood of recoupment has led to a decline in classical predatory pricing cases and a very low plaintiff success rate).

[118] Schrepel (n 10) 418-429 (arguing that antitrust analysis should exclusively rely on verified, quantifiable, amoral analytical tools and focus on "outcomes not opportunities" since "the great responsibility of our time is to avoid the temptation of expressionism and moralism". This framing 'moral' considerations as synonymous with subjective, sentimental, or populist impulses, and, thereby, conflates the broader, principled role of morality (as a source of values and normative reasoning) with the narrower, more pejorative notion of moralizing or moral

Non-welfarist approaches to predation reject the narrow focus on consumer welfare or total welfare, instead prioritising values such as fairness, market structure preservation, and competition as a process.[119] These approaches critique the Chicago School's cost-based recoupment test and Post-Chicago's strategic models for their over-reliance on economic efficiency, arguing instead that predation should be assessed through broader normative lenses.[120] For example, the European approach emphasises protecting rivalry rather than proving consumer harm. The Indian Competition Commission recognises predation via 'hyper-competition' tactics (e.g., deep discounts) that exploit network effects, prioritizing market plurality over short-term price benefits.[121]

Consequently, top-down axiomatic approaches, regardless of their chosen normative value, due to their normative singularity, entrench economic formalism and obscure the inherent value judgments embedded in economic analysis.[122] Bottom-up doctrinalism, by avoiding explicit engagement with normative debates and relying on doctrinal analysis supplemented by mainstream economics, similarly maintains a technocratic, economically formalistic posture. In the end it is doctrinal analysis and input from mainstream economics that is making the law determinate. Yet, legal doctrine, regardless of whether it incorporates economic principles or not, is not value-neutral, and there is no such thing as value-free mainstream economics.[123] As Schumpeter observed, economics is defined by competing paradigms and axiological orderings.[124]

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sentimentality. By insisting on the exclusion of non-quantifiable variables (such as fairness or innovation diversity) and prioritizing only measurable economic effects, Schrepel arguably overlooks the unavoidable role of value judgments in both scientific and legal reasoning).

[119] Thomas Horton, 'Fairness and Antitrust Reconsidered: An Evolutionary Perspective' (2013) 44(4) *McGeorge L Rev* 823 ('From an evolutionary perspective, basic notions of fairness are critical to the efficient functioning of competitive markets. It is therefore time to begin reincorporating evolutionary norms of fairness into antitrust analyses'); Anna Gerbrandy, 'Rethinking Competition Law within the European Economic Constitution' (2019) 57 *JCMS* 127, 129 (approaching fairness as a process, i.e., from the perspective of outcomes and the aim of market outcomes to be 'acceptable to society'); Niamh Dunne, 'Fairness and the Challenge of Making Markets Work Better' (2020) 84 *MLR* 230.

[120] Khan (n 46) ("Rather than pegging competition to a narrow set of outcomes, this approach would examine the competitive process itself... assessing structure is vital to protect important antitrust values.") Tim Wu, 'After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice' (2018) *Columbia Public Law Research Paper* No 14-608 ("We should return to asking, in most antitrust cases, the following question: Given a suspect conduct (or merger): Is this merely part of the competitive process, or is it meant to 'suppress or even destroy competition?'... There is a fundamental and important difference between a law that seeks to maximize some value, and one that is designed to protect a process.").

[121] *Delhi Vyapar Mahasangh v Flipkart Internet Pvt Ltd and Amazon Seller Services Pvt Ltd* (Competition Commission of India, 13 January 2020) Case No 40 of 2019 (where the CCI investigated Flipkart and Amazon for offering deep discounts linked to exclusive agreements with sellers during sales events. The concern was that such discounts tied to exclusivity could harm the structure of the market structure despite their short-term consumer benefits).

[122] Even within welfare economics, debates persist over whether to prioritize consumer surplus, total surplus, or alternative metrics like innovation dynamism.

[123] Economics properly understood are an ideological science – see Makris (21) 251-252.

[124] Joseph Schumpeter, *History of Economic Analysis* (Routledge 1987) 5-9 (noting that "a science is any field of knowledge that has developed specialized techniques of fact-finding and of interpretation or inference (analysis)"), 31-45.

Economic formalism thus rests on a naïve view of science as the domain of value-free knowledge.[125] Robin Feldman, in *The Role of Science in Law*, incisively critiques this fallacy, demonstrating that law's persistent deference to science often stems from the misguided hope that scientific methods can resolve deeply normative legal dilemmas.[126] Feldman argues that legal problems are inherently value-laden and that science, far from providing neutral answers, is frequently invoked to avoid confronting the normative judgments at the heart of legal decision-making.[127] This reliance on the supposed neutrality of economics thus obscures the contested and ideological foundations of both economic theory and legal reasoning.

Feldman's analysis is particularly relevant when discussing competition law's inherent indeterminacy as it exposes the misplaced faith that both top-down axiomatic reasoning and bottom-up doctrinalism place in economics as a value-neutral science. By prioritizing 'objective', 'scientific', and 'value-neutral' criteria these approaches attempt to sideline the problem of value disagreements in competition law seeking to reduce competition law to a closed system of empirically verifiable rules without engaging with its normative foundations. Economic formalism, however, conceals the normative judgments embedded in concepts such as 'consumer welfare' or 'restriction of competition', offering a technocratic illusion as a solution to competition law's polycentric tensions.[128] By treating economics as apolitical, economic formalism masks the methodological choices and normative assumptions that shape legal analysis. In divorcing economic tools from their ideological roots, it entrenches a technocratic elitism that overlooks the pluralistic and contested nature of competition law.[129]

This approach seeks to neutralise ideological debate and minimise judicial discretion, presuming that indeterminacy arises from technical gaps rather than from deep-seated value conflicts. As a result, economic formalism is proposed as a universal solution. Yet this stance is fundamentally flawed. By treating economics as an apolitical arbiter, it hides normative choices behind a veneer of neutrality. Welfare metrics, for example, reflect unacknowledged ideological preferences, and static models often overlook dynamic factors such as innovation

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[125] Ibid, 39 (noting that "analytic effort is of necessity preceded by a preanalytic cognitive act that supplies the raw material for the analytic effort. In this book, this preanalytic cognitive act will be called Vision. It is interesting to note that vision of this kind not only must precede historically the emergence of analytic effort in any field but also may re-enter the history of every established science each time somebody teaches us to see things in a light of which the source is not to be found in the facts, methods, and results of the preexisting state of the science."), 40 (noting that "Factual work and 'theoretical' work, in an endless relation of give and take, naturally testing one another and setting new tasks for each other, will eventually produce scientific models, the provisional joint products of their interaction with the surviving elements of the original vision, to which increasingly more rigorous standards of consistency and adequacy will be applied. This is indeed a primitive but not, I think, misleading statement of the process by which we grind out what we call scientific propositions. Now it should be perfectly clear that there is a wide gate for ideology to enter into this process. In fact, it enters on the very ground floor, into the preanalytic
cognitive act of which we have been speaking.").
[126] Feldman (n 113) 1-18, 37-48.
[127] Ibid, 1-18, 37-48.
[128] Lianos (n 19) 161, 165-169.
[129] A point made here is that top-down approach due to their normative singularity would necessarily be economically formalistic.

and ecosystems' dynamics. Thus, technocratic thinking and economic formalism perpetuate the myth of epistemic neutrality.

Moreover, economic formalism's procedural reliance on complex economic evidence risks paralysing enforcement through endless counterfactuals, as seen in digital market cases.[130] Economic formalism also risks turning the law into a closed circuit, where legal validity is tied to a particular epistemic paradigm that may eventually become obsolete, leading to epistemological circularity.[131] It can also result in contextual blindness and 'blackboard economics', [132] which is especially problematic when geopolitical or market dynamics shape legal choices.[133] Ultimately, economic formalism fails to reconcile competition law's polycentric objectives and value pluralism (e.g. growth, consumer welfare rivalry, fairness, innovation),[134] treating indeterminacy as a technical gap rather than as an inevitable feature of competition law's inherently value-laden adjudication. By dismissing the constitutive role of value judgments in legal outcomes, economic formalism offers procedural fixes that obscure, rather than resolve, the underlying tensions between competing visions of how effective competition should be understood.

Consequently, both bottom-up doctrinalism and top-down axiomatic reasoning by relying on economic formalism conflate methodological rigour with normative neutrality, leaving competition law's value conflicts unresolved.

ii. The positivist view of competition law and its limitations

The second shared foundation of top-down aximomatic reasoning and bottom-up doctrinalism is the positivist view of law. Legal positivism, as championed by figures such as Hobbes, Bentham, Austin, Kelsen, and Hart, asserts that the validity of a legal norm depends solely on its sources-never on its merits.[135] This so-called 'social thesis' holds that 'the conditions of legal validity are purely a matter of social facts' not the by-product of moral reasoning,[136] and that there is no necessary connection between law and morality (the 'separability thesis').[137]

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[130] Justin Lindeboom, 'How Much Economic Analysis in Competition Law and Policy Do We Really Want?' (2023) *Concurrences* No 4-2023, Art No 115114, University of Groningen Faculty of Law Research Paper No 3/2024 https://ssrn.com/abstract=4768186.
[131] Roger van den Bergh, 'The More Economic Approach in European Competition Law: Is More Too Much or Not Enough?' in Mitja Kovač and Ann-Sophie Vandenberghe (eds), Economic Evidence in EU Competition Law (CUP 2020) 13; Andriychuk (n 10) 599-603, 606-609, 612.
[132] Ronald H Coase, *The Firm, the Market, and the Law* (University of Chicago Press 1988) 19.
[133] Andriychuk (n 11) 599-603, 606-609, 612.
[134] Stavros Makris, 'Applying Normative Theories in EU Competition Law: Exploring Article 102 TFEU' (2015) 3(1) *UCL Journal of Law and Jurisprudence* 1.
[135] Gardner (n 13) 199, 202 (stating that the gist of legal positivism is the thesis that in 'any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits').
[136] Joseph Raz, *The Authority of Law* (OUP 1979) 37-52.
[137] John Austin, *The Province of Jurisprudence Defined* (first published 1832, CUP 1995) 157; Hans Kelsen, *The General Theory of Law and State* (first published New York: Russel and Russel 1961) 113; Hart (n 30) 110, 302; Julius Coleman, 'Negative and Positive Positivism' (1982) 11 *J Leg Stud* 139.

Herbert Hart refined this tradition by introducing the concept of the rule of recognition: a social practice through which courts, officials, and private persons identify valid legal norms by reference to certain criteria.[138] The rule of recognition is both an external social fact (a practice observable within a community) and an internal normative attitude (acceptance of certain criteria as authoritative).[139] For Hart, law is a union of primary and secondary rules,[140] and a social institution aimed at offering authoritative guidance.[141] According to him to properly grasp the existence of law we need to combine the external and the internal point of view.[142] Hence, the rule of recognition provides the authoritative criteria[143] for identifying primary legal rules of obligation[144] and, unlike the other rules of the system that establish rights or impose obligations and are derivative, its existence is a *social fact* accompanied by a specific normative attitude. This normative attitude consists in a social practice of acceptance, within a given community, of the rule of recognition as authoritative.[145]

Hart's account, while more nuanced than Austin's command theory,[146] still treats legal validity as ultimately rooted in social facts. Austin's theory is too crude to capture law's normativity, whereas Hart's theory offers a more compelling way to understand what law is: it maintains the traditional positivist position that law is a social fact, while introducing certain conceptual devices (e.g. the rule of recognition and the internal point of view) that could account for the normative dimension of law. Furthermore, Hart's rule of recognition is a more robust explanation of law's existence compared to Kelsen's Grundnorm since the latter is essentially

[138] Hart sought to hit two birds with one stone: (a) to articulate a sophisticated version of legal positivism uninhibited from the shortcomings of older theories – such as the command theory of Bentham and Austin or the pure theory of law of Kelsen – and (b) to defend legal positivism vis-à-vis its main opponent, the natural law tradition, by showing how legal validity can have a normative dimension and still remain a social fact independent from moral authority. Hart (n 28) 250.

[139] Hart (n 28) 110, 256. A statement that a rule of recognition exists is both (a) an external statement of fact that a certain practice exists within a community according to which a rule (or certain rules) are used for identifying a legal proposition as valid, and (b) an internal statement made by the participants of the system who accept that certain facts could be used to identify the legal norms, and use the rule of recognition to identify which norms are legally valid and accept these norms as authoritative reasons for action.

[140] ibid, 79-99 ('wherever the word 'law' is 'properly' used, this combination of primary and secondary rules is to be found'). Primary rules establish rights or impose obligations, whereas secondary rules confer public or private powers for creating, modifying or annulling duties or obligations. The rule of recognition is a secondary rule.

[141] ibid 126, 130 and 249 (noting that it is 'quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct').

[142] The internal point of view is the perspective of participants in the system that use the norms as sources of authority and reasons for action. The external point of view is the perspective of outsiders that discern patterns of behaviour. ibid 89-91, 242-243, 254.

[143] The rule of recognition which provides the criteria by which the validity of other rules of the system is assessed is an ultimate and supreme rule. Hart (n 28)105.

[144] ibid 101 (noting that 'the criteria so provided may, as we have seen, take any one or more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases').

[145] ibid 102 (noting also that 'This attitude of shared acceptance of rules is to be contrasted with that of an observer who records ab extra the fact that a social group accepts such rules but does not himself accept them')

[146] According to Austin (a) law is simply a set of orders of the sovereign that could be implement by force[146] and (b) in the simple notion of 'orders backed by threat' lies the 'key to the science of jurisprudence'. Austin defines the sovereign as the one that is habitually obeyed without habitually obeying anyone. Ibid 20-25, 81.

a hypothetical, a logical precondition for a legal system to exist.[147] Hart's practice theory of law treats legal norms as constituted by a form of social practice that includes not only patterns of conduct regularly followed by most members of the group but also a distinctive normative attitude to such patterns of conduct (i.e. acceptance) and in this way it demystifies the existence of law.[148] The existence of law remains a social fact since a rule of recognition is itself a social fact.

Simultaneously, the rule of recognition as a master rule does not require resorting to any kind of moral authority to understand legal validity while simultaneously it allows for moral principles (or other extra-legal knowledge) to play a role in determining legal validity as long as they are recognised by certain criteria *incorporated* in the rule of recognition.[149] In that way, the positivist view of the law explains how nonlegal knowledge has a bearing in determining the legal validity of certain propositions about the law: certain provisions give a mandate to the decision-maker to use that particular knowledge. For example, the term 'dominance' in Article 102 TFEU gives an authorisation to courts and enforcers to use non-legal, economic knowledge to pin down which undertaking is dominant when there is no precedent.[150] Understanding therefore dominance as substantial market power and using economic methodology (e.g. market definition, identification of existing and potential competitors, assessment of countervailing buyer power) to determine whether a particular undertaking is dominant, a positivist would argue, remains a social fact as long as the use of economics is authorised by a legal provision (e.g. Article 102 TFEU) the existence of which is itself a social fact.[151] Hence, when judges use economics to determine the content of the law they still operate within the confines of the positivist paradigm – a positivist would argue – as long as their use of such knowledge can be tied back to source-based law. Legal validity remains a social fact.[152]

This approach underpins both top-down and bottom-up strategies in competition law, which frame legal validity as deriving from identifiable sources: statutes, precedents, or empirical metrics. When legal rules are indeterminate, positivism maintains that the most advanced scientific or extra-legal knowledge should be invoked to resolve ambiguity and render the law determinate. However, this positivist framework faces significant limitations in the context of competition law. By framing law as a system of rules validated solely through social facts, positivism overlooks the interpretive openness of key legal concepts such as 'restriction of competition' and 'abuse.' In practice, these essentially contested concepts require value

[147] Kelsen (n 137) 110-111. Hart disagreed with Kelsen's Pure Theory of Law as he found his notion of Grundnorm a 'needless duplication' of the 'living reality' of the courts and officials actually identifying the law in accordance with the constitution's rules.
[148] Hart (n 30) 254-259.
[149] Hart (n 30) 250.
[150] Case 27/76 *United Brands Company and United Brands Continental BV v Commission of the European Communities* [1978] ECL 207.
[151] As will become evident in part IV we profoundly disagree with such an account of what the courts do when interpreting 'dominance'. The argument made here is that when courts determine what 'dominance' means they choose a particular interpretive theory over another (e.g. dominance as substantial market power instead of commercial or bargaining power; dominance as a substantive vis-à-vis jurisdictional concept). See Giorgio Monti, 'The Concept of Dominance in Article 82' (2006) 2(1) *European Competition Journal* 31.
[152] Joseph Raz, *Ethics in the Public Domain: Essays in Morality of Law and Politics* (OUP 1994) 210.

judgments to become operational and cannot be reduced to empirical or value-free criteria alone.

Hart's practice theory of law, though, offers a useful lens for understanding how EU institutions reconcile legal texts with evolving economic theories. For instance, the CJ's shift from the formalistic presumptions of *Hoffmann La Roche* to the effects-based approach of *Post Danmark I* and *Intel* reflects a changing acceptance of economic methodologies, while the EC's reliance on error-cost frameworks and consumer welfare metrics demonstrates a technocratic approach to validating legal standards. Yet, while Hart's framework explains the formal structure of legal systems, it ultimately falls short in guiding legal practice, particularly in the interpretation and application of competition law, because it cannot resolve the tension between social facts and normative reasoning.

According to the positivist view, legal validity stems from identifiable social facts, such as legislative enactments or judicial precedents and is grounded in the acceptance of these sources by institutional actors. In competition law, this raises the question: what is the rule of recognition, and does it provide a stable foundation for legal validity? A positivist would argue that competition law does have a rule of recognition since the validity of its norms derives from sources recognised by institutional actors (courts, legislators, authorities). Here it is useful to distinguish between exclusive and inclusive positivism. Exclusive positivists maintain that legal validity is determined solely by social facts (legal texts and established practices) and that when these run out, judges must turn to the best available extra-legal knowledge, such as economic expertise.[153] Inclusive positivists, by contrast, argue that moral or economic considerations can be part of the rule of recognition.[154]

An exclusive positivist would argue that competition law's rule of recognition is exclusively a social fact (e.g. the legal materials) and maintain that when this material cannot make the law fully determinate the judges have to use the best available extra-legal knowledge. An inclusive positivist would argue that competition law's rule of recognition is a hybrid construct blending formal legal sources (e.g. Articles 101, 102 TFEU, Regulation 1/2003), interpretive practices (e.g. CJ judgments), and institutional practices (e.g. Commission Notice on Market Definition, Guidance Paper, Guidelines).[155] An inclusive legal positivist would even include economics as quasi-sources.

For instance, an exclusive positivist would argue that the As-Efficient Competitor (AEC) test, though absent in the TFEU, gained validity through judicial adoption in cases such as *Telia Sonera*, *Post Danmark I* and *Intel* because it is the best (sic) available source for exercising judicial discretion. However, an inclusive legal positivist would argue that the AEC test

[153] Andrei Marmor, 'Exclusive Legal Positivism' in Jules L Coleman and Scott Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 104; Joseph Raz, *Legal Principles and the Limits of Law,* (197) 81(5) *Yale LJ* 823, 847-8; Gardner (n 13) 199.
[154] Hart endorsed this approach in his Postscript. See also Kenneth Einar Himma, 'Inclusive Legal Positivism' in Jules L Coleman and Scott Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 125.
[155] ibid 125.

derives from a moral principle (e.g. the as-efficient competitor principle) which is itself as a moral fact part of the rule of recognition.

However, both exclusive and inclusive positivist accounts encounter serious limitations. Exclusive positivism faces the problem of infinite regression: the authority of any rule of recognition ultimately depends on an interpretive choice that itself requires justification.[156] The AEC test becomes part of the legal doctrine due to an interpretive choice, yet its normative force derives from the very legal framework it helps constitute.[157] Inclusive positivism, on the other hand, makes broad concessions to interpretivism by allowing legal validity to be partly determined by moral or normative (nonfactual) considerations.[158]

While proponents cite the AEC test's 'conceptual elegance'[159] and critics attribute its rise to strategic lobbying,[160] neither explanation fully resolves why a Chicago School-derived standard[161] – emphasizing exclusion of equally efficient rivals – gained prominence in EU jurisprudence, which traditionally prioritised broader notions of 'effective competition'. The AEC test's adoption reflects its role within a compelling interpretive theory that reconstructs Article 102 TFEU's purpose in light of its effects. By shifting focus from preserving market structure to protecting rivalry among 'as-efficient' competitors, the Court tacitly redefined competition law's objectives, balancing doctrinal 'fit' (coherence with previous cases such as *Post Danmark I and II*, *AKZO*) with 'justification' (e.g. avoid protectionism, protect efficiency benefit consumers).[162] This evolution underscores how legal validity transcends positivist social facts, relying instead on value-laden theories that reconcile competing policy goals.

Moreover, positivism assumes a stable, shared understanding of the criteria of legal validity. In reality, though, competition law's rule of recognition is inherently contested due to the field's inherent value pluralism and reliance on essentially contested concepts such as 'effective competition', 'restriction of competition', and 'abuse'. For instance, is a merger that reduces efficiency incompatible with the internal market, or should the focus be on whether it undermines rivalry, media pluralism, or sustainability?[163] Positivism cannot resolve such

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[156] Scott J Shapiro, *Legality* (Belknap Press 2011); Scott Hershovitz, 'The Model of Plans and the Prospects for Positivism' (2014) 125 *Ethics* 152.

[157] Arguably, only few lawyers and judges that consider them positivists would accept that judges should simply decide cases on their merits when law runs out, that they are not always obliged to apply legal rules or that that they can use sources that go beyond legal texts. In this regard, it seems implausible to argue that non leal theorists positivists would accept that judges should not only and always apply valid legal norms. Gardner (n 13) 211-218, 214 (maintaining that 'legal positivism militates against the assumption that judges should only and always apply valid legal norms').

[158] Coleman (n 137) 139.

[159] Akman (n 67) 418-428; Pinar Akman, 'Searching for the Long-Lost Soul of Article 82 EC', (2009) 29(2) *OJLS* 267.

[160] Cristina Caffarra, 'Speaking notes Athens Keynote' (The "Post-Bubble" Blog, 18 October 2024) https://cristinacaffarra.blog/2024/10/18/speaking-notes-athens-keynote/.

[161] Posner (n 6) 194-196, 253-254.

[162] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* (Post Denmark I) [2012] EU:C:2012:172; Case C-23/14 *Post Danmark A/S v Konkurrencerådet* (Post Denmark II) [2015] EU:C:2015:651; *AKZO* (n 112).

[163] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1 (EUMR).

questions; it can only describe which rules have been recognised after the fact. Furthermore, when economics serves as a quasi-source of legal validity, it is not a neutral social fact but a value-laden construct. This introduces epistemic circularity: the legal validity of the AEC test depends on its alignment with judicial practice, yet its adoption simultaneously redefines what counts as valid law and which empirical facts are legally relevant.[164]

Hence, positivism has two options. First, it can remain linked to economic formalism (see previous section) and maintain its social and separability thesis. Yet, as already noted this exclusive positivist approach fails to grasp that legal validity in competition law is partly determined by substantive economic principles (which are not themselves social facts but the by-product of a value-laden choice). The second option is to accept that on certain occasions the criteria of legal validity are normative or moral facts (not social facts) *and* acknowledge that economics provide normative moral facts to determine legal validity.[165] In that case though (inclusive) legal positivism would have been transformed into interpretivism (see next section).

Institutional fragmentation further complicates the picture. Different actors – the EC, National Competition Authorities, the General Court, and the CJEU – often apply competing criteria for legal validity. For example, on certain occasions the EC has prioritized consumer welfare,[166] whereas the CJ has emphasized the competitive process over consumer harm.[167] As will be shown in section IV, this is the case because legal validity is an *interpretive* and not a social fact continually negotiated through interpretive argumentative practices. Furthermore, as we have argued elsewhere, EU competition law is a responsive system where

[164] Scott J Shapiro, *Legality* (HUP 2013) 95-96. Shapiro exposes positivism's deeper infinite regression dilemma: If the rule of recognition itself depends on a social practice, another meta-rule is needed to validate that practice, ad infinitum (the so-called infinite regression problem). This entails that Hart's theory cannot be an entirely descriptive theory of law (contrary to what Hart aspired to) because a reference to a normative authority is required to claim that a legal norm exists (or that a certain rule operates as rule of recognition). The alternative option would be to interpret the acceptance component of the rule of recognition as a crude social (non-normative) fact, as collective acceptance. This would entail that the existence of law remains a social fact that can be described in positivistic terms. Nonetheless, this plain-fact view, which is dismissed by Hart, would transform his theory into only an incremental improvement of Austin's command theory as it would simply replace the sovereign as a social fact with another social fact (i.e. an observable social practice of acceptance), leaving unexplainable the normativity of law. Thus, the rule of recognition oscillates between descriptivism's empirical limits and the unresolved demand form normative justification, leaving competition law's validity contested between social facts and moral principles. Hart (n 30) 239 ('My aim in this book was to provide a theory of what law is which is both general and descriptive'), 240 ('My account is descriptive in that it is morally neutral and has no justificatory aims').

[165] Note that an inclusive positivist would accept that there could be non-social sources of law and therefore that economics can serve as quasi-sources of legal validity. In that case though the inclusive positivist would have to accept that such non-social facts are value-laden constructs. This would transform the positivist into an interpretivist.

[166] 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) (2009/C 45/02), Official Journal C 45/7, 24.2.2009, para 19.

[167] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc v Commission of the European Communities* [2009] ECR I-09305.

the criteria of legal validity evolve through interpretive struggles between openness (adaptability) and integrity (principled consistency).[168]

In sum, while Hart's framework helps explain the formal structure of competition law, it cannot account for the field's responsiveness to value conflicts and evolving market complexities. If a rule of recognition exists in competition law, it is not a fixed social fact but an interpretive construct shaped and reshaped by ongoing argumentative practices. Legal validity in competition law emerges from the interplay of legal texts, economic paradigms, institutional acceptance, and value-laden deliberation-not from predetermined or purely factual criteria. This interpretive openness is not a flaw, but a necessary feature of a legal system tasked with mediating competing societal interests in a dynamic and pluralistic market environment.

iii. Revisiting Competition Law's Indeterminacy

The inherent limitations of both top-down axiomatic reasoning and bottom-up doctrinalism due to their shared reliance on economic formalism and legal positivism-frameworks fail to address competition law's indeterminacy in dynamic digital markets. An example can illustrate this point.

As mentioned above the AEC test has been increasingly playing a prominent role in Article 102 TFEU. Originally designed for traditional single-market predation, the AEC test assumes that competitors operate on comparable cost structures, and that market power is a function of static efficiency advantages. However, these assumptions do not hold in digital ecosystems, which are defined by network effects, data asymmetries, and ecosystem lock-ins.[169] In such contexts, cost-based comparisons become inadequate. For instance, a dominant platform (e.g., Amazon or Google) might leverage cross-subsidization from adjacent markets to offer below-cost pricing in one segment, and manage to exclude rivals without ever pricing below its own costs – a scenario the AEC test fails to capture.[170] Similarly, practices like self-preferencing or algorithmic bundling may foreclose rivals without implicating cost benchmarks, as seen in *Google Shopping*, where harm stemmed from distortion of user choice rather than price predation.[171]

Therefore, one might also wonder whether the AEC test should be the key legal test under Article 102 TFEU. Rigid adherence to the AEC test risks false negatives, allowing exclusionary conduct that undermines long-term market contestability and resilience, while stifling innovation from not-yet-as-efficient rivals. Conversely, expanding the test to accommodate digital dynamics (e.g., incorporating data-driven barriers) risks introducing arbitrariness, inviting accusations of judicial overreach. The top-down axiomatic approach, with its

[168] Makris (n 1) 3-5; Makris (n 21) 230-232.
[169] Ioannis Lianos and Bruno Carballa Smichowski, 'A Coat of Many Colours—New Concepts and Metrics of Economic Power in Competition Law and Economics' (2022) 18(4) *JCL&E* 795; Marco Iansiti and Karim R Lakhani, *Competing in the Age of AI: Strategy and Leadership When Algorithms and Networks Run the World* (Harvard Business Review Press 2020) 1-24.
[170] Khan (n 46) 717-721, 722-723.
[171] *Google Shopping* (n 100) paras 150-197, 377-379, 438-443, 435–445, 519–533.

normative singularity, as it fails to guide courts in resolving fundamental questions such as: Is only rivalry between equally efficient undertakings worthy of legal protection or there are occasions where the law should step in and protect less efficient rivals? Would our answer to this question change if the main competition-relevant concern was to ensure market contestability and resilience instead of consumer welfare? How relevant is (or should be) the AEC test in analysing competitive dynamics within digital ecosystems? Even an expansive definition of consumer welfare that includes output, quality, and innovation cannot eliminate the need for normative decisions since such a thick concept of consumer welfare would create an additional need for prioritizing and balancing its different dimensions.

Bottom-up doctrinalism fares no better. While it can retrospectively rationalize legal developments, such as the gradual integration of the AEC test into abuse-of-dominance jurisprudence, it cannot resolve ongoing disputes over the test's application. Key questions remain unanswered: Should failing the AEC test alone suffice to establish abuse? Should passing it invariably preclude liability? Moreover, the AEC test is ill-equipped to address probabilistic competitive harm, where multiple acts, any one of which might or might not harm competition, and synergistic competitive harm, where individually lawful acts combine to produce anticompetitive effects.[172] These unresolved issues expose the inability of doctrinalism to reconcile the law's pluralistic objectives with the demands of dynamic, real-world enforcement.

In sum, the shared reliance on economic formalism and legal positivism by both top-down and bottom-up approaches ultimately fails to resolve the indeterminacy at the heart of competition law. By treating value-laden and context-dependent questions as if they could be settled by technical expertise or doctrinal analysis alone, these frameworks obscure the persistent normative choices that shape enforcement and interpretation. The legal validity of propositions about the law in competition law cannot be determined solely by reliance on precedent, value-free economic knowledge or; concepts like 'restriction of competition', 'restraints of trade', 'monopolization' or 'abuse' require judges and enforcers to weigh competing values (e.g., protecting rivalry versus incentivizing efficiency, or fostering innovation versus maximising consumer welfare) and to make normative choices even internalising expert non-legal, scientific knowledge.[173] This interpretive process is inherently shaped by normative reasoning rather than positivist fact-finding. True responsiveness to the complexities of modern markets requires embracing the interpretive openness and value pluralism that are intrinsic to competition law, rather than seeking to eliminate them through technocratic or positivist means.[174]

[172] Robin C Feldman and Mark A Lemley, 'Atomistic Antitrust' (2022) 63(6) *WMLR* 1869.
[173] Makris (n 1) 23-31.
[174] Makris (n 21) 252-262.

IV. Competition Law as an Interpretive Argumentative Practice

i. The Theory: Beyond Positivism and Economic Formalism

The preceding analysis has exposed the limitations of framing competition law through positivist or economically technocratic lenses. Both economic formalism and legal positivism, as discussed, treat competition law as a closed system whose validity derives from social facts presuming indeterminacy can be eliminated through technical expertise or doctrinal coherence. However, this view fundamentally misdiagnoses indeterminacy as temporary gap rather than an endogenous feature arising from the tension between competition law's normative and epistemic openness and the need to secure integrity.

By contrast, this section advances a theory of competition law as an interpretive argumentative practice: a dynamic enterprise where legal validity emerges not from static social facts or value-neutral (and therefore noninterpretive) economic axioms but from deliberative engagement with competing values, purposes, and principles. This 'Argumentative Practice Model' draws on interpretivism as developed by Ronald Dworkin and Nicos Stavropoulos, to propose a non-positivist understanding of competition law that rejects the technocratic illusion of economic formalism, positioning competition law as a pluralistic discipline that balances empirical insights with normative reasoning.[175]

Interpretivism posits that the law is not merely a system of rules grounded in social facts (e.g., precedents, legislation) but a moral and interpretive practice shaped by principles that justify institutional practices.[176] Unlike legal positivism, which ties validity solely to social facts, interpretivism contends that legal content is inherently shaped by moral reasoning, even when such principles are not formally codified. Therefore, interpretivism acknowledges that legal concepts like 'abuse' or 'restriction of competition' are essentially contested, requiring judges to engage with moral principles and normative reasoning that transcend empirical sources. Moral principles and normative facts (not only social facts) determine legal validity. Value laden reasoning *constitutes* the law; it does not simply fill gaps when 'rules run out'.

Consequently, according to interpretivism the criteria of legal validity are not exhausted by the conventional sources of law because the law is composed of the source-based law *and* the best moral justification of it.[177] Moral principles contribute to the identification of the law, by the sole reason that they are sound moral principles without being identified as such by a rule of recognition.[178] Dworkin noted that legal professionals often engage in 'theoretical disagreements about the law': conflicts not merely over whether specific legal grounds exist (e.g., "Did Congress enact this statute?"), but over what *constitutes* valid law in the first

[175] Dworkin (n 22) 5–68, 71–80, 90–99, 225–228, 249–254, 266–275; Stavropoulos (n 23) sections 2-4.
[176] Stavropoulos (n 24) sections 3 and 4.
[177] Raz (n 152) 210.
[178] Dale Smith, 'Theoretical Disagreement and the Semantic Sting' (2010) 30 *OJLS* 635, 638.

place.[179] Legal professionals may make conflicting statements about the content of the law and the method(s) for interpreting it.[180]

For example, in *Riggs v Palmer*, judges agreed that statutes governed inheritance but disagreed on whether a murderer could inherit, resolving the issue by appealing to the principle that "no one should profit from wrongdoing."[181] Similarly, in *Brown v Board of Education*, the Court invoked equality over precedent to dismantle segregation. These cases illustrate how judges routinely invoke moral principles to resolve ambiguities, even when sources like statutes are undisputed.[182] Judges utilised something more than conventional, source-based law to reach their conclusions. They invoked moral principles to identify what the law was, and this invocation did not consist in an empirical inquiry about the sources of law or certain social facts from which the criteria of legal validity could be derived.[183] In other words, even though there was no empirical disagreement about the sources of law, there was theoretical disagreement on whether social facts alone, a combination of social and moral facts or moral facts alone were what would constitute certain propositions of law true.[184]

Positivism, however, cannot explain this phenomenon, as it presumes a static, consensus-driven rule of recognition. If, as Hart's theory suggests, the rule of recognition is ultimately a social fact, then identifying legal validity should be a matter of empirical inquiry into historical facts and prevailing social attitudes. In this view, only empirical disagreements about the law would exist,[185] and the truth of propositions about law would depend only on questions of plain historical fact including facts about individual beliefs and social attitudes.[186] Yet, paradoxically for positivism, theoretical disagreements are a prominent and persistent feature of modern legal

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[179] Such disagreements are empirical disagreements about the law Ronald Dworkin, *Taking Rights Seriously* (HUP 1977) 14-46, 81-130; Dworkin (n 22) 4-7, 13, 37. Dworkin calls 'the grounds of law' the facts that determine the truth of propositions of law. See 4, 11-15.

[180] Dworkin (n 20) 4-7, 13, 37.

[181] ibid 15-33.

[182] ibid 15-30.

[183] The *Riggs v. Palmer* court famously said that in all cases, certain more specific moral principles control 'the operation and effect' of all laws. This point constitutes one of the key theses of interpretivism.

[184] If a combination of social and moral facts or moral facts alone could answer the question of legal validity, legal positivism's social and separability theses would not hold. This is the key issue of the legal positivism v interpretivism debate. Interpretivism is a non-positivist legal theory claiming that normative facts necessarily play a role in the identification of the grounds of legal rights and obligations. For an illuminating explanation of interpretivism and its variations see Stavropoulos (n 23).

[185] Dworkin (n 20) 6-11. The possibility of theoretical is implied not only by the role and nature of moral facts, but also by the substantive (therefore potentially controversial) character of law's grounds. If the question of grounds is substantive, we can disagree about what they are without changing the subject.

[186] Hart negates this understanding of his theory in his Postscript and he accepts that moral facts could function as criteria of legal validity (See Hart (n 30) 245-254 and especially 250 where Hart notes 'Dworkin in attributing to me a doctrine of "plain-fact positivism" has mistakenly treated my theory as not only requiring (as it does) that the existence and authority of the rule of recognition should depend on the fact of its acceptance by the courts, but also as requiring (as it does not) that the criteria of legal validity which the rule provides should consist exclusively of the specific kind of plain fact which he calls "pedigree" matters and which concern the manner and form of law-creation or adoption. This is doubly mistaken. First, it ignores my explicit acknowledgement that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values; so my doctrine is what has been called "soft positivism" and not as in Dworkin's version of it "plain-fact" positivism'). However, by making such claims Hart arguably moves very close if not inside the interpretivist camp. See Hart (n 28) 245-2.

practice. This reveals the limits of positivism and underscores the necessity of moral reasoning in the determination and evolution of legal norms.

Hart's legal positivism-and positivism more broadly-fails to explain the prevalence of theoretical disagreements in law because it underestimates the constitutive role that moral facts and normative reasoning play in determining legal validity. While positivism reduces law to social facts, such as statutes and precedents, it cannot account for how judges routinely invoke moral principles to resolve ambiguity, especially in hard cases where legal sources alone are indeterminate. These moral facts and principles are not just gap-fillers; they are integral to identifying which legal interpretations best fit and justify the law,[187] and thus play a decisive role in shaping legal outcomes.[188]

For Dworkin, law is fundamentally an interpretive concept. To make the law determinate, judges must construct the meaning of legal norms by reconciling institutional practice with moral principles, balancing 'fit' (consistency with legal materials) and 'justification' (moral soundness).[189] In hard cases, namely in cases of semantic ambiguity and normative complexity, where the criteria of legal validity are unclear, judges should resolve indeterminacy by appealing to principles that best justify the goals of the law – such as efficiency, rivalry, consumer welfare, fairness, market resilience, and contestability in competition law. Legal norms, therefore, emerge from an interpretive argumentative practice, not from simple logical inferences from the sources of law or reliance on scientific, extra-legal knowledge as positivism claims.

Building on this, Stavropoulos distinguishes between 'hybrid' and 'pure' interpretivism.[190] Hybrid interpretivism (like inclusive legal positivism) holds that both institutional practices and moral principles jointly determine the law: for example, the adoption of the AEC test in *Intel* as a criterion for legal validity in rebate cases is justified both by alignment with precedent and by moral reasoning about effective competition.[191] Pure interpretivism, by contrast, claims that moral principles alone determine how practices affect legal rights, with social facts serving as inputs to moral reasoning.[192] In this view, the rule articulated by the Court in *Intel* is purely the by-product of moral reasoning that weaves together principles from

[187] The 'fit' element implies that the interpretation must account for the paradigmatic aspects of relevant legal field, while the 'justification' element consists in identifying the interpretation that presents the law in its best light. Dworkin (n 20) 22-45 49-53, 421-42. Scott Shapiro, 'The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed' (2007) 77 *Public Law and Legal Theory Working Paper Series* 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)

[188] Dworkin considers that such theoretical disagreements about the grounds of law is what makes certain cases hard. Ronald Dworkin, 'Judicial Discretion' (1963) 60 *Journal of Philosophy* 624–638. On the contrary Hart seems to say that what makes a case hard is semantic ambiguity, i.e. the open texture nature of law. Hart (n 30) 128–136; Stavropoulos (n 23) 3.

[189] Dworkin (n 22) 65-80, 90-99, 225-228, 249-254, 266-275.

[190] Stavropoulos (n 23) sections 3 and 4.

[191] *Intel* (n 109) 129-139.

[192] In that sense pure interpretivism is the polar opposite of exclusive legal positivism. Stavropoulos (n 23) section 4.

prior case law,[193] economics (i.e. the AEC test), and general rule-of-law principles (e.g. the principle that defendant should be allowed to rebut a presumption of unlawfulness).[194]

Interpretivism, thus, offers a powerful lens to critique the positivist approach to competition law and reframes its inherent indeterminacy as an endogenous feature rather than a defect. Under interpretivism, the validity of competition norms derives not from static social facts but from the persuasive force of arguments that reconstruct the purpose of the law in light of its effects in ways that meet the fit and justification requirements.[195] This approach reveals that economic formalism's claim to neutrality stifles competition law as an argumentative practice by narrowing the scope of legitimate debate as it frames welfare metrics (e.g. consumer surplus) as objective metrics excluding non-quantifiable concerns such as fairness, contestability or freedom as non-domination.[196] An interpretivist perspective is also sceptical of attempts to freeze epistemic hierarchies such as privileging neoclassical economics tools over complexity science ones.[197]

ii. Practical Implications

Viewing competition law through the lens of an inter Argumentative Practice Model yields several important implications. First, this Model makes it clear that legal meaning in competition law is not fixed by EU Treaty provisions or economic models alone. Instead, the validity of legal propositions is continually shaped through interpretive argumentation, where precedent and economic expertise are important, but not dispositive.[198] This means that legal reasoning in competition law is inherently dynamic and responsive to new arguments, evidence, epistemic change, and evolving societal values.

Second, the Argumentative Practice Model highlights that indeterminacy is not a flaw to be eradicated but a necessary feature that enables competition law's adaptation to secure its integrity in the face of new market realities and value conflicts.[199] Rather than seeking to eliminate indeterminacy through rigid technical or doctrinal solutions, the Argumentative Practice Model recognizes it as the space where meaningful legal development occurs.

Third, from this point of view economic tools and models are not neutral arbiters of legal validity. Their inherent normative assumptions become visible when they are understood as components of broader interpretive theories, rather than as objective and value-free, dispositive criteria of legal validity.[200] This perspective exposes the normative choices embedded in

[193] *Post Danmark I* (n 162).
[194] Makris (n 35) 119-120, 151-152.
[195] Stavropoulos highlights that for interpretivism moral principles are *constitutive* of legal content; they are not simply invoked when the 'rules run out'. See Stavropoulos (n 23) section 4. Contrast that with Gardner (n 13) 202-208, 214-217 and Marmor, *Philosophy of Law* (n 31) 84-108.
[196] Stavros Makris, 'A Smithian Political Economy Approach for the Competition Law of the 21st Century' (2025) 88(4) *MLR* 712, 712-718, 738-746.
[197] For a critique on neoclassical economics see Marianna Mazzucato, *The Value of Everything* (Penguin Books 2019) 1-36, 37-65.
[198] Dworkin (n 22) 45–52, 58–59, 65–66, 71, 86.
[199] Makris (n 1) 2-6, 23-31, 36-46, 57.
[200] Makris (n 21) 253-257.

welfare metrics and economic methodologies and invites courts and authorities to explicitly engage with those choices instead of obscuring them behind a veneer of scientific neutrality. Such transparency enhances competition law's cognitive openness, enabling it to address the challenges of a 'complex economy'[201] by integrating insights from diverse disciplines—including economics, economic sociology, ecology, and behavioural science.[202] This interdisciplinary synthesis would improve competition law's role in setting up the framework for the continuous competitive and collaborative interactions of actors across overlapping market spheres. Such methodoligcal upgrading requires leveraging new analytical tools such as computational analysis for dynamic market simulations, agent-based modelling to trace emergent behaviours in networked systems, complexity scient framework to map non-linear market adaptations.[203] In that regard new tools such as computational ('augmented') competition law and economics, role of Agent-based modelling, complexity science.

Fourth, at the institutional level, the Argumentative Practice Model mandates that courts and competition authorities explicitly articulate their value trade-offs, afford qualitative evidence parity with quantitative models, and treat precedents as provisional heuristic frameworks rather than binding social facts. This triad of commitments would enable competition law to evolve responsively to new epistemic paradigms and market realities.

Fifth, the Argumentative Practice Model frames competition law adjudication as a dynamic, argumentative process. Foundational concepts such as 'restriction of competition' and 'abuse' are not viewed not as static legal categories but as contested sites of argumentative struggles, requiring courts and enforcers to weigh and balance competing values.[204] This process resembles Dworkin's 'chain novel' metaphor: each decision incrementally develops the legal corpus through reinterpretation while preserving law's openness and fostering deliberative engagement.[205] Furthermore, viewing adjudication as an argumentative process highlights the importance of constructive interpretation – a central feature and key contribution of the Argumentative Practice Model, which we examine in detail in the following sections.

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[201] Lianos (n 18) 206-212.

[202] Samuel Bowles, *Microeconomics – Behaviour, Institutions and Evolution* (Princeton University Press 2004) 53.

[203] Ioannis Lianos, 'Competition Law for a Complex Economy' (2019) *50 International Review of Intellectual Property and Competition Law* 643.

[204] Balancing here is a misnomer. In practice, full balancing of costs and benefits of the specific practice to competition is performed in a very limited number of cases. See MA Carrier, 'The Real Rule of Reason: Bridging the Disconnect' (1999) *Brigham Young University Law Review* 1266 (noting that 'courts rarely conduct the balancing for which the Rule (of Reason) is known' and that in 96% Rule of Reason cases, courts do not balance anything', reporting for the period 1977 to 1999); MA Carrier, 'The Rule of Reason: An Empirical Update for the 21st Century' (2009) 16 *George Mason Law Review* 827 (noting that balancing occurs 'in only 2% of cases', reporting for the period of 1999 to 2009). H Hovenkamp, 'Antitrust Balancing' (2016) 12 *NYU Journal of Law & Business* 369 (noting that courts do not balance costs and benefits, according to a uniform metric, as in particular the costs and benefits to trade-off may be different in kind, such as higher prices, from one side, and higher quality or innovation, from the other side; balancing is a 'very poor label for what courts actually do'. In support of balancing see Louis Kaplow, 'Balancing Versus Structured Decision Procedures: Antitrust, Title VII Disparate Impact, and Constitutional Law Strict Scrutiny' (2019) 167 University of Pennsylvania Law Review 1375

[205] Dworkin (n 23) 228-238; Makris (n 1) 46-51, 51-61; Makris (n 21) 232-242, 253-257.

Two caveats are necessary here. First, while this study proposes an interpretivist Argumentative Practice Model to illuminate adjudicative in competition law, it expressly rejects Dworkin's 'one right answer' thesis.[206] Recognising law as an interpretive practice – where its content emerges from argumentative engagement rather than mere social facts or technocratic reasoning – does not entail that every legal question has a single correct answer. Furthermore, as will be shown below, embracing constructive interpretation does not require a unique outcome; rather, it calls for objective criteria to evaluate competing interpretations, such as comparative *fit* with preexisting legal materials and the robustness of *justificatory* reasoning. Just as scientific claims are assessed for credibility, methodological robustness and coherence, so too can interpretive theories be appraised for their alignment with the legal framework and justificatory strength.[207]

Second, this study also rejects Dworkin's principles/policies distinction. Dworkin's differentiation between principles (moral standards protecting individual rights) and policies (collective goals for societal welfare) was developed in the context of constitutional adjudication, and it is neither essential to interpretivism nor suitable for competition law.[208] In the competition law context, principled reasoning, value judgments, precedent, and extra-legal knowledge collectively shape the 'rules of the game' and the framework for distinguishing permissible from impermissible forms of competitive interaction and collaboration.[209] Moreover, the essence of interpretivism lies in integrity, namely in treating law as a coherent system of principle, rather than in maintaining a rigid principles/policies dichotomy.[210] In practice, economic policies and legal principles are deeply intertwined in competition law. Imposing, therefore, a strict distinction would be methodologically questionable, artificially constrain the law's adaptive capacity and hinder its responsiveness to evolving epistemic and societal understandings.

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[206] Dworkin's 'one right answer' thesis asserts that every legal question, including hard cases with ambiguous precedents or conflicting principles, has a single correct solution. This solution emerges through a judge's interpretative duty to construct the best moral and political justification for existing legal materials (statutes, precedents, and constitutional principles Dworkin (n 22) 411–413.

[207] Feldman (n 153) 5-6, 142-145, 171 (noting that legal reasoning must be appraised for its own justificatory strength—how well it fits within the law's purposes, values, and institutional context, rather than simply importing scientific methodologies).

[208] Ronald Dworkin, 'Hard Cases' (1975) 88 *HLR* 1057, especially pages 1063–1072, where he introduces the distinction between principles (which are standards that must be followed unless overridden by stronger principles) and policies (which are standards that set goals to be achieved and may be weighed against other considerations). Later Dworkin further elaborated this distinction emphasizing that principles protect individual rights and carry weight, whereas policies are collective goals aimed at social welfare Ronald Dworkin, Taking Rights Seriously (1977) further elaborates on this distinction, emphasizing that

[209] As Paul has observed competition law allocates coordination rights and actively structures economic organization by determining which actors may coordinate and under what conditions. Sanjukta Paul, 'Antitrust as Allocator of Coordination Rights' (2020) 67 *UCLA Law Review* 378.

[210] Other interpretivists reject rigid categorization while embracing value-sensitive interpretation. Cass R Sunstein, *The Partial Constitution* (Harvard University Press 1993) 19–23 (contending that legal principles and policies are often intertwined and that the distinction is not always workable in practice); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 58–63 (rejecting Dworkin's sharp separation between principles and policies, and arguing judicial review should be guided by process-oriented principles that inevitably blend normative (principled) and policy considerations, rather than by a strict dichotomy).

iii. Practical Implications: Constructive Interpretation and Anticompetitive Agreements

The most important practical implication of the Argumentative Practice Model, however, is the endorsement of constructive interpretation as the key method to interpret competition rules. According to this methodology when confronted with a legal question, legal decision-makers instead of searching for the 'true' or fixed intent of a rule, they should reconstruct the law's purpose in light of its effects and the best moral justification available, to secure its integrity. From an interpretivist point of view legal reasoning requires judges to interpret laws in a way that 'fits' existing legal materials while morally 'justifying' them. For example, such an interpretive attitude would allow decision-makers to integrate in the concept of competition harm not only price effects or output restrictions but also probabilistic harm (e.g., Apple's app store fees and anti-steering rules may collectively foreclose rivals, even if individually lawful[211]) and synergistic harm (e.g. conduct lawful in isolation such as exclusivity rebates that do not exclude as-efficient rivals might constitute an abuse when combined with other competitive advantages or strategies[212]) that may arise in complex digital (but even non digital) markets.[213]

Constructive interpretation differs from traditional hermeneutics by recognising that legal meaning is not discovered but constructed through argumentative engagement. Constructive interpretation is a 'matter of imposing purpose on an object or practice in order to make it the best possible example of the form of genre to which it is taken to belong'.[214] Hence, legal institutions should treat the arguments of plaintiffs and defendants as competing interpretive theories about the law's purpose, and should ultimately adopt or develop the theory that presents the law in its best light – one that both fits the legal materials and justifies them in view of their purpose and effects.[215] The 'fit' element implies that the interpretive theory must account for the paradigmatic aspects of competition law. The 'justification' component consists of putting competition norms in their best light by taking into consideration their purpose, functions and effects.[216] This approach encourages a purposive, principle-based, and results-oriented attitude, where value judgments are not excluded but embraced as essential to legal reasoning.

In contrast to traditional methods, proposed by top-down axiomatic reasoning and bottom-up doctrinalism due to their shared positivist foundation, which seek a fixed objective or intent, constructive interpretation acknowledges that legal interpreters must often make normative choices and reconstruct the purpose of a rule to apply it meaningfully.[217] Rather than treating

[211] European Commission, 'Commission fines Apple over €1.8 billion for abusing its dominant position on the market for the distribution of music streaming apps' (Press Release IP/24/1161, 4 March 2024) https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161; Giorgio Monti, 'Exploitative Abuse - Takeaways from the Apple App Store Practices Decision' (June 04, 2024) at https://ssrn.com/abstract=4853304.
[212] Monti (n 68) 112-116, 118-120.
[213] Feldman and Lemley (n 172)
[214] Dworkin (n 22) 49-53, 421-422.
[215] Ibid, 1-44, 52.
[216] Shapiro (n 187) 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).
[217] Dworkin (n 22) 45-86, 225-227.

value judgments as impermissible, this model integrates them into the interpretive process, allowing for a more nuanced and adaptive approach to competition law's inherent openness.[218]

For example, consider whether a selective distribution agreement constitutes a restriction of competition. If neither the text of Article 101 TFEU, nor its legislative history, nor existing case law provides a clear answer, a constructive interpretivist approach would not simply default to economic or doctrinal orthodoxy.[219] Instead, it would require courts to engage with the underlying purposes and values at stake-such as consumer welfare, market contestability, or freedom to compete-and to justify their decision in light of those principles. This method provides a principled framework for addressing novel and complex cases that traditional approaches struggle to resolve.

The EU Courts' jurisprudence abounds with examples of constructive interpretation, where legal concepts are defined through purposive reasoning aligned with competition law's objectives, rather than rigid formalism. In *Metro I* (1977), the CJ addressed the question whether selective distribution agreements constitute a restriction of competition under Article 101(1) TFEU. The Court held that, although such agreements restrict a form of price competition, they may still be compatible with Article 101(1) if certain conditions are met: the nature of the product necessitates a selective distribution system; resellers are chosen based on objective, qualitative criteria applied uniformly and non-discriminatorily; and the restrictions do not exceed what is necessary.[220] Notably, the Court emphasised that while price competition is important and cannot be eliminated, it is not the only effective form of competition, nor does it always deserve absolute priority.[221] In this context, the CJ recognised 'effective competition' as a multifaceted and essentially contested concept, linked to the broader objectives of the Treaty, particularly the creation of a single market.

On this reasoning, the Court concluded that restrictions on price competition are permissible if they are essential to achieving Treaty objectives and do not eliminate competition for a substantial part of the common market.[222] Thus, an agreement that restricts certain forms of inter-brand price competition may still be compatible with Article 101(1) TFEU if it enhances another dimension of competition, such as quality or inter-brand rivalry.[223]

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[218] ibid, 45-86, 225-227. It should be noted though that I disagree with Dworkin's distinction between principles (i.e. propositions associated with rights) and policies (i.e. propositions that describe goals) because in competition law adjudication, judges inevitably make policy decisions (i.e. consequentialist decisions). Competition law adjudicators cannot and should not be solely committed to deontic logic as this distinction implied. In addition, enforcers must employ also deontic logic (not only consequentialist reasoning as said distinction would entail). For example, they must protect the competitive process irrespective of any consequences, e.g. prohibit a merger-to-monopoly even when it bears countervailing efficiencies. Art. 101(3) TFEU could be also interpreted as introducing such a categorical imperative: no consumer-welfare enhancing efficiencies can excuse an agreement that fully eliminates competition to a substantial part of the market.

[219] Contrast that to Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81(5) *Yale LJ* 823, 847–8 (suggesting that on such occasions decisionmakers should make a decision on the basis of the best moral reasons).

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

[221] ibid, para 21.

[222] ibid, paras 20, 21.

[223] ibid, paras 21, 22.

This principle was reiterated in *AEG-Telefunken*, where the Court held that selective distribution agreements could fall outside the scope of EU competition law if they improve competition in areas beyond price, such as by maintaining specialist trade capable of servicing high-quality or technologically advanced products.[224] The key issue in that case was whether a selective distribution system for consumer electronics, though theoretically valid, could infringe Article 101(1) TFEU due to improper application. The CJ ruled that even a formally compliant selective distribution system violates Article 101(1) if applied to exclude qualified resellers or manipulate resale prices. The Court emphasized that actual implementation (e.g., discriminatory exclusion of distributors, indirect price-fixing) determines legality, not just the system's design.

In *Pierre Fabre* the main question was whether a de facto ban on online sales in a selective distribution system for cosmetics constitutes a restriction of competition 'by object'.[225] The CJ held that prohibiting online sales is a restriction by object under Article 101(1); it recognised, though, that such restrictions may be justified if they enhance non-price competition (e.g., quality services for high-tech products).[226] In *Coty*, the Court was asked whether luxury brands can prohibit authorised distributors from using third-party platforms (e.g., Amazon) in their selective distribution systems. The CJ upheld that luxury goods suppliers may ban third-party platform sales if the selective distribution system meets the *Metro* criteria (objective qualitative criteria, non-discriminatory application, necessity for product quality) and the restriction is proportionate to preserve the brand's luxury image.[227]

Through a series of interpretive decisions, the Court crafted a "chain novel" of jurisprudence, seamlessly integrating value judgments, doctrinal analysis, and economic insights. In doing so, it developed a framework to safeguard quality competition in traditional brick-and-mortar markets—drawing on distinctions between intra- and inter-brand competition, addressing concerns about free riding, and applying the principle of proportionality with *Metro I* and *AEG Telefunken*. Building on this foundation, the Court extended its approach to the digital economy. In *Pierre Fabre*, it sought to ensure that vertical restraints would not impede the growth of e-commerce, ultimately prohibiting absolute bans on online sales. Subsequently, in *Coty* the Court continued this narrative by upholding measures that allow luxury brands to maintain control over their brand image in the digital sphere, particularly in relation to dominant online marketplaces like Amazon and eBay. Through these interpretive moves, the Court has maintained its commitment to protecting quality competition while adapting to the realities of both physical and digital markets.

The 'chain novel' evolution of EU competition law, exemplified by cases like *Metro I*, *Pierre Fabre*, and *Coty*, poses a fundamental challenge to positivist frameworks.[228] From a top-down

[224] Case 107/82 *AEG-Telefunken* v *Commission* ECLI:EU:C:1983:293, para 33.
[225] Case C-439/09 *Pierre Fabre Dermo-Cosmétique* EU:C:2011:649, paras 39-40.
[226] ibid, paras 39-40.
[227] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* ECLI:EU:C:2017:941, para 29 (Therefore a supplier of luxury products can prohibit authorized sellers from selling its product on third party platforms).
[228] Please note that I do not claim all case law can be comprehensively understood through the lens of the chain novel metaphor; rather, this metaphor most effectively captures the optimal jurisprudential practices of the EU

axiomatic perspective, this jurisprudential narrative would require tracing all developments to an initial normative anchor (e.g., an explicit commitment to consumer welfare) and framing subsequent rulings as mere implementations of that ideal.[229] Yet this approach cannot explain how the Courts dynamically reinterpreted 'effective competition' to balance price rivalry with non-price factors like brand integrity.[230] These are value-laden judgments that go beyond doctrinal fidelity and reflect the courts' engagement with evolving market realities and societal values.

Similarly, bottom-up doctrinalism struggles to account for the origins and evolution of the *Metro I* criteria and lacks the analytical tools to critically assess whether subsequent cases like *Pierre Fabre* and *Coty* were correctly decided. As long as these judgments remain consistent with established case law and conform to prevailing economic thought, the doctrinalist would be satisfied. This, however, risks epistemically closing competition law, making it challenging – if not impossible – to evaluate whether the law has been properly applied in emerging contexts like e-commerce. However, as argued below, *Coty* should be understood as an attempt to allow luxury brands to retain a degree of control over their products in relation to far more powerful online marketplaces.

Top-down axiomatic reasoning, with its emphasis on normative singularity, is equally limiting. It fails to accommodate competition law's value pluralism. The digital and the analogue environments are not equivalent (e.g. an online marketplace is not the same as a physical mall), and these differences may necessitate prioritizing certain values instead of others depending on the context. For example, prohibiting absolute bans on online sales (*Pierre Fabre*) might be warranted as they could stifle the development of online commerce. Yet, allowing certain online sales restrictions – bans on selling via platforms like Amazon or eBay – (*Coty*) might be justified even if it could inhibit the growth of such platforms (and thereby e-commerce) when it is necessary to preserve brand image and value. Thus, *Pierre Fabre* demonstrates a policy commitment to fostering the development of e-commerce, whereas *Coty* aims to secure high-quality competition as this sector continues to expand.

Such an explanation is available only if we endorse the argumentative practice model which rejects the notion that legal developments are the byproduct of mechanical application of fixed principles. This model frames adjudication as a dynamic, deliberative process where courts openly weigh competing values and adapt legal concepts to address new market realities. From

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Courts. It must be recognised, however, that pragmatic considerations—and, at times, judicial error—are inevitable features of decision-making. Pragmatic approaches to judicial reasoning primarily serve a descriptive function, illuminating how judges decide, but rarely offer prescriptive benchmarks for distinguishing between sound and unsound decisions. See Richard A. Posner, 'Legal Pragmatism Defended' (2004) 71 *University of Chicago Law Review* 683.

[229] Radic and Petit (n 78) 6-11.

[230] For the argument that effective judicial protection guaranteed in Article 47 of the Charter of Fundamental Rights is the central reason for the recent developments of the Court of Justice in competition law see Damjan Kukovec, 'The Realist Trend of the Court of Justice of the European Union' (2021) *EUI Working Papers LAW* 2021/11, European University Institute.

The "realist" trend of the Court (taking the case in its social and economic contexts, the requirement of a robust theory of harm and avoiding premature termination of engagement with the relevant facts and Interest) is fundamental not only to competition law, but shapes other areas of law, such as state aid and trademark law.

this perspective, it could be argued that in cases like *Metro I*, *Pierre Fabre*, and *Coty*, the Court assessed whether agreements enhanced or undermined specific dimensions of competition within their legal and economic contexts,and made evaluative judgments on which dimensions of competition should weigh over others. In doing so, the Court reconstructed the purpose of Article 101 TFEU in light of its effects in way that both fits and justifies the law.[231] This approach can ensure that competition law remains responsive, pluralistic, and capable of governing complex, evolving markets while maintaining its principled coherence (integrity).

This interpretivist attitude of the Court is evident in two features of this case law. First, the Court centred its inquiry on whether agreements harmed or improved aspects of the competitive process (e.g., inter-brand rivalry, market resilience), rather than relying on a single value (e.g. consumer welfare) and rigid economic metrics. Second, the Court did not rely on expert economic knowledge on the welfare impact of the various available legal solutions; it did not use the best extra-legal knowledge as the exclusive legal positivist would hope. Instead, it asked whether this type of agreements could improve non-price competition while restricting price competition and attempted to set up certain conditions to secure such an outcome.

These decisions illustrate the Court's constructive interpretation. The Court sought to interpret competition law's fuzzy, essentially contested overarching goal (i.e. effective competition) by taking into consideration the Treaty's objectives (e.g., single market integration, consumer choice, diversity) instead of being guided by static economic models. The Court did not ask whether and if yes under which conditions selective distribution agreements increase consumer welfare. Instead, it engaged in value-laden, interpretivist adjudication positioning competition law as a flexible framework that mediates competing societal interests through principled deliberation – not procedural rigidity or economic formalism.

iv. Practical Implications: Constructive Interpretation and Abuse of Dominance

The abuse of dominance case law under Article 102 TFEU also offers abundant examples of constructive interpretation in action. The interpretive departures from *Bronner* in *Slovak Telekom*, *Google Shopping* and *Android Auto* illustrate this method of interpretation, reflecting a shift from rigid criteria to evaluative, context-sensitive assessments of digital platform conduct.

In *Oscar Bronner,* the CJ established strict criteria under which a refusal to supply would constitute an abuse and access to a facility would be ordered.[232] The case involved a niche newspaper (Der Standard owned by Mr Bronner) with a market share of less than 4% seeking access to Mediaprint's nationwide home-delivery system. Mediaprint published two newspapers with a combined market share of almost 50% and had established a nationwide system for the distribution of newspapers early in the morning, with deliveries to the

[231] Giorgio Monti, EC Competition Law (CUP 2007) 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").
[232] Case C-7/97 *Oscar Bronner GmbH and Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH and Co KG* [1999] 4 ECR I-7791.

subscribers' homes.[233] This system, the only one of its kind, provided distribution services also to newspapers published by a third publisher.

Mr Bronner argued that the distribution system should be regarded as an essential facility, as he lacked the ability to establish a competing system, and that Mediaprint's refusal to distribute Bronner's newspaper should be regarded as an abuse of a dominant position. The Court rejected the claim, emphasizing that alternatives like newsstand sales existed and that imposing access obligations would undermine investment incentives.[234] According to the Court a refusal to supply would constitute an abuse if (a) it would eliminate all competition in the downstream market; (b) the facility is indispensable (i.e. duplication by equally efficient competitors is physically or economically impossible); and (c) there is no objective justification.[235] *Bronner*, thus, offered a formula that balanced property rights with competition concerns, rooted in 1990s analog-market logic.

In *Slovak Telekom* however, the CJ clarified that Bronner's indispensability requirement applies exclusively to outright refusals, and not to situations involving unfair trading practices particularly where there is a regulatory obligation to provide access.[236] The case centred on Slovak Telekom's abuse of its broadband infrastructure dominance: while legally obligated to provide competitors access to its local loop under EU telecoms regulations, the company degraded access through margin squeeze tactics (wholesale prices exceeding retail rates) and onerous technical conditions impeding operational parity.[237]

Notably, Slovak Telekom was the incumbent telecommunications operator in Slovakia; had a legal monopoly on the Slovak telecommunications market until 2000, was the largest telecommunications operator and broadband provider, and owned copper and mobile networks covering almost the entire Slovak territory.[238] It was also designated as an operator with significant power on the wholesale market for unbundled access to the local loop and obliged to grant all reasonable and justified requests for unbundling.

The EC found that Slovak Telekom withheld from alternative operators network information necessary for the unbundling of local loops, reduced the scope of obligations regarding unbundled local loops, set unfair terms and conditions in unbundling offers regarding collocation, qualification, forecasting, repairs and bank guarantees, and applied unfair tariffs which did not allow a competitor as efficient as the appellant relying on wholesale access to

[233] ibid, paras 4-10.
[234] ibid, paras 45-47.
[235] ibid, para 41 ("even if that case-law on the exercise of an intellectual property right were applicable to the exercise of any property right whatever, it would still be necessary…in order to plead the existence of an abuse within the meaning of Article [102]…, not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme.").
[236] C-165/19 P *Slovak Telekom v Commission* [2021] EU:C:2021:239.
[237] Ibid, paras 8-17, 18-26.
[238] Ibid, paras 8-17.

the unbundled local loops of that operator to replicate the retail broadband services offered by that operator without incurring a loss.[239]

The EC's decision was largely upheld on appeal to the General Court. The Court held that margin squeeze and discriminatory access terms constitute standalone abuses under Article 102, distinct from refusal to supply, thereby rendering *Bronner*'s 'exceptional circumstances' test (indispensability, elimination of competition) irrelevant. This case marked a pivotal shift enabling regulators to bypass *Bronner*'s high bar by reclassifying exclusionary tactics related to access as independent abuses.[240] Yet, the case had a peculiarity: Slovak Telekom was under a sector-specific obligation to provide non-discriminatory access under the EU's telecoms framework. Hence, in that case the Court made it clear that where a dominant firm is already subject to a regulatory obligation to grant access to its assets but offers access on unfair terms, it is not necessary for the EC to demonstrate that access is, in fact, indispensable for operating on a downstream market in order for the conduct to be abusive. Thus, *Slovak Telekom* constitutes an interpretive move away from *Bronner* suggesting that forms of 'constructive refusal to deal' should not be equated with refusal to deal. Through evaluative judgments the Court refused to equate outright refusals with access restrictions even though such conducts might have similar effects.

In *Google Shopping*, both the General Court and the CJ rejected Google's argument that the EC should apply *Bronner* to Google's preferential treatment of its own comparison shopping service and demotion of its rivals.[241] The General Court underlined that not every issue of, or partly of, access necessarily triggers the *Bronner* conditions.[242] It also stressed that Google's practice can be distinguished in its constituent elements from a refusal to deal even if it may have the same exclusionary effect.[243] Hence, a refusal to supply that warrants the application of *Bronner* criteria requires (i) an 'express request' to be granted access and a consequential 'refusal', and (ii) that the trigger of the exclusionary effect – the impugned conduct – lies principally in the refusal as such, and not in an extrinsic practice such as, in particular, another form of leveraging abuse.[244] Therefore, a lack of 'express refusal' precludes the description of the practice as 'refusal to deal'.[245] Otherwise, the GC noted, all or most exclusionary practices would be treated as implicit refusals to supply inappropriately extending the scope of the stringent and exceptional *Bronner* conditions and reducing correspondingly the effectiveness of Article 102 TFEU.[246] Under this reasoning the Court concluded that Google's conduct

[239] European Commission, 'Commission Decision of 15 October 2014 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39523 – Slovak Telekom).
[240] Case C-165/19 *Slovak Telekom v Commission* [2021] EU:C:2021:239, Opinion of AG Saugmandsgaard ØE, para 88.
[241] *Google Shopping* (n 100), para 214.
[242] ibid, para 230.
[243] ibid, para 231.
[244] ibid, para 232.
[245] ibid, para 233.
[246] ibid, para 234 (noting that Article 102 is not limited to practices relating to indispensable goods).

constituted an independent form of abusive leveraging, a form of unequal treatment involving positive acts of discrimination and not refusal to deal.[247]

AG Kokott agreed with GC's reasoning[248] emphasizing that there was no separate facility or a distinct infrastructure as the Shopping Units were integrated into Google's search ecosystem. On this basis, she noted that Google's conduct affected *how* Google's general results pages were accessed; rather than access itself to a supposedly separate infrastructure separate infrastructure.[249] Hence, she concluded, 'the General Court was therefore able to find, without erring in law, that the alleged practices constituted an independent form of leveraging abuse which expressed itself in 'active' behaviour in the form of positive discrimination in favour of search results from Google's comparison shopping service'.[250] Instrumental role to this finding played the fact that the concomitant diversion of data traffic was not based on the better quality of Google's comparison shopping service, but rather resulted from the self-preferencing and leveraging effected through Google's general results page.[251] Therefore, this practice deviated from competition on the merits as it was abnormal[252] and discriminatory and allowed Google to gain a competitive advantage by exploiting its dominant position on the market for online general search services.[253] Given that a large proportion of the traffic to competing comparison shopping services could not be effectively replaced by other sources,[254] the AG found that Google's 'off the merits' conduct could give rise to at least potentially anticompetitive effects.[255] The CJ followed her Opinion and upheld GC's analysis.[256]

In *Android Auto*, the Court further distanced itself from *Bronner* by holding that the indispensability requirement is not a universal prerequisite for intervention, particularly when the platform in question is at least partially open to third parties.[257] When Enel X sought interoperability for its electric vehicle charging app, JuicePass, Google cited security and resource constraints. Following *Bronner* one could say that imposing an access remedy is warranted only if the facility is indispensable, the refusal eliminates downstream competition and there is no objective justification. The Court, however, relaxed these criteria for partially open digital platforms. If the platform was designed for third-party use, the Court said, showing indispensability is not required.[258] If the infrastructure owned by the dominant undertaking was developed to enable third-parties to use it, and the refusal to grant access has 'the actual or potential effect of excluding, obstructing, or delaying the emergence of a product or service' that competes or could potentially compete with one supplied by the dominant undertaking,

[247] Ibid, para 167-180, 236, 238, 240.
[248] Case C-48/22 P *Google LLC and Alphabet Inc v European Commission (Google Shopping)*, Opinion of AG Kokott, ECLI:EU:C:2024:19, delivered 11 January 2024.
[249] Ibid, para 115.
[250] ibid, 116.
[251] ibid, para 97.
[252] ibid, paras 176, 179. Google adopted the converse economic model from the one that brought it success.
[253] ibid, paras 97, 98, 152.
[254] ibid, paras 141, 142.
[255] ibid, para 90.
[256] *Google Shopping* (n 100).
[257] Case C-233/23 *Alphabet Inc., Google LLC, Google Italy Srl v Autorità Garante della Concorrenza e del Mercato* (Android Auto) ECLI:EU:C:2025:110.
[258] ibid, paras 47, 49, 50.

such conduct may constitute an abuse of dominance.[259] Such conduct is capable of harming consumers not only when the platform is indispensable for the commercial operation of the competing apps, but also when access could make that app 'more attractive to consumers'.[260] Denying to rivals the opportunity to make their apps more attractive in the absence of an objective justification could constitute an abuse, particularly when the platform originally designed to facilitate third-party access.[261] Hence, dominant platforms may be ordered to develop interoperability tools (e.g. standardized EV charging templates) provided that interoperability could enhance consumer choice and third-party compensation to the platform is fair.

Android Auto contrasts with *Bronner*'s analog-era logic, where Mediaprint's refusal to share its delivery network was permissible because competitors had alternative options: they could use newsstands. As per *Bronner* if there were an alternative, there would be no foreclosure.[262] However, in *Android Auto*, Enel X which developed JuicePass could distribute it via users' smartphones, Apple Car Play, and a car's own infotainment system.[263] Hence, if *Bronner* were followed no abuse would have been found in this case.[264]

The evolution of the case law cannot be adequately explained solely by referencing differences in market structures – such as the contrast between the analog, physical infrastructure at issue in *Bronner* and the digital ecosystems examined in *Android Auto* – or by appealing to ostensibly neutral economic developments, like the rise of platform economics.[265] A closer analysis of these cases reveals that the Court adopts distinct conceptions of competitive harm in each context. First, in *Bronner,* the Court's concern was the risk of eliminating all downstream competition, focusing on the indispensability of access to physical infrastructure as a precondition for intervention. In contrast, the *Android Auto* case centers on the potential reduction of consumer choice and innovation that could result from Google's conduct. By excluding JuicePass, Google not only sought to defend its maps and data collection businesses (defensive leveraging) but also aimed to establish a presence in the market for users seeking electric vehicle charging services (offensive leveraging).[266] Such exclusionary conduct can harm competition in two significant ways even when access to the platform is not

[259] ibid, paras 47, 51.
[260] ibid, para 52.
[261] ibid, para 52.
[262] Giorgio Monti, 'The Android Auto Judgment: Every Road Leads Back to Magill' (30 March 2025) SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5198665, 10.
[263] The Italian competition authority did not see a car's infotainment system as an alternative since the development and updating of multiple app versions per infotainment system would have very high transaction costs, while Android Auto was a market standard accessible on 98% of cars sold in Italy. See Decision A529, *Alphabet Inc, Google LLC and Google Italy Srl* (27 April 2021), available at https://www.agcm.it/dotcmsdoc/allegati-news/A529_chiusura.pdf (hereinafter Google/Enel), para 64, 295.
[264] Note, though, that the Italian authority concluded that the Android operating system and play store 'constitute indispensable products for app developers' who wish to reach uses that do not have iOS. It also found Android Auto similarly indispensable. See *Google/Enel* (n 263) para 410.
[265] Bruno Jullien, 'The Economics of Platforms: A Theory Guide for Competition Policy' (2020) 54 *International Journal of Industrial Organization* 137; Geoffrey G Parker, Marshall W Van Alstyne and Sangeet Paul Choudary, *Platform Revolution: How Networked Markets Are Transforming the Economy and How to Make Them Work for You* (Norton & Company 2016).
[266] Monti (n 262) 6.

indispensable: (a) by preventing Enel from developing an app with functions similar to those found in Google Maps (harm to static competition), and (b) by impeding Enel's ability to introduce innovative functionalities on its app (harm to dynamic competition).[267] This evolution in judicial reasoning underscores a shift in the notion of competitive harm from a narrow focus on market foreclosure to a broader consideration of how dominant firms' conduct may suppress both existing competition and future innovation.

Second, according to *Bronner* a dominant company 'competes on the merits' even if it does not preserve infrastructure exclusivity for itself as long as equally efficient rivals can replicate its facility.[268] Understanding 'competition on the merits' in that way presupposes a natural monopoly theory.[269] Effectively, the Court in *Bronner* says that in the absence of a natural monopoly (if the market can sustain more than one player operating at minimum efficient scale) no 'regulatory' duty to provide access can be imposed on the dominant undertaking as long as the rivals of the dominant company have (even less convenient) alternatives.[270] Post-*Android Auto*, however, 'competing on merits' is understood as requiring proactive ecosystem stewardship to avoid unjustified exclusion, even if alternatives exist.[271] The Court appears to implicitly acknowledge that, in this context, applying the natural monopoly theory would set the threshold for intervention excessively high, since genuine natural monopolies are uncommon in digital markets.[272] As a result, relying solely on this standard and imposing access requirements only when access to a facility is indispensable, would render competition law largely ineffective in addressing anti-competitive conduct in the digital sphere.

Thirdly, the Court's understanding of the relationship between competition law and innovation appears to evolve from *Bronner* to *Android Auto.* In *Bronner*, the Court is concerned about the risk of free riding, which could undermine long-term investment and stifle innovation. The Court faces a dilemma: if access to essential infrastructure is made 'too difficult', it risks eliminating all downstream competition and reducing short-term consumer welfare; if access is made 'too easy', it may discourage dominant firms from investing in infrastructure development and incentivize rivals to free ride on the dominant firm's efforts.[273] This approach

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[267] *Google/Enel* (n 263) para 375.
[268] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, Opinion of AG Jacobs, ECLI:EU:C:1998:264, [1998] ECR I-7791, delivered 28 May 1998, para 68 ('But the purpose of establishing a competing nation-wide network would be to allow it to compete on equal terms with Mediaprint's newspapers and substantially to increase geographical coverage and circulation').
[269] ibid, paras 46-47, 50-51, 65-70.
[270] ibid, para 67.
[271] Giuseppe Colangelo, 'The EU Essential Facilities Doctrine after Android Auto: A Wild Card without Limiting Principles?' (2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5176785.
[272] Francesco Ducci, *Natural Monopolies in Digital Platform Markets* (CUP 2020).
[273] Opinion of AG Jacobs (n 268) paras 65 ("It seems to me that intervention of that kind, whether understood as an application of the essential facilities doctrine or, more traditionally, as a response to a refusal to supply goods or services, can be justified in terms of competition policy only in cases in which the dominant undertaking has a genuine stranglehold on the related market. That might be the case for example where duplication of the facility is impossible or extremely difficult owing to physical, geographical or legal constraints or is highly undesirable for reasons of public policy. It is not sufficient that the undertaking's control over a facility should give it a competitive advantage.") 68 ("Moreover, it would be necessary to establish that the level of investment required to set up a nation-wide home distribution system would be such as to deter an enterprising publisher who was convinced that there was a market for another large daily newspaper from entering the market. It may well be

to innovation is justified to the extent that innovation is viewed as a *standalone* activity (as is usually the case in analogue markets). However, in *Android Auto* the test devised by the Court's test acknowledges that innovation within digital ecosystems is inherently collaborative and collective, requiring cooperation between platforms and third parties.[274] Various authors have showed that in the modern connexionist economy firms inevitably cooperate and share technological knowledge during early technology development stages, while maintaining competition in other business aspects – a phenomenon described as 'soft rivalry' or 'co-opetition'.[275]

For example, Allen introduced the concept of 'collective invention', in which competing firms openly share technical information and improvements rather than keeping them proprietary. He analyzed the motivations behind such openness, highlighting factors such as the limited ability to appropriate returns from innovation and the advantages of rapid, industry-wide technological progress.[276] Von Hippel examined informal know-how trading among rival firms, where engineers and technical staff reciprocally exchange proprietary technical information. His research found that, under certain conditions, this reciprocal sharing can be both mutually beneficial and rational for firms, even when they are direct competitors.[277] Bessen explored the dual nature of innovation, focusing on the shift from tacit, hard-to-communicate knowledge to formalized, codified ideas that are easily disseminated. He argued that this process of formalization alters the competitive dynamics of innovation: when knowledge is formalized, patents and intellectual property rights can enhance incentives to innovate; when knowledge remains tacit, firms may share it more freely, and strong intellectual property protections can actually dampen innovation.[278]

Taken together, this literature underscores that open or shared innovation systems are vital to business ecosystems, with innovation sharing serving as a key driver of technological progress. However, such collective innovation can be threatened if a dominant platform or ecosystem entrenches its position[279] and exercises full control over the quality and diversity of innovation,[280] even if alternative options exist. In these circumstances, it is essential to safeguard the collaborative or collective innovation that emerges within the platform itself. In these circumstances prohibiting access restrictions or permitting them only when they are

uneconomic, as Bronner suggests, to establish a nation-wide system for a newspaper with a low circulation. In the short term, therefore, losses might be anticipated, requiring a certain level of investment. But the purpose of establishing a competing nation-wide network would be to allow it to compete on equal terms with Mediaprint's newspapers and substantially to increase geographical coverage and circulation").

[274] Suzanne Scotchmer, *Innovation and Incentives* (MIT Press 2004) (offering a comprehensive and rigorous analysis of the economics of innovation, focusing on the institutional, legal, and policy frameworks that shape incentives for research and development. Scotchmer examines how knowledge functions as a public good, the challenges of cumulative innovation, and the interplay between competition, licensing, and joint ventures.)

[275] Ioannis Lianos et al., 'Shared ecosystem innovation – towards a new interaction between competition law and IP rights' (forthcoming 2025).

[276] Robert C Allen, 'Collective invention' (1983) 4 *Journal of Economic Behavior and Organization* 1.

[277] Eric von Hippel, 'Cooperation between rivals: informal know-how trading' (1987) 16 *Research Policy* 291.

[278] James Bessen, 'The Two Faces of Innovation' (2011) *Boston University School of Law Working Paper* 10-35.

[279] Manu Batra, Paul de Bijl and Timo Klein, 'Ecosystem theories of harm in EU merger control: analysing competitive constraints and entrenchment' (2024) 15(6) *JECL&P* 357.

[280] Ariel Ezrachi and Maurice E Stucke, 'Innovation Misunderstood' (2024) 73 *American University Law Review* 1941.

objectively justified as in *Android Auto* appears far more appropriate than limiting access obligations to situations involving a natural monopoly as established in *Bronner*. While the Bronner approach may have been suitable for the analog economy, it is much less relevant in the digital context characterised by platform ecosystems and collective, cumulative innovation.[281]

This analysis suggests that the Court moved from *Bronner* to *Android Auto* via interpretive moves not via pure doctrinal analysis and input from economics; it reconceptualised the notions of 'competitive harm' and 'competition on the merits' and made a value to afford greater protection to 'cumulative, collective innovation' instead of 'standalone innovation' given the nature of innovation in digital platforms and ecosystems. The case law evolved in a way that meets both the 'fit' and the 'justification' requirements. With regards to the fit requirement, we cannot but note the significant efforts made to differentiate *Slovak Telecom*, *Google Shopping* and *Android Auto* from *Bronner* without overruling the latter.[282] With regard to the justification requirement, the CJ seems to acknowledge that digital gatekeepers wield qualitatively distinct power due to network effects (compared to traditional market power)[283] and experience structural conflicts of interest, and that the features and dynamics of innovation in digital markets require a balancing of competing considerations different from the one in *Bronner*.[284] Hence the old *Bronner* approach, with the underlying natural monopoly economic theory, is not well-founded any more when what is at stake is cumulative, collective innovation.

The evolution of the refusal to supply doctrine highlights the distinctive value of the Argumentative Practice Model. A positivist approach to competition law – whether top-down axiomatic reasoning or bottom-up doctrinalism – cannot explain these legal outcomes. The abuse of dominance jurisprudence functions as a 'chain novel', with its meaning continuously reinterpreted and reshaped through principled argumentation rather than rigid adherence to precedent or formal logic. This process is enabled by competition law's inherent value pluralism, and in turn allows the Court to adapt legal principles to shifting economic and technological realities. The effectiveness of adjudication ultimately depends on the Court's capacity to interpret the purpose of the law in a manner that both aligns with established legal doctrine ('fit') and is normatively defensible ('justification'). From that angle, while *Android Auto* is a welcome addition that clarifies certain aspects of competition law in digital markets, it also leaves important questions unresolved, signalling that further judicial refinement is likely.

The purpose of this section, however, was to show how the Argumentative Practice Model repositions competition law as an interpretive argumentative practice where indeterminacy is

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[281] Martin Fransman, *Innovation Ecosystems* (CUP 2018) 111-154, 155-196.
[282] *Android Auto* (n 257) para 45; Case C-48/22 P, *Google LLC and Alphabet Inc. v European Commission, Judgment of the Court (Grand Chamber)* ECLI:EU:C:2024, delivered 10 September 2024, paras 103, 110-111.
[283] Android Auto's integration with Google Maps and 500+ apps created a 'walled garden' where exclusion stifles ecosystem innovation.
[284] Opinion of AG Jacobs (n 268) paras 46-47, 50-51, 65-70. The Court recognised Google's dual role as platform operator and app competitor (via Google Maps) incentivizes discriminatory conduct. See also Amazon Buy Box commitments. In previous work we have explained this phenomenon through the lens of technofeudalism and raised concerns about private regulatory power. See Makris (n 196) 746-753.

addressed through moral reasoning, not technical fixes.[285] As already noted, this Model treats precedents and economic insights as inputs for deliberative reasoning – not as binding rules or dispositive criteria of legal validity. The preceding analysis showed how by adopting such a model the development of the case law on abuse of dominance could be understood as (more or less successful) principled argumentation not as value neutral application of legal doctrine or economic expertise.

By embracing law's inherent openness and advocating for constructive interpretation, this framework could help competition authorities and courts to adapt to novel market realities (e.g., digital ecosystems, sustainability imperatives) and integrate insights from various disciplines (e.g., complexity science, behavioural economics). Unlike top-down axiomatic or bottom-up doctrinal approaches, which entrench the positivist methods of legal interpretation and economic formalism, the Argumentative Practice Model prioritizes constructive interpretation, epistemic openness and value pluralism. In that way courts and authorities may be able to mediate competing objectives (e.g., market resilience vs. short-term efficiency) and secure its legitimacy without sacrificing its integrity.[286]

Conclusion

This study argued that reasonable disagreements in competition law's indeterminacy is not a flaw but a feature enabling adaptation – an endogenous feature of this field of law that allows legal institutions to harness its conceptual, epistemic and normative openness to secure its integrity. The prevailing strategies to eliminate indeterminacy (top-down axiomatic reasoning and bottom-up doctrinalism) pursue a false ideal: eradicating indeterminacy would ossify competition law into a rigid framework incapable of governing dynamic markets or reconciling pluralistic objectives.

The limitations of top-down axiomatic reasoning and bottom-up doctrinalism stem from their shared economic formalism and positivist foundation. Both approaches rely on economics as a technocratic field of knowledge and assume that law can become fully determined by using social facts, legal texts, past decisions or non-evaluative economics. In other words, both approaches consider that scientific, apolitical, value-free knowledge can make legal decision-making determinate when rules run out – when statutory language or precedent fall short of

[285] Ronald Dworkin, *Taking Rights Seriously* (HUP 1977)22-45, 81-130; HLA Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Clarendon Press 1982) 21-39 (critiquing Bentham's purely technical approach and acknowledges the limits of rule-based reasoning, and noting that indeterminacy often requires recourse to broader moral or political principles), 243-268 (examining how legal reasoning often involves weighing and interpreting principles, not just applying rules, especially when rules 'run out'), 79-105 (discussing the role of moral reasoning in legal interpretation, particularly when technical or utilitarian calculations are insufficient to resolve disputes); Scott Hershovitz, *Law is a Moral Practice* (OUP 2023) 1-24, 55-89 (arguing that legal reasoning is a species of moral reasoning, and that indeterminacy in law is addressed through interpretive, value-laden argument rather than technical fixes), 181-208 (discussing the persistent role of disagreement and interpretation in law, emphasizing that law's openness and contestability are features, not bugs, and require moral deliberation to resolve); Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7(1) *International Journal of Constitutional Law* 2, 13-17 (emphasizing that judges are tasked with reasoning about the best moral interpretation of the law, not merely applying technical rules, especially in constitutional and rights-based cases).
[286] Makris (n 21) 232-242, 242-245.

providing a comprehensive answer to a novel legal issue. Yet, due to their shared foundations both approaches overlook the fact that competition law is built on contested concepts and value judgments and relies on economics as an 'ideological science.' As such, competition law is an 'essentially contested legal field' that needs controlling by referencing to morality. Competition law cases raise questions of morality which cannot be answered exclusively by using economic judgements (e.g. When are prices unfair? What is competition on the merits?).

On the contrary, the Argumentative Practice Model reconceptualises competition law as an interpretive, argumentative practice and shifts focus from imposing artificial determinacy to embracing indeterminacy as the space where deliberative reasoning thrives. This approach recognizes competition law as a dynamic amalgam of value judgments, doctrinal analysis and extra-legal knowledge. Its boundaries are shaped by argumentative practices that reconstruct the law's purpose (e.g., protecting 'effective competition') in light of precedent, societal values, extra-legal knowledge, and market effects.

The Argumentative Practice Model grounded in interpretivism and inspired by Dworkin's 'law as integrity', holds that legal propositions gain validity through narratives that best 'fit' institutional history while 'justifying' outcomes as morally coherent. This model encourages decision-makers to (a) be transparent about the value judgments they weigh; (b) approach economic models as heuristic tools rather than deterministic proofs; and (c) prioritise adversarial testing and procedural legitimacy to identify the best interpretive theory.

By embracing the Argumentative Practice Model, competition law will retain its adaptive vitality and secure its integrity in a world where market power increasingly resides in intangibles like data and algorithms. The pursuit od full determinacy in competition is not only futile but also counterproductive. Instead, it is through structured argumentation and constructive interpretation – where value-judgments intersect with doctrinal and economic reasoning – that this field can fulfil its mandate. Its true strength lies not in unchanging rules, but in its capacity to adapt and remain relevant through thoughtful, reasoned dialogue in an ever-evolving marketplace.