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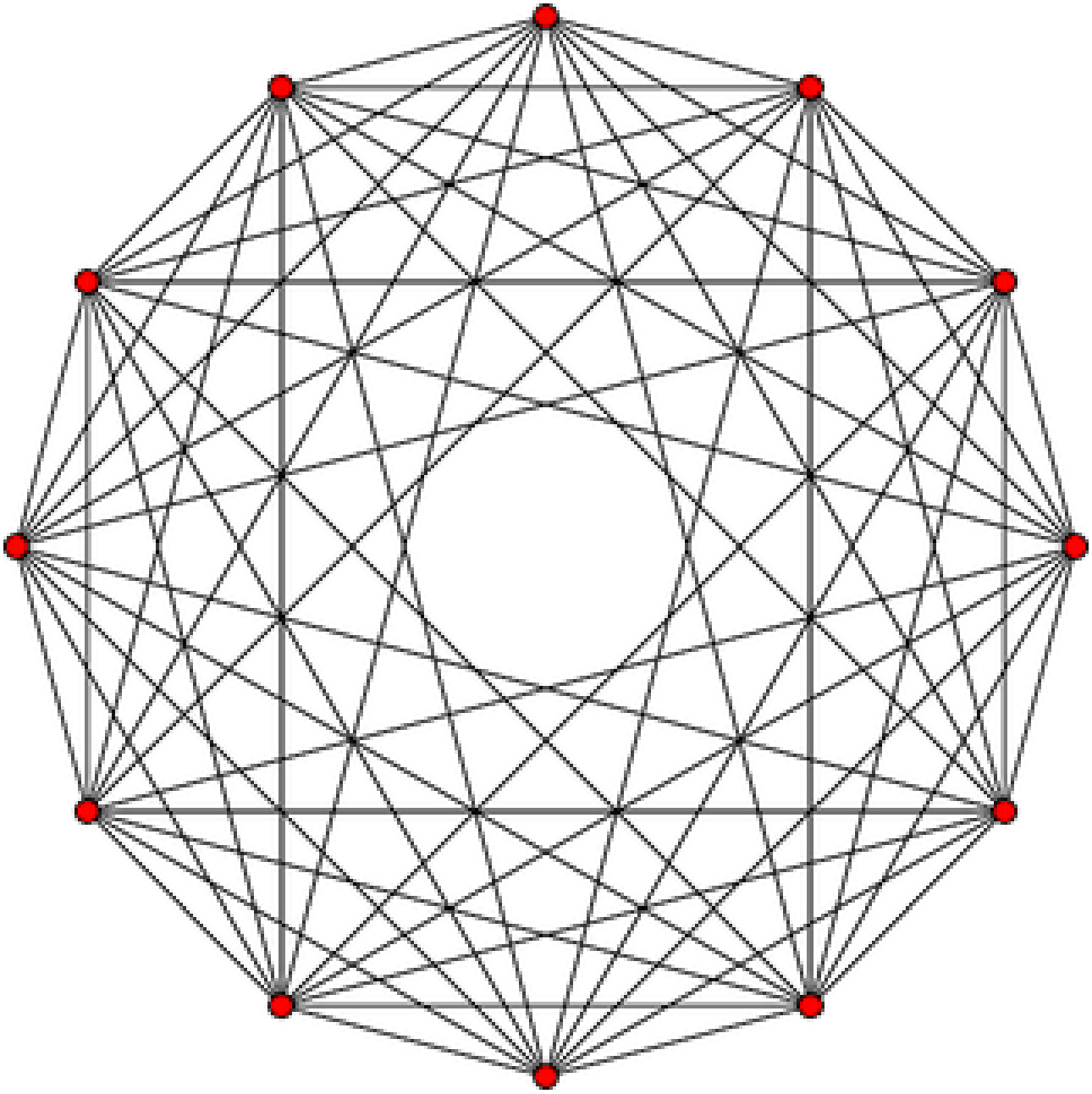

Formalism in Competition Law

Justin Lindeboom

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Formalism in Competition Law

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Abstract: This article analyzes the meaning and role of formalism in competition law. Drawing on general legal theory and philosophy, this article conceives of formalism as decision-making constrained by rules, whereby rules exclude considerations from the decision-making process. It analyzes the degree to which per se rules and the rule of reason in US antitrust law and the category of "by object" restrictions in EU competition law involve formalistic reasoning. It subsequently discusses the relationship between "legal form" and "anti-competitive effects" and the debate on "form-based" versus "effects-based" approaches to competition law. It concludes that "effects-based" approaches to competition law typically involve formalistic legal rules, thus deconstructing the well-known form–effect dichotomy. Finally, this article analyzes the normative relationship between formalism, type 1 and 2 errors and legal certainty, and argues that this relationship is fundamentally shaped by beliefs about institutional competence and the allocation of decisional jurisdiction. The article concludes by arguing against pejorative conceptions of "formalistic" and "form-based" competition law. Competition law, like law in general, is inherently formalistic, albeit to a limited degree. Rather than the empty dichotomy of "form" versus "effect", the central question in competition law is to *which* formalism it ought to be committed.

JEL Classifications: A11, A12, A13, B40, B41, K00, K21, K40, K41, K42

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Formalism in Competition Law

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I. Introduction

Formalism is competition law's scarecrow. For many decades, scholars, practitioners, and courts have argued against "formalistic" or "form-based" approaches in competition law analysis. While many scholars and other commentators alike reject "formalistic" analysis, it is often unclear what is meant by the term. Does it refer to per se prohibitions? Per se prohibitions that are over-inclusive? Any categorization of conduct that abstracts from the unique circumstances of each case?

This article offers an account of the meaning and relevance of formalism in competition law. Its aim is to provide an analysis of how formalism is understood in general legal theory, how this legal-theoretical understanding of formalism applies to competition law, and what role formalism plays in current competition law and doctrine. The article is structured around five claims:

1. The term "formalism" should be understood as referring to decision-making constrained by rules which exclude considerations from the decision-making process. In other words, "formalism" is conceptually contrasted to "all-things-considered" decision-making.[1]
2. While the paradigmatic example of formalism in competition law is the per se rule, the application of per se rules often fails to be genuinely formalistic throughout.[2] The same

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[1] Section II *infra*.

[2] Section III *infra*.

applies more strongly to the notion of a restriction of competition "by object" in EU competition law.[3]

3. The rule of reason is in theory characterized by a low degree of formalism, but in practice has developed into a set of structured, partly conduct-specific rules that are considerably formalistic.[4]

4. The assessment of "anti-competitive effects" is frequently contrasted with a formalistic or form-based approach to competition law. In practice, however, the notion of anti-competitive effects has itself been highly formalized in economic science. Such economic formalism generally translates into formalistic legal rules. As a result, "effects-based" and "economics-based" approaches to competition law have not substituted, but rather reproduced legal formalism in competition law.[5]

5. The normative relationship between formalism, type 1 and 2 errors, and legal certainty, is ultimately shaped by beliefs about institutional competence and the allocation of decisional jurisdiction.[6]

Existing competition law literature has not yet provided a robust, theoretical analysis of formalism in competition law.[7] Since my aim is to provide a conceptual and general account of the meaning and relevance of formalism in competition law, this article does not focus on one legal order specifically. The main, theoretical part of this article will refer to examples from both US antitrust law and EU competition law. However, I do not aim to provide a comparative analysis between US and EU law, nor do I aim to offer a comprehensive analysis of a specific domain of either legal order. The importance of such a task notwithstanding, reasons of space prevent me from analyzing fully the substantive and institutional dimensions of formalism in either US antitrust law or EU competition law as such. By contrast, in this article I only discuss various examples from sections 1 and 2 of the Sherman Act 1890 and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). I will not discuss merger control or other provisions of competition law. The theoretical framework that I use can, to the best of my knowledge, be applied equally to other legal orders and other

[3] Section IV *infra*.
[4] Section V *infra*.
[5] Section VI *infra*.
[6] Section VII *infra*.
[7] On the use of categorization, see in general M.A. Lemley and C.R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207 (2008); I. Lianos, *Categorical Thinking in Competition Law and the "Effects-based" Approach in Article 82 EC*, in ARTICLE 82 EC: REFLECTIONS ON ITS RECENT EVOLUTION (A. Ezrachi ed., 2009). For some useful observations on formalism in specific doctrines of US antitrust law, see B. Orbach, *The Durability of Formalism in Antitrust*, 100 IOWA L. REV. 2197 (2015).

domains of competition law. In this regard, my discussion of the meaning and relevance of formalism in sections 1 and 2 of the Sherman Act 1890 and Articles 101 and 102 TFEU aims to serve as an introductory and exemplifying analysis.

As a second methodological note, I mainly use the term "formalism" as a general, theoretical concept to describe some features of competition law that are sometimes called "form-based" or "formalistic". It might be that those who use the term "form-based" have something in mind that is completely different from my interpretation of formalism.[8] However, I think that my interpretation of formalism is both descriptively accurate in that it explains what is at stake in "form-based" and "formalistic" approaches to competition law, while also adding conceptual clarity. At bottom, I hope to provide a conceptual framework that allows us to analyze the use of formalistic and form-based reasoning in competition law in a neutral, analytical manner.

The remainder of this article is structured as follows. Section II discusses the concept of formalism in general, drawing in particular from the rich literature in legal theory, and conceptualizes formalism as "rule-based decision-making". Section III to V apply this theoretical framework to more familiar concepts and distinctions in competition law: the per se rule in US antitrust law (Section III), the "by object" restriction in EU competition law (Section IV) and the rule of reason (Section V). Section VI connects the concept of legal formalism to that of anti-competitive effects, in particular by critically analyzing the frequently used distinctions between "form" and "effect" and between "form-based" and "effects-based" approaches to competition law. Section VII discusses the relationship between formalism and type 1 and type 2 errors from an institutional perspective, showing that this relationship is more fundamentally about the institutional allocation of decision-making power than about the substantive over- and under-inclusiveness of rules. Section VIII concludes.

II. Formalism and Rule-based Decision-Making: A Theoretical Framework

What is this infamous notion called formalism? In law, the terms "formalism" and "formalistic" appear to derive their meaning almost exclusively from pejorative usage. Hardly anyone would describe themselves as a "formalist".[9] Instead, formalism appears to be a concept primarily

[8] See to this end also Section VI.A *infra*.

[9] For a rather rare exception, A. Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS

used to criticize certain approaches to legal reasoning. In order to conceptualize "formalism" as "rule-based decision-making", this article mainly draws on the work of legal philosopher Frederick Schauer. Before turning to his analysis of formalism and formalistic decision-making, this Section will first situate this approach in the broader literature on legal formalism. This will help to contextualize Schauer's attempt to avoid a pejorative conception of formalism. Indeed, as we shall see, avoiding such a pejorative or otherwise normative stance towards formalism helps fleshing out the characteristics of formalism and formalistic decision-making in (competition) law.

Attempts to grasp the meaning of "(legal) formalism" in a neutral manner have typically resulted in highly abstract definitions. Formalism has been described, for instance, as the "endeavour to treat particular fields of knowledge as if governed by interrelated, fundamental and logically demonstrable principles of science".[10] Alternatively, the process of (legal) formalization has been said to imply that the operations within the system are determined "by specifying solely the graphical forms of the linguistic signs used and their distribution in space".[11] More specifically, and more dramatically, the legal theorist Roscoe Pound described the idea that law is a consistent, interdependent, and fixed system of rules, within which rules were to be applied to concrete cases through deductive reasoning, as a formalistic construct of the lawyer's mind: "the lawyer *believes* that the principles of law are absolute, eternal, and of universal validity, and that law is found, not made…".[12]

From a historical perspective, the endeavor to formalize the law was one of the leading movements in nineteenth-century jurisprudence – most notably associated with Langdellian legal science in the United States, and *Begriffsjurisprudenz* in Germany.[13] However, in law the

AND THE LAW 25 (2018) "Of all the criticisms leveled against textualism, the most mindless is that it is "formalistic." The answer to that is, *of course it's formalistic*! The rule of law is *about* form. If, for example, a citizen performs an act – let us say the sale of certain technology to a foreign country – which is prohibited by a widely publicized bill proposed by the administration and passed by both houses of Congress, *but not yet signed by the President*, that sale is lawful. It is of no consequence that everyone knows both houses of Congress and the President wish to prevent that sale. Before the wish becomes a binding law, it must be embodied in a bill that passes both houses and is signed by the President. Is that not formalism? […] Long live formalism. It is what makes a government a government of laws and not of men" (italics in original).

[10] N. DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 10 (1995).

[11] G. KALINOWSKI, INTRODUCTION À LA LOGIQUE JURIDIQUE: ÉLÉMENTS DE SEMIOTIQUE JURIDIQUE, LOGIQUE DES NORMES ET LOGIQUE JURIDIQUE 31 (1965), cited in M. VAN DE KERCHOVE AND F. OST, LEGAL SYSTEM BETWEEN ORDER AND DISORDER 45 (I. Stewart transl., 1994).

[12] R. POUND, THE FORMATIVE ERA OF AMERICAN LAW 110–111 (1938), cited in B. Tamanaha, *The Bogus Tale About the Legal Formalists*, ST. JOHN'S LEGAL STUDIES RESEARCH PAPER No. 08-0130, 29–30 (2008).

[13] For useful overviews, see e.g. DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 10, ch. 2; T.C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); M. Reimann, *Nineteenth Century German Legal Science*, 31 B. C. L. REV. 837 (1990).

formalist program never acquired the status which it acquired in the natural[14] and the social sciences,[15] including notably economics.[16] In the United States and in Europe, legal formalism became the antithesis of the *Interessenjurisprudenz* and the *Freirechtslehre*, the *libre recherche scientifique* and, most famously, American legal realism.[17] Not only did scholars associated with traditions such as American legal realism endorse the use of empirical methods in legal scholarship, they also rejected commitments to formalistic reasoning, agreeing with judges such as Oliver Wendell Holmes, who did not hide his "realist" perception of law and judicial decision-making:

> "Ours is not a closed system of existing precedent. The law is not such a formal system at all. […] We [the US Supreme Court] legitimately made the law in question and can legitimately change it. Courts must make law".[18]

Nevertheless, the ideas of formalism and formalistic decision-making have not waned. This is perhaps in large part due to the fact that legal language has an inherent commitment to form.[19] The same applies, perhaps even more forcefully, to judicial decision-making, which is based on certain pre-commitments to form-based reasoning, and what it means to "reason like a lawyer".[20] Thus, charges of legal formalism continue to be widespread in critical analysis of the legal status quo. While it is frequently unclear what it means to reason "formalistically", I believe that scholarly literature employing the term "legal formalism" typically has one of two types of formalism in mind. I call these types *sociological* formalism and *analytical* formalism respectively. While the remainder of this article mainly focuses on the application of analytical formalism to competition law, the basic characteristics of sociological formalism will be outlined in order to sharpen the distinction between the two.

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[14] See e.g. S. Russ, *The Unreasonable Effectiveness of Mathematics in the Natural Sciences*, 36 INTERDISC. SCI. REV. 209 (2011), and other contributions to the special issue *Unreasonable Effectiveness of Mathematics*, in 36 INTERDISC. SCIENCE REV. 209–267 (2011).

[15] See e.g. J.T. BERGNER, THE ORIGIN OF FORMALISM IN SOCIAL SCIENCES (University of Chicago Press 1981).

[16] See e.g. M. Blaug, *The Formalist Revolution of the 1950s*, 25 J. HIST. ECON. THOUGHT 145 (2003). See further Section VI.B. *infra*.

[17] For introductory overviews, see J. EDELMANN, DIE ENTWICKLUNG DER INTERESSENJURISPRUDENZ: EINE HISTORISCH-KRITISCHE STUDIE ÜBER DIEDEUTSCHE RECHTSMETHODOLOGIE VOM 18. JAHRHUNDERT BIS ZUR GEGENWART (1967); J.E. Herget and S.Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987); W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (2nd edn., 2012).

[18] Southern Pacific Co v. Jensen, 244 U.S. 205, 221 (1917) (Holmes J., dissenting).

[19] See e.g. E.J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L. J. 949 (1988); R.S. Summers, *How Law Is Formal, and Why It Matters*, 82 CORNELL L. REV. 1165 (1997).

[20] P. Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 805, 817–826 (1987).

A. Sociological and Analytical Formalism

By "sociological formalism," I refer to the idea that the legal system, law-makers, law-appliers and other institutions who determine the content of the law are committed to certain assumptions and presuppositions, as a result of which the legal system becomes "closed" to knowledge that does not conform to those commitments.[21] As a result, certain types of knowledge are disregarded as "extra-legal," and are not taken into account in legal reasoning.[22]

Hovenkamp describes formalism of this kind as the result of a dominant group having achieved its goal of modifying the law largely to its own interests, which then purports to "freeze" the law to protect its social and legal position.[23] This resistance to "opening" the legal system to new insights in non-legal knowledge usually lasts for a fairly long period of time due to the inherently conservative nature of legal adjudication, especially in systems of *stare decisis*,[24] until "the force of the new idea is so powerful that it eventually breaks through".[25]

Analytical formalism is a related, but different, conception of formalism. Here formalism refers not to the macro-level of legal systems and their degree of closure, but to the micro-level of legal reasoning and rule-application. In this regard, many legal theorists have associated legal formalism in this sense with the "mechanical", "deductive", "automatic", or "apolitical" application of rules.[26] According to Duncan Kennedy, for instance, "[*f*]*ormality* consists in the

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[21] The "normative closure" of legal systems has been analyzed in great detail by legal theorists such as Niklas Luhmann and Gunther Teubner. See e.g. AUTOPOIETIC LAW – A NEW APPROACH TO LAW AND SOCIETY (G. Teubner ed., 1987); G. TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (1993); N. Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419 (1992); N. LUHMANN, LAW AS A SOCIAL SYSTEM (2004). In a competition law context, what I describe as "sociological formalism" has been extensively theorized and criticized by Stavros Makris in S. Makris, *Openness and Integrity in Antitrust*, 17 J. COMP. L. & ECON. 1 (2021); and S. Makris, *EU Competition Law as Responsive Law*, CAMBRIDGE YB. EUR. LEG. STUD. 1 (2021), advance access at https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/abs/eu-competition-law-as-responsive-law/0E37519F97926BCBB6B0768C9C908AC6.

[22] On balancing openness and closedness in competition law systems, see Makris, *Openness and Integrity*, *supra* note 21, with further references.

[23] H. HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT 1870–1970 6–7 (2015).

[24] Legal adjudication is "conservative" in the sense that courts usually apply, or are at least constrained by, pre-existing legal norms; they do not decide each case, unconstrained by legal norms, on the basis of its own, ad hoc merits. The conservative aspect of adjudication and rule-application in general is reinforced strongly by systems of precedent and *stare decisis*, which require courts – with varying degrees of strictness – not only to decide on the basis of pre-existing rules but also to decide new cases equally to previously decided cases, even if it has been established that the previous case was wrongly decided. However, insofar pre-existing legal norms do not, or not entirely, determine the outcome of the case, courts generally have to decide the case based on "merits-based reasoning according to law". See Justin Lindeboom, *Rules, Discretion, and Reasoning According to Law: A Dynamic-Positivist Perspective on Google Shopping* (2022) 13 J. EUR. COMP. L. & PRAC. (forthcoming).

[25] HOVENKAMP, THE OPENING OF AMERICAN LAW, *supra* note 23 at 6–7.

[26] See e.g. D. Kennedy, *Legal Formality*, 2 J. LEG. STUD. 351 (1973); M. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985); R.A. Posner, *Legal Formalism, Legal Realism, and the*

attempt to accomplish substantively rational results – i.e., to achieve outcomes that 'maximize' a set of conflicting purposes – through the substantively rational formulation and mechanical application of rules rather than directly through substantively rational decision processes".[27]

The charge of formalism of this "analytical" kind has itself been criticized widely in the legal-theoretical literature, both philosophically and historically.[28] According to legal philosopher Andrei Marmor, for example, formalism "is taken to suggest that the application of rules is a matter of *logical inference* expressible in terms of analytical truths".[29] However, as Marmor observes, there is nothing mechanical about solving so-called "easy cases",[30] whatever those may be.[31] Applying rules to facts is never "mechanical": evaluative choices are always required.[32] To the extent that applying a norm to a fact appears so straightforward and obvious that either interpretation of the norm is not necessary or that there clearly is only one correct interpretation, theorists in literary theory and hermeneutics have demonstrated convincingly that, even then, meaning and interpretation are informed by value-laden pre-commitments[33] and interpretive practices.[34]

Moreover, whether any legal theorist has ever genuinely committed to the idea of mechanical application may be doubted. According to Brian Tamanaha, legal formalism in this sense has probably never existed except in the minds of those who criticized it.[35] Tamanaha concludes that the anti-formalist literature typically traces back to Roscoe Pound, Jerome Frank

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Interpretation of Statutes and the Constitution, 37 CASE WEST. RES. L. REV. 179 (1986); P.L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions – A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987); R. MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 79–82 (2015).

[27] Kennedy, *Legal Formality*, *supra* note 26 at 358.

[28] E.g. H.L.A. HART, THE CONCEPT OF LAW ch. 7 (3rd edn, 2012); A. Marmor, *No Easy Cases*, 3 CANADIAN J. L. & JURISPR. 61 (1990); Tamanaha, *The Bogus Tale*, *supra* note 12; B.Z. TAMANAHA, BEYOND THE FORMALIST–REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING chs. 3, 4, and 9 (2009).

[29] Marmor, *No Easy Cases*, *supra* note 28 at 64.

[30] *Id*. at 64–65.

[31] See also R. DWORKIN, LAW'S EMPIRE 350–354 (1986).

[32] To give just two examples: first, notwithstanding the first-blush, semantic meaning of a legal norm, its application in a present case is invariably influenced by previous interpretations of that rule. See A. SCALIA AND B.A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 412–414 (2012). Second, any rule-application requires the taking into account of the legal context of the rule, which might be broader or narrower construed. See e.g. R.H. Fallon, *The Meaning of Legal "Meaning" and its Implications for Theories of Legal Interpretation*, 82 U. CHIC. L. REV. 1235 (2015). The sheer *possibility* of analytical truths in general has been influentially questioned by W.V.O. Quine more than half a century ago: W.V.O. Quine, *Two Dogma's of Empiricism*, 60 PHILOSOPHICAL REV. 20 (1951).

[33] H.-G. GADAMER, TRUTH AND METHOD 306–318 (2nd edn., 2004) on the pre-commitments and prejudices constituting the "interpretive horizon" of the interpreter, "beyond which it is impossible to see" (at 316).

[34] For the idea that interpretation always takes place within constraining structures and practices of "interpretive communities", see S. FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1982). According to Fish, "a meaning that seems to leap off the page, propelled by its own self-sufficiency, is a meaning that flows from interpretive assumptions so deeply embedded that they have become invisible" (S. Fish, *Still Wrong After All These Years*, in DOING WHAT COMES NATURALLY 358 (1989).

[35] Tamanaha, *The Bogus Tale*, *supra* note 12 at 5–6; 83–89.

and sometimes Oliver Wendell Holmes.[36] However, the nineteenth century lawyers and legal theorists whom they criticized could hardly be seen as committing to the nonsensical idea that law can be "mechanized" to the extent that its intricate system of rules would apply itself to cases.[37] Since the so-called legal formalists from the nineteenth century were not at all committed to mechanical jurisprudence, as Tamanaha demonstrates, analytical formalism in the sense of mechanical decision-making is an unproductive theory even as an archetypical position.

If "legal formalism" is to have any useful meaning as an analytical term, we should dispose of the overly pejorative and obscure manner in which it is used to criticize "mechanical" decision-making. Instead, we should scrutinize neutrally the sense in which the term "legal formalism" is used, in order to dissect its *conceptual* meaning. The most elaborate analysis of legal formalism of this kind is provided by legal philosopher Frederick Schauer, whose analytical discussion of legal formalism will be used as the main theoretical framework of this article.

B. Demystifying Formalism: Rule-Based Vis-à-Vis All-Things-Considered Decision-Making

Schauer aims to provide a neutral, conceptual understanding of the term "formalism". Based on the manner in which the concept is used in legal discourse, he conceives of the essence of formalism as the idea that the choices of decision-makers are *constrained by rules*.[38]

For Schauer, rules are devices which mediate between certain purposes and certain decisions which (are supposed to) further these purposes.[39] In the absence of rules, says Schauer, given certain purposes that they may want to achieve, decision-makers could decide on the basis of all relevant considerations of the individual case. Rules restrict the decision-maker's ability to take into account some of these considerations. They exclude considerations which might have been relevant to the decision-maker in the absence of rules, and the rules themselves become reasons for deciding in a particular manner.[40] Formalism is therefore identical to "ruleness" and "rule-based decision-making".[41] It is important to note that this

[36] *Id.* at 5–6.
[37] *Id.* at 66–75.
[38] Frederick Schauer, *Formalism*, 97 YALE L. J. 509 (1988).
[39] *Id.* at 520–535.
[40] *Id.* at 537.
[41] *Id.* at 537–538.

conception of formalism does not purport to describe "mechanical" decision-making. It is true that formalism simplifies decision-making by only relying on the rule itself rather than the purposes underlying the rule. However, decision-makers still need to discern the content of the rule, which may involve some evaluative choices, if only relating to the literal meaning of the words contained in the rule.[42] Furthermore, rules may be more or less formalistic in excluding more or less considerations. While some rules may be so specific that their application could indeed be deemed virtually mechanical, other rules only exclude some considerations, while including many others in the analysis.

What is crucial, then, is the fact that a rule does not supply the *whole* array of considerations that are relevant for the purposes of the rule to the decision-maker. If this were the case, the rule itself would be superfluous because the decision-maker might as well decide on the basis of these considerations directly.[43] Formalism, therefore, is the phenomenon that a rule is taken as a reason for decision "independent of the reasons for decision lying *behind* the rule".[44]

In this regard, the conceptual opposite of formalism is what we might call "all-things-considered" decision-making.[45] In the absence of rules, a decision-maker would decide on the basis of all relevant considerations, which include the factual circumstances of the case, the consequences of each of the possible decisions to be made, and beliefs about values, norms and objectives that are relevant to the decision. A rule, by removing one or more of these considerations from the balance of reasons, simplifies the decision-making process by requiring the decision-maker to abstract from these excluded considerations.[46]

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[42] See *supra* notes 32–34.

[43] There are close similarities between Schauer's analysis of the function of rules and legal philosopher Joseph Raz's theory of the authoritative nature of law. For Raz, one of law's necessary conditions is that it claims legitimate authority over its subjects. In order for law to be able to make such a claim, it must be *capable* of claiming legitimate authority. This is only possible, says Raz, if law mediates between the moral reasons that apply to the law's subjects and the decisions which those subjects subsequently make in order to comply with those reasons. The law performs this mediating function by pre-empting and thus replacing the moral reasons that apply to the law's subjects, so that these subjects subsequently act on the basis of the law's prescriptions rather than on the basis of the moral reasons which the law pre-empts. See generally J. RAZ, THE AUTHORITY OF LAW chs. 1 and 2 (1979); J. RAZ, THE MORALITY OF FREEDOM ch. 2 and 3 (1988); J. Raz, *Authority, Law, and Morality*, in ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS (1995).

[44] Schauer, *Formalism*, *supra* note 38 at 537. Tamanaha criticizes Schauer's account of formalism on the ground that the purpose of the rule (i.e. the "reasons for decision lying behind the rule") is almost always taken into account to some degree (TAMANAHA, BEYOND THE FORMALIST–REALIST DIVIDE, *supra* note 28, ch. 9). This critique does not target the conceptual accuracy of Schauer's approach but rather aims to cast doubt on its *empirical* accuracy, i.e. the extent to which Schauer's conception of formalism is relevant to legal decision-making. In my view, the answer to that question must be affirmative, but I cannot discuss the details of Tamanaha's critique here in more detail.

[45] Schauer, *Formalism*, *supra* note 38 at 536–538.

[46] In F. SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE chs. 1–3 (1991), Schauer refers to rules as "entrenched generalizations". Rules are

It follows that rules are interesting precisely in situations where applying the rule leads to a different result than deciding on the basis of the reasons which justify the rule.[47] The usual legal-theoretical example is a rule that says "No vehicles in the park".[48] If the purpose of the rule is to ensure safety and tranquility in the park, using the rule to prohibit cars or motorcycles driving through the park is an unproblematic case of rule-following; based on the objectives of park safety and tranquility, one would most likely also want to prohibit cars and motorcycles from entering the park even if the rule itself had not existed. Rule-following becomes more interesting were, for instance, an old war tank to be placed at a war memorial in the park. While such a tank would threaten neither safety nor tranquility, the rule arguably still prohibits it being placed in the park, for it is clearly a "vehicle".

The "no vehicles in the park" example shows that legal formalism is both *constraining* and *liberating*. Rules constrain because the decision-maker ought not to take into account certain considerations: if a judge concludes that an old war tank qualifies as a "vehicle" and applies the rule against vehicles in the park to a case involving an old war tank memorial in a park, the judge cannot but conclude that the rule has been violated, even if the judge realizes that this is not the purpose of the rule. The judge may obviously try to avoid this formalism by concluding that an old war tank is not a "vehicle" for the purpose of the rule. Once the judge has concluded that an old war tank *must* be qualified as a vehicle, however, the rule prevents the judge from concluding that the rule has not been violated. Similarly, if there is a formalistic prohibition against naked horizontal price-fixing, positive effects cannot be taken into account even if such effects might otherwise be relevant.[49] Rules also liberate the decision-maker, however, because (s)he need not take into account certain considerations. A rule against vehicles in the park liberates the judge from taking into account numerous factors that could count in favor or against prohibiting an old war tank in the park, just as the prohibition against naked horizontal price-fixing liberates judges from having to weigh all the positive and negative effects of all price-fixing agreements.[50]

"generalizations" because they require the decision-maker to abstract from some of the particular circumstances of each case, and they are "entrenched" because according to their normative logic, they ought to be followed regardless of whether the outcome in a specific case is desirable or undesirable. Whether there is a *genuine* obligation to follow a rule if it leads to an undesirable outcome is a different matter which cannot be discussed here.

[47] *Id*.

[48] The hypothetical "no vehicles in the park" rule gained prominence in the Hart–Fuller debate: H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

[49] See Section III *infra*.

[50] I discuss this point in more detail in the subsequent Sections *infra*, esp. Sections III, IV, V and VII.

At this point it is useful to link Schauer's conception of formalism as rule-based decision-making to the familiar distinction between rules and standards. If formalism is decision-making constrained by rules, and rules discard otherwise relevant considerations from the decision-making process, how does a standard fit into this picture?

First and foremost, rules and standards are both legal norms.[51] A norm may be defined in this regard as a prescriptive statement which expresses what ought to be done.[52] Some authors distinguish between a rule and a standard based on the question of whether the norm is given content *ex ante*, that is, before its application to a concrete case, or *ex post*, that is, in the application itself.[53] This distinction may, however, be criticized on the ground that standards always need to incorporate a sufficient degree of content *ex ante* in order to be recognized as norms, while the meaning of even the most rigid of rules will always be partly be determined by their application (*ex post*). Second, rules and standards tend to converge: a standard, such as section 2 of the Sherman Act 1890, will tend to incorporate case-specific rules as jurisprudence develops, for instance by the introduction of rules which determine whether some business behavior constitutes "monopolization" in the sense of section 2.[54] Conversely, rules tend to naturally develop into standards. Negative or absurd consequences of applying a rule to a case tend to lead courts to develop exceptions, evidence-suppressing rules, or unwritten justifications which aim to avoid the seemingly deductive structure of the legal syllogism.[55]

[51] In addition to "rules" and "standards" some authors distinguish "principles". Some authors would distinguish principles from rules based on the fact that they are more general or abstract (see e.g. J. Raz, *Legal Principles and the Limits of Law*, 81 YALE L. J. 823 (1972)). Others have distinguished principles from rules in a qualitative manner. According to Dworkin, for instance, principles are different from rules not only because they do not operate in an all-or-nothing manner like rules, but also and arguably more importantly because unlike rules, they are usually unwritten and in any case never exhaustively supplied by positive law. See R. Dworkin, *The Model of Rules I* and *The Model of Rules II*, both reprinted in TAKING RIGHTS SERIOUSLY (1978).

[52] For a general discussion including various conceptions of norms, see R. ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 20–25 (2002).

[53] L. Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992).

[54] F. Schauer, *The Convergence of Rules and Standards*, NEW ZEALAND L. REV. 303 (2003).

[55] Examples include the possibility for dominant undertakings to provide an "objective justification" for their abusive conduct. While Article 102 TFEU does not include a written possibility to justify abuse akin Article 101(3) TFEU, the ECJ has interpreted Article 102 TFEU as encompassing an implied objective justification. See, in this regard, e.g. Microsoft Corp. v. Commission of the European Communities, T-201/04, EU:T:2007:289, para. 1144; Konkurrensverket v. TeliaSonera Sverige AB, C-52/09, EU:C:2011:83, para. 76; Post Danmark A/S v Konkurrenceradet; Post Danmark A/S v. Konkurrenceradet, C-209/10, EU:C:2012:172, para. 41. The case law-based justifications in EU free movement law may be understood in the same fashion. These case law-based justifications add to the written derogations in Articles 36 (free movement of goods), 45(3) (workers), 51 and 52 (establishment and services) and 65 (capital) of the Treaty on the Functioning of the European Union (TFEU), and cannot be inferred from either the Treaty prohibitions or the aforementioned Treaty derogations. See e.g. Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, C-55/94, EU:C:1995:411, para. 37, and see further C. BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS 503–513 (2019).

Connecting the rules–standards distinction to Schauer's account of rule-based decision-making, the distinction could thus be rephrased as a sliding scale: the more considerations are excluded from the decision-making process, the more "rule-like" a norm is, while the less considerations are excluded from the decision-making process, the more "standard-like" a norm is.[56] In this article, I typically refer to "formalism" and "formalistic" or "rule-based" decision-making as opposed to "all-things-considered" decision-making. It is crucial, however, to note that formalism as rule-based decision-making is always a matter of degree: the more considerations a norm removes from the decision-making process, the more formalistic the decision-making process of applying that norm. Nonetheless, taking the dichotomy between "formalistic" and "all-things-considered" decision-making as an analytical starting point remains useful, in my view, to flesh out the key characteristics of formalism in competition law, and to analyze to what degree competition law doctrine is formalistic.

To take this point further, Schauer observes that in most legal systems "formalism" is never absolute. There are always situations in which the application of a rule to a case entails such an absurd result that it becomes impossible to accept the outcome. In such situations, the decision-maker usually refrains from applying the rule all together. It is crucial, however, that such situations cannot extend to all situations in which the outcome of applying the rule would be "wrong" in light of the rule's purpose: if that were the case, as noted above, the rule would lose its relevance. Schauer calls this understanding of rule-following "presumptive formalism," and summarizes it by saying that a rule-based outcome can be resisted when other norms, including the purposes underlying the particular rule that has been applied, offer "especially exigent reasons for avoiding the result generated by the presumptively applicable norm".[57]

"Presumptive formalism" should be clearly distinguished from the combination of a rule and an exception or derogation to that rule. An exception is a second, *separate* rule which can declare the result of the first rule inapplicable.[58] The fact that an exception is a separate rule is evidenced, among others, by the fact that the legal burden of proof is usually borne by the

[56] See also Raz, *Legal Principles*, *supra* note 51; F. Schauer, *Prescriptions in Three Dimensions*, 82 IOWA L. REV. 911 (1997).
[57] Schauer, *Formalism*, *supra* note 38 at 547.
[58] One may also conceive of the main rule and possible exceptions to that rule as parts of one single rule which includes, for instance, a shift in de legal burden of proof. In that case, however, presumptive formalism can still be distinguished from such a situation because presumptive formalism, as Schauer defines it, involves the formalistic application of a single rule – however simple or complex its formulation and internal structure – and the possibility that a decision-maker in extreme situations does not apply the rule because the outcome is unacceptable. The possible "escape" from formalism to which the "presumptive" in "presumptive formalism" refers, in other words, is *not* part of the rule or set of rules itself. I am thankful to Martin Holterman for raising this point.

person subject to the first rule.[59] By contrast, presumptive formalism means that the decision-maker, instead of deciding on the basis of all relevant considerations, decides by following a rule which excludes some considerations from the balance of reason, unless that result would be unacceptable to such an extent that the decision-maker refrains from applying the rule at all.[60]

C. The Relevance of Formalism to Competition Law

Before moving to an in-depth analysis of the relevance of formalism in various parts of competition law, the remainder of this section aims to clarify some aspects of Schauer's conception of formalism as I understand it, its limits, and how it can be relevant to competition law.

In accordance with Schauer's theory, I conceive of formalism as a descriptive theory of rule-based legal reasoning. It is not a theory of law in general: it does not say anything about the criteria of legal validity, the relationship between positive law and natural law, the relationship between legal knowledge and extra-legal knowledge in general, and numerous other questions that could be included in more general theories of law. Formalism is only about the characteristics of (legal) reasoning based on rules.

It is also important to emphasize, especially in a competition law context, that formalism is not only about statutory rules. Most competition law provisions are vague, "standard-like" norms that, in themselves, seem to exclude very few considerations from their application to concrete cases. Section 1 of the Sherman Act 1890 as such, for example, is so abstract that it can only be applied to concrete cases by taking into account its purposes, whatever they may be. If formalism were only applicable to legal reasoning based on statutory rules, arguably it would hardly be relevant to any competition law system.[61]

However, nothing in Schauer's conception of formalism resists its application to judicially crafted rules. Both US antitrust law and EU competition law, as well as numerous other competition law systems, largely comprise case law, and that case law may or may not include rules that operate as legal formalisms. In light of this characteristic of competition law, the

[59] See e.g. Article 2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 on the burden of proof in respect of Article 101(1) and 101(3) TFEU respectively.
[60] For some examples in competition law, see Sections III–VI *infra*.
[61] I am thankful to an anonymous reviewer for pressing me on this point.

remainder of this article focuses almost exclusively on formalistic (and non-formalistic) reasoning in respect of *case law-based* rules.

Such judicially crafted rules include, in particular, substantive legal tests. Examples of formalistic substantive legal tests are the rule that a naked horizontal price-fixing agreement is an unreasonable restraint of trade (in US antitrust law),[62] and the rule that restrictions of competition by object are by definition appreciable (in EU competition law).[63]

It should be noted, of course, that purpose is usually in the back of our minds. We could apply a per se prohibition against naked horizontal price-fixing *knowing* that doing so advances the purposes justifying the prohibition. Courts applying that rule know that the rule was crafted because all or virtually all naked horizontal price-fixing agreements are detrimental to competition. However, there is a crucial distinction between taking into account purpose in *creating* the rule and taking into account purpose in *applying* the rule. No substantive legal test in competition law has been created without taking into account one or more purpose(s).[64] If the resulting substantive legal test is rule-like, however, it is capable of being applied formalistically without actively taking into account these underlying purpose(s). While few if any decision-makers in competition law would be unaware of the purpose of the per se prohibition against naked horizontal price-fixing, that prohibition can nevertheless be applied in a formalistic manner, a point which I discuss in more detail in Sections II and III below.

Not all legal formalisms are substantive legal tests, and not all substantive legal tests are legal formalisms. As to the first point, procedural rules and rules of evidence can also exclude more or less considerations from the decision-making process. While they can likewise be more or less formalistically, this article mainly focuses on formalism in substantive legal tests. As to the second point, the remainder of this article provides several examples of substantive legal tests that are formalistic to a greater or lesser degree. At this stage, a few examples suffice to illustrate the basic point. In EU competition law, the substantive legal test applicable to price discrimination by dominant undertakings expressly *includes* "all the circumstances" of the

[62] United States v. Trenton Potteries, Co., 273 U.S. 392 (1927).
[63] Expedia Inc. v. Autorité de la concurrence and Others, C-226/11, EU:C:2012:795, para. 37.
[64] To put this point differently, creating, amending, refining or overruling a substantive legal test almost inevitably involves what Stavros Makris calls "constructive teleological interpretation". See Makris, *Openness and Integrity in Antitrust*, *supra* note 21; and *EU Competition Law*, *supra* note 21. However, once that substantive legal test has been crafted, constructive teleological interpretation may no longer be needed to apply it to subsequent cases, at least insofar as the test is sufficiently clear. Although it is of course always *possible* to interpret a rule teleologically, there is a point at which taking into account purpose amounts in effect to deciding on the basis of that purpose directly, instead of on the basis of the rule.

case.[65] Therefore, this substantive legal test has a low "rule-like" character and is not formalistic. The same applies to the guidelines provided by *Société Technique Minière* on the application of Article 101(1) TFEU to exclusive distribution agreements.[66] By contrast, the *Bronner* criteria applicable to a refusal to provide access to a facility by a dominant undertaking includes the criterion that access to the facility is "indispensable".[67] This rule excludes various considerations from the decision-making process that would otherwise be relevant, such as evidence that a refusal to provide access to an important – but not strictly indispensable – facility weakens the functioning of markets. This makes the indispensability criterion formalistic.

A final, but no less important point is the *descriptive* nature of formalism as a theory of rule-based decision-making. Formalism, for the purpose of this article, describes what it means to apply a rule, or to use a phrase more familiar to competition law, to use "form-based" legal reasoning. The theory aims to provide conceptual clarity. It does not *prescribe* how courts should decide cases, or even how they should apply rules. As noted above, the vagueness of the most important statutory competition law provisions makes non-formalistic, purpose-based reasoning indispensable in creating more specific substantive legal tests, which can in turn be more or less rule-like, and can be applied more or less formalistically.

Moreover, the existence of a rule does not mean that all subsequent cases could or should be solved formalistically. Rules often leave open many questions, and future courts can enrich already existing rule(s) with additional ones. For example, in *Höfner and Elser* the ECJ established a rule that defines an "undertaking" for the purpose of Articles 101 and 102 TFEU as "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".[68] This definition can be formalistically applied to subsequent cases concerning the question of whether a certain entity counts as an "undertaking". The rule, however, does not answer questions regarding the liability of parental companies for their subsidiaries, to name just one issue. Those questions simply cannot be answered by applying the rule in *Höfner and Elser*, and require the introduction of additional rules regarding, for

[65] Post Danmark A/S v Konkurrencerådet, C-209/10, EU:C:2012:172, para. 26; MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência, C-525/16, EU:C:2018:270, para. 31.
[66] Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH (M.B.U.), 56/65, EU:C:1966:38, p. 249.
[67] Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG, C-7/97, EU:C:1998:569. On how subsequent case law refined this formalistic rule, see Section VII below.
[68] Klaus Höfner and Fritz Elser v Macrotron GmbH, C-41/90, EU:C:1991:161, para. 21.

example, the notion of a single economic unit.[69] My conception of legal formalism, in other words, is limited to the manner in which existing legal rules are, or can be, applied.

Even when a large body of case law-based rules that covers most cases has been created, however, formalism does not *require* courts to continue applying these rules. Such a requirement is strongly associated with the abovementioned notion of sociological formalism. By contrast, in this article's conception of analytical formalism, formalism does not prescribe or require anything. It shows what it *means* to apply a rule formalistically. In this regard, it is true that rules, as mentioned above, are norms. They are themselves prescriptive. A legal formalism, therefore, can be understood as prescribing courts to apply that legal formalism instead of deciding on the basis of all relevant considerations. But this does not mean that this is what courts actually do, nor what they *should* do, all-things-considered.[70] As noted above, courts have always found ways to avoid the formalistic application of rules. Whether or not this is legitimate for courts to do is a question of political and judicial morality beyond the scope of this article. It suffices to emphasize that formalism as a descriptive theory does not require courts to commit unabashedly to formalistic decision-making, while presumptive formalism recognizes that courts do not always do so. This descriptive approach may be considered a virtue, however, since it allows us to analyze the prevalence and salience of formalism and formalistic reasoning in competition law in a neutral manner.

III. Formalism and Per Se Rules in Competition Law

One of the primary distinctions in competition law analysis is the one between the "per se" rules and the rule of reason. This distinction shares affinities with the distinctions between "rules" and "standards," as well as between "formalistic" and "effects-based" analysis. Some authors indeed conflate "standards" and "rule of reason", as well as "rules" and "per se rules".[71] This Section aims to scrutinize to what extent the per se rule can be characterized as a legal formalism in the sense of Section II above. To concretize this discussion, reference will be made to the functioning of the per se rule in US antitrust law.

[69] See e.g. Akzo Nobel NV and Others v Commission of the European Communities, C-97/08, EU:C:2009:536, paras. 58–61.
[70] What courts should do "all-things-considered" is a moral question that should be distinguished from the question what they should to "according to law". See generally J. Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS 1 (1993).
[71] See e.g. R.A. POSNER, ANTITRUST LAW 39 (2nd edn., 2001).

In US antitrust law, the per se prohibition of certain types of business conduct appears to be a typical example of a legal formalism. In our theoretical framework, it is recalled, "legal formalism" or "form-based reasoning" is not juxtaposed to effects-based reasoning. The relevant comparison, rather, is that between legal formalism and all-things-considered decision-making. In the context of per se rules, this means that decision-makers are prevented from taking all considerations into account when determining whether some conduct is anti-competitive or "in restraint of trade". Thus, while the US Supreme Court had ruled in *Standard Oil* that sections 1 and 2 of the Sherman Act 1890 always ought to be applied as a "rule of reason",[72] subsequent case law concluded that certain types of conduct are unreasonable irrespective of evidence to this end in the specific factual circumstances of the case. For instance, in *Trans-Missouri Freight Association* the Supreme Court held that horizontal price-fixing agreements are illegal under section 1

> "without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce, or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it".[73]

This passage provides an example of a limited legal formalism. It states that the *purpose* or *intent* of the parties is irrelevant in establishing whether a price-fixing agreement restricts trade. The Supreme Court did not rule that all considerations other than the plain content of the agreement – for instance efficiency effects – are irrelevant in applying section 1 of the Sherman Act 1890 to horizontal price-fixing agreements, but in excluding purpose and intent the Supreme Court formalized section 1 at least in that regard.

In later case law, however, the Supreme Court expanded the legal formalism applicable to horizontal price-fixing agreements. In *Trenton Potteries, Co.*, for instance, the Court concluded that no case-specific inquiry into the reasonableness of the agreement was relevant:

> "[Price-fixing agreements] may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman

[72] Standard Oil Co. v. United States, 221 U.S. 502, 516–517 (1911).
[73] United States v. Trans-Missouri Freight Association, 166 U.S. 290, 342 (1897).

> Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions".[74]

The legal formalism present in *Trenton Potteries* is that the application of section 1 of the Sherman Act 1890 to horizontal price-fixing agreements does *not* involve an analysis of whether, all-things-considered, a particular price-fixing agreement is anti-competitive (i.e. an unreasonable restraint of trade). Based on *Trenton Potteries* as such, the sole fact that something is a price-fixing agreement suffices to trigger the illegality of the agreement, without regard to the circumstances of the facts of the case and the relevant effects on competition. As I discuss below, the rigidity of this formalism subsequently caused the Supreme Court to restrict the scope and meaning of this rule.

Another example can be found in *Dr. Miles*. In that case, the Supreme Court effectively subjected resale price maintenance (RPM) agreements to a per se prohibition:

> "But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void […] The complainant's plan falls within the principle which condemns contracts of this class".[75]

The relevant formalism here is that all agreements of the "class" of RPM agreements are prohibited, similarly to the "class" of horizontal price-fixing agreements. Intuitively, therefore, it seems that legal formalism is generally about subsuming some general "class" or "category" of conduct to the relevant competition law provision, without an analysis of all the circumstances of individual cases within that class.

However, conceiving formalism as subsuming particular types of conduct under a pre-existing class is over-inclusive. This is because *any* application of a legal norm to a specific case involves the application of "classes" – including categories in legal provisions – to specific facts.[76] At the most general level, section 1 of the Sherman Act 1890 prohibits agreements that fall within the class of "agreements in restraints of trade", just as Article 101(1) TFEU refers

[74] United States v. Trenton Potteries, Co., 273 U.S. 392, 397–398 (1927).
[75] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911).
[76] On the syllogistic nature of legal reasoning, see generally e.g. A.G. Guest, *Logic in the Law*, in OXFORD ESSAYS IN JURISPRUDENCE (A.G. Guest ed., 1961); N. MacCormick, *Legal Deduction, Legal Predicates, and Expert Systems*, 5 INT'L J. SEMIOTICS L. 181 (1982); B. Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111 (2010).

to the class of agreements that have as their object or effect the restriction of competition. We therefore need a more specific description of what, if anything, is formalistic about per se rules.

Per se rules are formalistic, I submit, because *assigning the conduct to the relevant class is done on the basis of the plain meaning of the class, without enquiring whether it is justified to do so, all-things-considered*.[77] In other words, formalism requires the decision-maker to apply the plain meaning of the class to the conduct without asking the question of whether, on the basis of all relevant considerations, it is justified to assign the conduct to the class.

To use the example of horizontal price-fixing, it seems that the fact that an agreement is a horizontal price-fixing agreement can be inferred from the plain meaning of the term "horizontal price-fixing". A non-formalistic approach to horizontal price-fixing, by contrast, would be to analyze the facts of the conduct in light of the purpose of the Sherman Act 1890, which may involve an analysis of the actual or likely anti-competitive effects of the conduct.

Most, if not all of the time, formalism requires not only applying the plain meaning of the class to the conduct, but also applying the plain meaning of the conduct itself. This is because any enquiry into the legal or economic context of some conduct requires a choice as to *which* context is taken into account and which context is left out. Such choices can only be made, however, on the basis of the *purpose* of the relevant class or legal provision, which is what formalism is precisely supposed to prevent. Therefore, if the factual context is relevant in some way, formalism can only be maintained to the extent that the relevant rule specifically describes which legal and economic context of the conduct is relevant to the rule.[78]

In light of the formalistic approach in *Trenton Potteries*, once something is qualified as horizontal price-fixing, no other circumstances need to be taken into account to warrant the conclusion that the agreement violates section 1 Sherman Act 1890. In contrast, in the absence of such specific formalisms, the fact that an agreement is a "restraint of trade" can only be inferred from all of the specific circumstances of the case, including its context and the possible effects of the agreement. In turn, such an analysis can only be done on the basis of the purposes

[77] The "relevant class", in this regard, could be the text of a legal provision itself – e.g. "restraint of trade" – or it could be an intermediary class that connects the conduct to the legal provision – e.g. "horizontal price-fixing". Whether such intermediary classes play a role in the application of rules to specific cases influences the complexity of legal reasoning. It does not, however, appear to be relevant to the degree of formalism by itself: formalism can play a role both in assigning facts to intermediary classes, or to the classes of the legal provision directly, or in assigning intermediary classes to classes contained in the legal provision itself. But we would only call a legal inference formalistic if it is entirely formalistic at all stages of the reasoning.

[78] Throughout EU competition law, and arguably in most of US antitrust law except, possibly, the application of section 1 Sherman Act 1890 to naked horizontal price-fixing and naked horizontal market-sharing, the legal and economic context of conduct is relevant, while the available legal rules and case law do not specify exactly *which* context is relevant. This would entail that genuine formalism is very rare in both US antitrust law and EU competition law, a point which will be further developed in the subsequent Sections.

of the Sherman Act. This is because, at the rule-level, the relevant class of "(unreasonable) restraint of trade" is insufficiently precise to subsume any type of conduct to the class *without* enquiring into the purposes of the provision.

Per se rules show that, as also noted above, legal formalism is both *constraining* and *liberating*. If a judge is confronted with a case concerning naked horizontal price-fixing, the court cannot but prohibit that conduct, even if the judge considers that the agreement has positive effects.[79] Rules also liberate the decision-maker, however, because (s)he need not take into account certain considerations, such as efficiency effects, that might otherwise certainly be relevant in applying a legal provision.

US antitrust case law after *Trenton Potteries* quickly revealed the difficulties of formalistically applying even a straightforward per se rule, such as the one against horizontal price-fixing. In a number of cases subsequent to *Trenton Potteries*, US federal courts have addressed the question of what exactly constitutes horizontal price-fixing, and which types of price-fixing fall outside the scope of the per se rule.[80] In *Broadcast Music*, for instance, the Supreme Court held that applying the per se rule against horizontal price-fixing "is not a question simply of determining whether two or more potential competitors have literally 'fixed' a 'price'".[81] That case centered on agreements between music copyright owners, which established blanket licenses that gave the licensees the right to perform all compositions for a standard price which typically depended on total revenue or a fixed total amount. Focusing on the pro-competitive effects of the blanket licenses, the Supreme Court concluded that the agreement did not constitute "horizontal price-fixing". Clearly, this conclusion is based on the perceived purpose of the per se rule against horizontal price-fixing and section 1 of the Sherman Act 1890 more generally, even though the agreements arguably would have to qualify as "price-fixing" in the sense of *Trenton Potteries*.[82]

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[79] The judge is, in that case, also obligated to award treble damages, even if (s)he thinks this might overcompensate the victims. Whether treble damages actually overcompensate victims is subject to debate, but my point here is that the treble damages rule is a legal formalism precisely because it must be applied irrespective of whether it entails overcompensation or not. See generally R.H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO STATE. L. J. 115 (1993).

[80] See e.g. Broadcast Music Inc. v. Columbia Broadcasting System Inc., 441 U.S. 1 (1979); Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982); NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984); Texaco Inc. v. Dagher, 126 U.S. 1276 (2006). I am thankful to Giorgio Monti for raising this point.

[81] Broadcast Music Inc. v. Columbia Broadcasting System Inc., *supra* note 80.

[82] *Trenton Potteries* itself, as Martin Holterman pointed out to me, also refers to the purposes of the Sherman Act 1890. Before concluding that every horizontal price-fixing agreement is an unreasonable restraint of trade, for instance, the Supreme Court observed that "[o]ur view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least, in the light of its effect on competition, for, whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be

Judgments such as *Broadcast Music* do not *deny* the existence of formalism or cast doubt on the abovementioned analytical framework. They rather show that *genuine* formalistic reasoning – not only at the level of subsuming an intermediary category such as "horizontal price-fixing" to the relevant legal provision, but also at the level of qualifying the facts of the case as falling under such intermediary categories – is quite rare. Courts typically do not apply legal rules formalistically to the facts of each case, but rather tend to reconceptualize the logic of the rule whenever the present case raises doubts as to a literal, face-value application of the rule. In US case law on horizontal price-fixing, this has for instance led to a further sophistication of the per se rule, which only applies to so-called "naked" horizontal price-fixing.[83] Agreements which have a price-fixing component that is ancillary to a broader and potentially pro-competitive agreement have to be assessed under the rule of reason.[84]

In summary, the key to the degree of formalism of a class or legal category is the extent to which the class is applied to the relevant conduct on the basis of the plain meaning of the class, without taking into account the purpose of the class or the consequences of applying it to the conduct, and without enquiring whether it is justified to do so, all-things-considered. Practically speaking, this means that the more contextual, fact-specific inquiry is needed to assign the case to the class or legal category, the less formalistic is the class at hand.[85] In this sense, it is clear that genuine formalism is quite rare even in the context of per se rules. In US antitrust law, arguably only naked horizontal price-fixing and naked market division agreements have remained subject to a fully formalistic analysis.[86] For all other types of

doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition" (Trenton Potteries, *supra* note 74, at 397). The Supreme Court only then proceeds to argue that "[a]greements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable […]". The difference between *Trenton Potteries* and *Broadcast Music*, however, is that in *Trenton Potteries* the Supreme Court dwelled on the purposes of the Sherman Act and the necessity of distinguishing between reasonable and unreasonable restraints in order to create a formalistic per se illegality rule against horizontal price-fixing. The rule is therefore grounded in the purposes of the Sherman Act, but that does not mean that the application of the rule, once it exists, requires – or even permits – inquiry into these purposes. This points therefore at the difference between *creating* and *applying* a legal formalism, as discussed in Section II.C. *supra*.

[83] NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 109–110 (1984); FTC v. Indiana Federation of Dentists, 476 U.S. 447, 460 (1986).

[84] On the ancillary restraints doctrine, see e.g. G.J. Werden, *The Ancillary Restraints Doctrine after* Dagher, 8 SEDONA CONFERENCE J. 17 (2007).

[85] On the implications of this interpretation of legal formalism for EU competition law, more specifically the concept of a "by object" restriction, see Section IV *infra*.

[86] See e.g. H. Hovenkamp, *The Rule of Reason*, 70 FLORIDA L. REV. 81 (2018). This is not to say that the case law is not inconsistent or at least puzzling. In *Arizona v. Maricopa Country Medical Society*, for instance, the Supreme Court held that a maximum fees agreement between physicians constituted horizontal price-fixing, justifying "their facial invalidation", notwithstanding the fact that the physicians had argued that the agreement was overall pro-competitive (Arizona v. Maricopa County Medical Society, 457 U.S. 332, 348–349 (1982)). What matters for

conduct, at least some contextual, case-specific analysis is necessary to scrutinize whether the conduct falls under the scope of a per se prohibition, which explicitly or implicitly involves engaging with the purpose(s) of the relevant provision.[87]

IV. Formalism and "By Object" Restrictions

As we have seen in the previous Section, the per se rule is a typical example of a legal formalism because it requires decision-makers to apply the rule without enquiring into the purpose(s) of the rule. In practice, however, it has proved difficult to apply a seemingly straightforward per se rule, such as the one against horizontal price-fixing, without considering the purposes of that rule in cases where applying the rule leads to an undesirable outcome. Moreover, obviously the conclusion that an outcome is "undesirable" can only be reached by considering the purpose of the rule. This explains how the per se rule in US antitrust law increasingly gave way to the ancillary restraints doctrine and the rule of reason.

This tension between formalism and purpose-driven analysis is even more explicit in the functional equivalent of section 1 of the Sherman Act 1890 in EU competition law. Article 101 TFEU prohibits agreements which have as their object or effect the distortion of competition. The category of "by object" restrictions has important similarities with the per se rule in US antitrust, although it cannot be considered its doctrinal equivalent.[88]

Both the per se rule and the by object category involve a legal inference that abstracts from actual anti-competitive effects in the specific case at hand, thus removing considerations from

our purposes is that the approach in both *Trenton Potteries* and in *Arizona v. Maricopa County Medical Society* represents a formalistic approach to horizontal price-fixing.

[86] On the implications of this interpretation of legal formalism for EU competition law, more specifically the concept of a "by object" restriction, see Section IV *infra*.

[87] This conclusion raises the broader question of whether textualism in legal interpretation in general is possible at all. While this issue cannot be discussed here in detail, I should note that even contemporary textualists appear to argue that taking into account context is necessary to some degree. E.g. F.H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUBLIC POLICY 61, 64 (1994); J.F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUMBIA L. REV. 70, 73, 79 and 80 (2006); SCALIA AND GARNER, READING LAW, *supra* note 32 at 32–34. This also raises the second question of whether textualists such as Scalia, notwithstanding his claim cited *supra* note 9, are really legal formalists all the way down. See also the literature cited *supra* note 32.

[88] This is, first of all, because Article 101(3) TFEU provides a possibility to justify all violations of Article 101(1) TFEU including restrictions of competition by object, while by definition there is no possibility to justify a "per se" violation of section 1 Sherman Act 1890. According to some scholars, the "by object" category is similar to a "quick look" analysis in US antitrust law. See K.H.F. Kwok, *Re-conceptualizing "Object" Analysis under Article 101 TFEU: Theoretical and Comparative Perspectives*, 14 J. COMP. L. & ECON. 467 (2018).

the decision-making process that would otherwise be relevant.[89] In this regard, both of them involve a formalization of the decision-making process. While the disadvantages of such formalization are similar for the per se rule in US antitrust law and the by object category in EU competition law, this Section aims to show that the case law of the European Court of Justice (ECJ) has more explicitly *limited* the formalizing effects of the by object category. More specifically, while the US federal courts' case law on per se rules can be read as a process of narrowing the scope of the per se rule, the ECJ's case law on the by object category has limited the degree to which the by object category itself excludes considerations from the decision-making process.

Already in its 1966 judgment in *Société Technique Minière*, the Court held that an agreement has as its object the restriction of competition only if the agreement itself shows a sufficiently deleterious effect on competition, which must be assessed in its economic context.[90] In later case law, the Court expanded this formula and held that the category of "by object" restrictions includes types of agreements which reveal "a sufficient degree of harm to competition".[91] In order to determine whether this is the case

> "regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question".[92]

This formula excludes very few, if any, relevant considerations from the analysis, and consequently the assessment necessarily draws indirectly on the supposed purposes of Article 101 TFEU. It is impossible to decide what "legal and economic context" one must take into account without an express or implied pre-commitment to (a) certain purpose(s). The only factor which explicitly need not be taken into account in establishing an anti-competitive object is whether "competition has *in fact* been prevented, restricted or distorted to an appreciable

[89] Whether the per se rule and the by object restriction can be conceived as "presumptions" of anti-competitive effects is somewhat controversial, especially as regards the latter. See e.g. A. Kalintiri, *Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises, and Presumptions*, 16 J. COMP. L. & ECON. 392 (2020).
[90] Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH (M.B.U.), 56/65, EU:C:1966:38, p. 249.
[91] Groupement des cartes bancaires (CB) v. European Commission, C-67/13 P, EU:C:2014:2204, para. 49–53.
[92] Expedia Inc. v. Autorité de la concurrence and Others, C-226/11, EU:C:2012:795, para. 21; Allianz Hungária Biztosító and Others, C-32/11, EU:C:2013:160, para. 36; Groupement des cartes bancaires, C-67/13, *supra* note 91, para. 53.

extent".[93] Accordingly, what demarcates the "by object" from the "by effect" category is that the former does not require evidence of an actual, or likely,[94] restriction of competition.[95]

Both restrictions by object and by effect, therefore, can only be established with regard to the legal and economic context of the specific agreement.[96] This is difficult to reconcile with a formalistic approach to decision-making, since inherently such a contextual approach requires taking into account the purpose of the provision.

Nevertheless, the ECJ specified the conditions for the application of Article 101(1) TFEU to specific types of conduct. Even though it has always been required to consider any agreement in its legal and economic context, for a number of clearly anti-competitive agreements the Court *de facto* applies a formalistic approach.[97] In *Beef Industry Development Society* (*BIDS*), for example, the Court concluded that an output restriction agreement is by definition a restriction of competition by object, regardless of its potential economic benefits.[98] The Court rejected, in this regard, BIDS' arguments that the output restriction agreements would "rationalise the beef industry in order to make it more competitive",[99] and concluded that the

[93] Allianz Hungária, C-32/11, *supra* note 92, para. 34; Groupement des cartes bancaires, C-67/13, *supra* note 91, para. 52.

[94] The criterion of whether "competition has in fact been prevented, restricted or distorted to an appreciable extent" (*id.*), associated with an analysis of anti-competitive effects, seems to suggest that a restriction of competition by effect requires an *actual* restriction of competition (i.e. a restriction *in fact*). Both case law and soft law suggest, however, that likely effects also suffice to find an anti-competitive effect under Article 101(1) TFEU. See to this end MasterCard Inc. and Others v. European Commission, C-382/12 P, EU:2014:2201, para. 166; European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, paras. 26–28.

[95] To what extent an analysis of the object of an agreement requires evidence that the agreement is "appreciable" has been somewhat controversial. In *Völk/Vervaecke*, the Court concluded that an excluding dealing agreement entailing absolute territorial protection fell outside the scope of Article 101 TFEU because the agreement only had insignificant effects on the market (Franz Völk v. S.P.R.L. Ets J. Vervaecke, 5/69, EU:C:1969:35, para. 5/7). In Expedia Inc. v Autorité de la concurrence and Others, C-226/11, *supra* note 92, para. 37, however, the Court concluded that an agreement with an anti-competitive object "by its nature and independently of any concrete effect that it may have" constitutes an appreciable restriction of competition. The *Expedia* judgment could be interpreted as saying that the appreciability of the agreement could be taken into account as part of the "economic context". However, it is unclear which aspects of appreciability could be taken into account in this regard. In *ING Pensii*, for instance, the Court held that "the number of persons actually affected by the agreements to share clients at issue in the main proceedings is irrelevant for the purpose of determining whether there is such a restriction of competition" (ING Pensii – Societate de Administrare a unui Fond de Pensii Administrat Privat SAvConsiliul Concurenței, C-172/14, EU:C:2015:484, para. 54).

[96] P. Ibáñez Colomo, *Anticompetitive Effects in EU Competition Law*, J. COMP. L. & ECON. 1, 19 (2020).

[97] In Groupement des cartes bancaires, C-67/13, *supra* note 91, para. 51, the Court observed that "horizontal price-fixing by cartels may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article [101 TFEU], to prove that they have actual effects on the market". Obviously, for the purpose of Article 101 TFEU it is important to note that all violations of Article 101(1) TFEU can be justified on the basis of Article 101(3) TFEU, and therefore formally there are no per se rules in Article 101 TFEU. This dictum in *Cartes bancaires*, nonetheless presents a formalistic approach towards horizontal price-fixing similar to *Trenton Potteries*, albeit merely for the purpose of Article 101(1) TFEU.

[98] Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd., C-209/07, EU:C:2008:643, para. 34–40.

[99] *Id.*, para. 19.

agreements had as their object "to change, appreciably, the structure of the market".[100] It observed also that Article 101(1) TFEU prohibits "any form of coordination which deliberately substitutes practical cooperation between undertakings for the risks of competition".[101] The Court refused to weigh the negative effects of the agreement against its alleged positive effects under Article 101(1) TFEU because "an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives".[102] This is a formalistic approach to Article 101(1) TFEU to the extent that those other legitimate – economic or non-economic – objectives are excluded from the analysis.

However, Article 101(1) TFEU is only applied formalistically to very specific and clearly anti-competitive arrangements such as naked horizontal price-fixing,[103] output restrictions,[104] and market division.[105] While even those arrangements have to be analyzed in light of their legal and economic context, the Court has made clear that, for instance, "agreements which aim to share markets have, in themselves, an object restrictive of competition and fall within a category of agreements expressly prohibited by Article 101(1) TFEU, and that such an object cannot be justified by an analysis of the economic context of the anticompetitive conduct concerned".[106] Accordingly, "the analysis of the economic and legal context of which the practice forms part may thus be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object", which seems to establish a *de facto* formalistic rule in all but name.[107]

All situations in which it is not abundantly clear that the agreement has an anti-competitive object, however, require an actual analysis of the "legal and economic context",[108] including "the nature of the goods or services affected, as well as the real conditions of the functioning

[100] *Id.*, para. 31.
[101] *Id.*, para. 34.
[102] *Id.*, para. 21.
[103] Groupement des cartes bancaires, C-67/13, *supra* note 91, para.51.
[104] Beef Industry Development Society, C-209/07, *supra* note 98, para. 31.
[105] Siemens and Others v. Commission, C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866, para. 218; Toshiba Corporation v. European Commission, C-373/14 P, EU:C:2016:26, para. 28–29.
[106] Toshiba Corporation, *supra* note 105, para. 28.
[107] *Id.*, para. 29.
[108] Strictly speaking one cannot conclude that an agreement clearly has an anti-competitive object without taking into account the legal and economic context at least to some degree, as the Court observed in *Siemens and Others* and *Toshiba* (see *id.*), however, this contextual analysis remains highly limited. In my view, the degree to which legal and economic context ought to be taken into account in order to infer, for instance, a naked price-fixing agreement is so limited that this inference still warrants a "formalistic" label, although this is of course a matter of degree.

and structure of the market or markets in question".[109] This analysis can only take place on the basis of a conception of the purpose(s) of competition law.

A good example is the *Allianz Hungaria* case, in which the Court offered an extensive analysis of all the considerations that should be taken into account in determining the object of a vertical agreement between insurance companies and car repairers about hourly repair charges – an agreement that does not fall within a clear antitrust category.[110] While the extent of this analysis is indeed capable of greatly expanding the "by object" category, as several critical commentators observed,[111] it also means that establishing a "by object" restriction is a case-specific, non-formalistic analysis.

In *Cartes bancaires* and *Budapest Bank*,[112] the ECJ opted for a slightly different approach than the one in *Allianz Hungaria*. In both cases, the Court concluded that an anti-competitive object could only be established by a case-specific analysis. Instead of offering a large number of considerations to be taken into account, which could further muddle the distinction between "by object" and "by effect" restrictions, the Court emphasized that the former should be interpreted narrowly. Whenever there is serious doubt about the nature and effects of the agreement, an analysis of actual effect ought to follow.[113]

A similar approach can be observed in the case law on exclusive distribution. In the seminal *Consten and Grundig* case, for instance, the ECJ ruled that distribution agreements entailing, as a result of a trademark agreement, absolute territorial protection to a distributor are restrictions of competition by object.[114] In the absence of absolute territorial protection, however, the extent to which an exclusive distribution agreement is anti-competitive by object

[109] Expedia Inc. v Autorité de la concurrence and Others, C-226/11, *supra* note 92, para. 21; Allianz Hungária, C-32/11, *supra* note 92, para. 36; Groupement des cartes bancaires, C-67/13, *supra* note 91, para. 53.
[110] Allianz Hungária, C-32/11, *supra* note 92, para. 34–49.
[111] See e.g. C.I. Nagy, *The Distinction between Anti-competitive Object and Effect after* Allianz*: The End of Coherence in Competition Analysis?*, 36 WORLD COMP. 541 (2013); D. Harrison, *The* Allianz Hungária *Case – The ECJ's Judgment Could Have Ugly Consequences*, 12 COMP. L. INSIGHT 10 (2013); C. Graham, *Methods For Determining Whether an Agreement Restricts Competition: Comment on* Allianz Hungária, 38 EUR. L. REV. 542 (2013); H.H.B. Vedder, Allianz *and the Object–Effect Dichotomy in Article 101(1) TFEU: A Practical Solution Meets Not So Practical Competition Law*, EUROPEAN LAW BLOG (8 April 2013).
[112] Gazdasági Versenyhivatal v. Budapest Bank Nyrt. and Others, C-228/18, EU:C:2020:265.
[113] This is particularly clear in *Budapest Bank*: "According to that court, setting the interchange fees at a uniform level may have triggered competition in relation to the other features, transaction conditions and pricing of those products. If that was actually the case, which is for the referring court to ascertain, a restriction of competition on the payment systems market in Hungary, contrary to Article 101(1) TFEU, can be found only after an assessment of the competition which would have existed on that market if the MIF Agreement had not existed, an assessment which — as is clear from paragraph 55 of the present judgment — falls within the scope of an examination of the effects of that agreement" (*id.*, para. 74–75).
[114] Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community, 56 and 58/64, EU:C:1966:41, p. 339–340, 343.

or effect must be determined on the basis of each specific case.[115] Furthermore, as Ibáñez Colomo noted,[116] the Court's strict approach to absolute territorial protection has been subsequently nuanced in cases including *Coditel II*[117] and *Erauw-Jacquery*.[118] In respect of intellectual property agreements, exclusive territorial licenses or trademark agreements do not restrict competition by their object unless the terms of the agreement eliminate parallel trade.[119] In other words, the formalistic application of the "by object" category in respect of exclusive distribution agreements only applies in a narrowly defined situation.

It appears, therefore, that the Court sometimes applies the "by object" category in Article 101(1) TFEU formalistically, in the sense that it assesses the conduct at hand against the benchmark of a rule. However, cases ranging from *Société Technique Minière* to *Cartes bancaires* and *Budapest Bank* show that by default the Court prefers to analyse each case in light of a broad range of considerations that appeal to the purposes of Article 101(1) TFEU. In this regard, there are close similarities between the development of the by object category and the per se rule in US antitrust law. Even just in theory, however, only the latter is a genuine legal formalism. This is precisely the reason why the US federal courts have had to narrow the scope of the per se rule via a process of distinguishing and overruling previous judgments, making its operation considerably less formalistic in practice. In contrast, the general definition of by object restrictions has never revealed a high rule-like or formalistic character. Only in respect of specific types of conduct, such as absolute territorial protection, naked horizontal price-fixing, and naked output restrictions, the ECJ interprets the by object category as a legal formalism.

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[115] Société Technique Minière, 56/65, *supra* note 90, p. 250: "Therefore, in order to decide whether an agreement containing a clause 'granting an exclusive right of sale' is to be considered as prohibited by reason of its object or of its effect, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionnaire on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation". This enumeration of relevant considerations is sufficiently broad as to include most if not all of the factual circumstances that are relevant in determining whether, in this specific case, there is anti-competitive harm.

[116] P. Ibáñez Colomo, *Article 101 TFEU and Market Integration*, 12 J. COMP. L. & ECON. 749 (2016).

[117] Coditel SA, Compagnie générale pour la diffusion de la télévision, and Others v. Ciné-Vog Films SA and Others, 262/81, EU:C:1982:334, involving an exclusive right to exhibit a film in the territory of a Member State, which entails absolute territorial protection due to the nature of copyright protection.

[118] SPRL Louis Erauw-Jacquery v. La Hesbignonne SC, 27/87, EU:C:1988:183, involving an agreement between the holder of plant breeders' rights and growers, in which growers were prohibited from selling and exporting the seeds.

[119] Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH, 56 and 58/64, *supra* note 114; L.C. Nungesser KG and Kurt Eisele v. Commission of the European Communities, 258/78, EU:C:1982:211, para. 53–67.

V. Formalism and the Rule of Reason

While the per se rule in US antitrust law is a proxy for a legal formalistic approach to competition law, the rule of reason is usually considered to be the doctrinal equivalent of a standard-based and/or effects-based approach.[120] Even though the rule of reason is a doctrine of US antitrust law, the term is also frequently used in regard to competition law systems throughout the world. In EU competition law, for example, sometimes the category of restrictions of competitions "by effect" is compared to the rule of reason.[121] Since the term "rule of reason" is a focal point in competition law, this Section will focus on the relevance of formalism and formalistic reasoning in the application of the rule of reason in US antitrust law. Like the discussion in the previous two Sections, the rule of reason in US antitrust law is chosen as an example to show how formalism is relevant in competition law. This Section does not aim to provide a comprehensive analysis of the functioning of the rule of reason in American law, let alone to what extent functional equivalents of the rule of reason in other jurisdictions involve formalization and formalistic reasoning. By applying the theoretical framework of Section II above to a number of landmark examples of rule of reason analysis in US antitrust law, however, this Section does intend to contribute to the general discussion about the relevance of formalism in competition law.

The rule of reason is frequently conceived as the opposite of a formalistic approach, i.e. an all-things-considered analysis of the specific case at hand, unconstrained by pre-existing rules. For example, it is frequently stated that the rule of reason in US antitrust law involves balancing pro-competitive and anti-competitive effects in light of the circumstances of each case.[122] Such an analysis would approach an "all-things-considered" judgment in light of the purpose of section 1 of the Sherman Act 1890. In *Chicago Board of Trade*, for instance, Justice Brandeis described the rule of reason as follows:

[120] E.g. POSNER, ANTITRUST LAW, *supra* note 71 at 39.
[121] See e.g. A. JONES AND B. SUFRIN, EU COMPETITION LAW: TEXT, CASES AND MATERIALS 247 (2014); V. Verouden, *Vertical Agreements and Article 81(1) EC: The Evolving Role of Economic Analysis*, 71 ANTITRUST L. J. 525, 539–540 (2003). But see Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v. Commission of the European Communities, T-112/99, EU:T:2001:215, para. 72–78; European Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, para. 30–31; G. MONTI, EC COMPETITION LAW 29–31 (2007).
[122] See for an overview of judicial authorities conceiving of the rule of reason as a "balancing exercise", Hovenkamp, *The Rule of Reason*, *supra* note 86 at 131–135.

> "Every agreement concerning or regulating trade restrains, and the true test of legality is whether the restraint is such as merely regulates, and perhaps thereby promotes, competition, or whether it is such as may suppress or even destroy competition. To determine this question, the court must ordinarily consider the facts peculiar to the business, its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts, not because a good intention will save an otherwise objectionable regulation or the reverse, but because knowledge of intent may help the court to interpret facts and predict consequences".[123]

Brandeis's formulation of the rule of reason as a requirement to take into account all circumstances of the specific case has been criticized widely for being indeterminate and detrimental to legal certainty.[124] Nevertheless, there is some further support in the Supreme Court's case law for decision-making on the basis of merely the facts of the individual case and the purpose of antitrust law (i.e. decision-making largely unconstrained by rules that mediate between facts and purpose). In *GTE Sylvania*, for example, the Supreme Court overruled the per se illegality rule for vertical non-price restraints by requiring a comprehensive case-specific inquiry in which "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition".[125]

More recently, in *Leegin* the Supreme Court overruled the per se illegality rule for vertical resale price maintenance. In respect of the required analysis under the rule of reason, the Supreme Court held that "[i]f the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market", and proceeded to elaborate a number of pro-competitive and anti-competitive indicators.[126] According to the Court, lower courts could further refine the substantive and procedural requirements:

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[123] Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).
[124] E.g. R.A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHIC. L. REV. 1 (1977); M.E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, UC DAVIS L. REV. 1375 (2009); A.I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 SOUTH CAL. L. REV. 733 (2012).
[125] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977).
[126] Leegin Creative Leather Products. v. PSKS, Inc., 551 U.S. __ (2007), 17–19.

> "As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anti-competitive restraints and to promote procompetitive ones".[127]

However, in practice the rule of reason is less unstructured than the abovementioned considerations suggest. This is not least because, as Hovenkamp observes, "[a] test that makes everything relevant provides nothing useful, because it gives no calculus for weighting or even identifying the important factors".[128] Instead, the rule of reason is usually conceived as a structured, three-step test involving a burden-shifting process.[129] In the first step, the plaintiff must prove that the restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff discharges this burden up to the required standard of proof, the defendant is required to show a procompetitive rationale for the restraint. Should the defendant succeed, then the plaintiff needs to show that these efficiencies could be reasonably achieved through less anticompetitive means.[130]

To a certain extent this structure makes the rule of reason more formalistic. The allocation of the legal and evidential burden of proof certainly is a way to formalize the administrative and judicial process: it may prevent administrative and judicial decision-makers from deciding on the basis of all relevant considerations, since some stages of the rule of reason – in which certain considerations would start to become relevant – are never reached. If the defendant does not succeed in showing a pro-competitive rationale, for instance, such pro-competitive rationales need not be taken into account. To put this in terms of the relationship between purposes, rules, and facts: if the purpose of competition law is to protect "competition," and anti-competitive effects, pro-competitive rationales and efficiencies are all relevant considerations in view of this purpose, then the structure of the rule of reason prevents an unconstrained, all-things-considered analysis of all these considerations in light of the purpose

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[127] *Id.* at 19.
[128] Hovenkamp, *The Rule of Reason*, *supra* note 86 at 133. See also the extensive critique by Stucke, *Does the Rule of Reason Violate the Rule of Law?*, *supra* note 124.
[129] M.A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, BYU L. REV. 1265, 1267–68 (1999); M.A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009); Gavil, *Moving Beyond Caricature and Characterization*, *supra* note 124 at 759–763; Hovenkamp, *The Rule of Reason*, *supra* note 86 at 103–104.
[130] Ohio et al v. American Express Co. et al, 585 U.S. 1, 9–10 (2018); National Collegiate Athletic Association v. Alston et al, 594 U.S. __ (2021), 24–25.

of protecting competition. The constraints imposed by the rule of reason are therefore mainly *sequential* and *procedural*.[131]

Furthermore, the three-part analysis of the rule of reason is, itself, formalistic in the sense that it does exclude some considerations that would otherwise be part of an all-things-considered judgment. As Carrier observed, the three-part analysis that is most commonly used in the case law excludes a "fourth stage" in which all pro-competitive and anti-competitive effects are weighed.[132] Since the fact that there are no less restrictive alternatives does not mean that the agreement is, overall, pro-competitive, excluding this fourth stage of analysis is itself also a legal formalism.[133]

Within the formal structure of administrative and judicial procedures, however, the rule of reason in general is characterized by a low degree of formalism. Whether the plaintiff succeeds in showing substantial anticompetitive effects appears subject to an analysis largely unconstrained by rules. In this more limited respect, it is true that the rule of reason shows certain similarities with what is usually called a "standard-based" approach. The first stage of the rule of reason acquires, to use Kaplow's words, most of its meaning *ex post* or in its application to a specific case.[134] In other words, whether the assessment of some business conduct moves beyond the first stage of the rule of reason cannot be determined by applying the substantive legal test ("substantial anticompetitive effects") to the plain content of the conduct or agreement, but requires a fact-specific analysis of all circumstances that are relevant to *that* legal test.[135]

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[131] Such "procedural formalism" may differ in possibly important ways from the "substantive" formalism that was discussed above, for example, in respect of the per se rule (Section III *supra*) and by object restrictions (Section IV *supra*). However, as I tried to show in the paragraph accompanying this footnote, as well as further below, the "procedural" constraints which the rule of reason imposes on administrative and judicial decision-makers by way of a system of burden shifting are, practically speaking, similar to other "substantive" constraints imposed by rules. In both situations, the decision-maker is neither required nor allowed to take into account certain considerations either at all or at a certain stage of the procedure. Nonetheless, a comparison between "substantive" and "procedural" would certainly deserve deeper scrutiny, although reasons of space prevent me from elaborating on this point.

[132] See e.g. M.A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST 50 (2019).

[133] Reasons for excluding actual balancing from the rule of reason include the polycentricity and legitimacy of such analysis. In favor of excluding a balancing stage where possible, see Hovenkamp, *The Rule of Reason*, *supra* note 86 at 131–135. See also H. Hovenkamp, *Antitrust Balancing*, 12 NYU J. L. & BUS. 369 (2016); C.S. Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUMBIA L. REV. 927 (2016).

[134] Kaplow, *Rules Versus Standards*, *supra* note 53.

[135] I say "circumstances that are relevant to *that* legal test" because, as discussed in the text accompanying note 131 *supra*, the first stage of the rule of reason excludes many considerations, namely those that are relevant to the subsequent stages of the rule of reason. *Within* the first stage of the rule of reason, however, the purpose of this first stage is to demonstrate substantial anticompetitive harm, not to demonstrate e.g. a procompetitive justification. From the perspective of the specific purpose of the first stage of the rule of reason, therefore, the fact that procompetitive justifications are excluded from the first-stage analysis therefore does not make this first stage more formalistic.

Nonetheless, a standard-like approach such as the one involved in the first stage of the rule of reason easily evolves into specific legal formalisms in specific cases. This is unsurprising, according to Schauer, who asserts that rules and standards tend to converge in the longer term.[136] In practice, the rule of reason does not comprise a consecutive number of standard-like stages alone, but the content of each stage is complemented with rules that are often specific to the type of conduct at hand. This "formalization" of the rule of reason can be illustrated by two recent Supreme Court judgments, *Actavis* and *Ohio v. AMEX*.

To start with the latter, in *Ohio v. AMEX* the US Supreme Court requires the plaintiff, in cases involving two-sided markets, to include both sides of a platform in the market definition and demonstrate market power on that single market.[137] Furthermore, the Court held that such market definition is necessary even if the plaintiff relies in his case on direct proof of anti-competitive effects.[138]

As the dissenting opinion of Justice Breyer and some commentators have observed, however, the requirement to always define the relevant market is obsolete if direct proof of anti-competitive effect has been established, because "proof of actual adverse effects on competition is, a fortiori, proof of market power".[139] Accordingly, the Court's approach to the first stage of the rule of reason in two-sided markets is best characterized as a legal formalism. It prevents administrative or judicial decision-makers from concluding, on the basis of direct evidence, that some conduct has substantial anti-competitive effects to the detriment of the consumer, if that decision-maker has not properly defined both sides of the market and proved market power on that two-sided market. This is a clear example of a rule constraining the decision-making process, which arguably makes it virtually impossible to prove substantial anti-competitive effects in two-sided markets.[140]

As a brief side note, the requirement to define the "relevant" market as such is, obviously, a legal formalism too.[141] In *Ohio v. AMEX*, the result of this formalism constrains decision-

[136] Schauer, *The Convergence*, *supra* note 54.
[137] Ohio et al v. American Express Co. et al, *supra* note 130 at 12–14.
[138] *Id.* at 12–15.
[139] *Id.* (Breyer, J., dissenting), 14 See also H. Hovenkamp, *Platforms and the Rule of Reason: The* American Express *Case*, COLUMBIA BUS. L. REV. 35 (2019).
[140] T. Wu, *The* American Express *Opinion, the Rule of Reason, and Tech Platforms*, 7 J. ANTITRUST ENFORCEMENT 104, 122 (2019): "Their mirror-image counterpart [of *per se* rules] in *American Express* takes the less-appealing approach of using complex economic theory to create near-impossible burdens of proof—burdens particularly hard to meet when they emerge on appeal. At worst, they offer a highly jazzed-up way of getting around some awfully damaging facts".
[141] For critique of this requirement, see e.g. L. Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010); L. Kaplow, *Market Definition: Impossible and Counterproductive*, 79 ANTITRUST L. J. 361 (2013). Cf. G.J. Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 ANTITRUST L. J. 729 (2013).

makers. In other contexts, legal rules on market definition may liberate decision-makers by allowing them to measure market power by proxy, on the basis of specific legal constructions as to what counts as "the relevant market". In this regard, market definition requirements demonstrate the more general point that legal formalisms can both constrain and liberate, and can have both positive and negative implications for the quality of the decision-making process.[142]

In *Actavis*, the Court formalized the first stage of the rule of reason by limiting the evidential requirements that are necessary to prove substantial anti-competitive effects. More specifically, the Court limited the considerations to be taken into account by the plaintiff mainly to the net size of the payment:

> "[T]he likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The existence and degree of any anticompetitive consequence may also vary as among industries".[143]

The Court also explicitly mentioned that courts need not take into account all the circumstances of the case in establishing substantial anti-competitive effect:

> "To say [that reverse payments are subject to the rule of reason] is not to require the courts to insist, contrary to what we have said, that the Commission need litigate the patent's validity, empirically demonstrate the virtues or vices of the patent system, present every possible supporting fact or refute every possible pro-defense theory".[144]

The judgment's formalism has a mostly liberating effect for decision-makers, since they can infer the conclusion of anti-competitive effect from a limited number of considerations mostly related to the size of the payment. By contrast, *AMEX*'s formalism regarding market definition, in presumably aiming to avoid false positive outcomes, limits decision-makers in their ability

[142] For an interesting analysis in this regard, see M. Eben, *The Antitrust Market Does Not Exist: Pursuit of Objectivity in a Purposive Process*, 17 J. COMP. L. & ECON. 586 (2021).
[143] FTC v. Actavis, Inc., 570 U.S. __ (2013), at 20.
[144] *Id.* at 21.

to apply the Sherman Act 1890 in comparison to an all-things-considered analysis, which would likely infer market power from anti-competitive effects.

Which of the two judgments is more representative of the functioning of the rule of reason? In other words, does the rule of reason mainly limit decision-makers' ability to apply the Sherman Act to individual cases, or does it rather liberate them from a more burdensome, genuine all-things-considered analysis? The answer appears to be the former. As many commentators have noted, the rule of reason may in practice easily function as a quasi-per se legality rule.[145] According to Carrier's empirical analysis of all 495 federal rule of reason cases between 1977 and 1999, in 84% of the cases the court concluded that the plaintiff had failed to show significant anti-competitive effect, thus disposing of the case at the first stage of the rule of reason.[146] Only in 3% of the remaining cases did courts conclude that the defendant had failed to show a pro-competitive justification.[147] Furthermore, between 1999 and 2009, 215 out of 222 federal rule of reason cases, i.e. 97%, were dismissed at the first stage.[148] The plaintiff won in only one case.[149] Practically speaking, at least in appellate adjudication, the rule of reason is close to a per se legality rule.[150]

Accordingly, in US antitrust law the increased application of the rule of reason instead of the per se rule has not, it seems, lead to less constrained decision-making on the basis of the characteristics of each case in light of the purpose(s) of antitrust. To the extent that the rule of reason is formulated as a genuine all-things-considered analysis – as in *GTE Sylvania* and to a lesser extent in *Leegin* – it is so undefined that it can hardly be used for a consistent and predictable analysis. Consequently, it is likely to lead to per se legality in the overwhelming majority of cases. To the extent that the Supreme Court has provided additional interpretive guidance on its application – as for instance in *Actavis* and *Ohio v. AMEX* – this guidance turns the rule of reason even more into a (set of) formalistic rule(s). In *Actavis*, the result is a fairly straightforward rule that substantively works as a quick look or presumptive illegality approach

[145] See e.g. Posner, *The Rule of Reason and the Economic Approach*, *supra* note 124 at 14; F.H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L. J. 305 (1987); A.A. Foer, *The Political-Economic Nature of Antitrust*, 27 ST. LOUIS U. L. J. 331, 337–338 (1983); P. Nealis, *Per Se Legality: A New Standard in Antitrust Adjudication under the Rule of Reason*, 61 OHIO STATE L. J. 347, 366–370 (2000).
[146] Carrier, *The Real Rule of Reason*, *supra* note 129 at 1267–68.
[147] *Id*.
[148] Carrier, *The Rule of Reason: An Empirical Update*, *supra* note 129 at 828.
[149] *Id*.
[150] In NCAA v. Alston et al, *supra* note 130, the US Supreme Court applied the rule of reason in favor of the plaintiff for the first time in decades. To what extent this judgment will alter the functioning of the rule of reason as a quasi-per se legality rule in the future is beyond the scope of this article. For an insightful analysis emphasizing the importance of the case, see H. Hovenkamp, *A Miser's Rule of Reason: The* Alston *Antitrust Case*, FACULTY SCHOLARSHIP AT PENN LAW 2533 (2022).

to reverse payment settlements.[151] In *Ohio v. AMEX*, the result is a substantive legal test that will in practice likely exculpate the defendant in the overwhelming majority of cases involving two-sided markets.

The relationship between the rule of reason and legal formalism is, therefore, complex, and ambiguous. The structured multi-stage approach which includes separate substantive questions and accompanying burdens of proof limits, by itself, a genuine all-things-considered analysis and is in that sense formalistic. Excluding a fourth, balancing stage also excludes certain considerations from the balance of reasons, further formalizing the analysis. Within each stage, the rule of reason itself suggests an unstructured, case-by-case approach to the relevant legal question. For specific types of conduct, however, case law may incorporate a varying degree of rule-based constraints which makes the required analysis more or less formalistic. In this sense, the rule of reason may entail a relatively high degree of formalism in respect of specific types of conduct.

VI. Formalism and Anti-Competitive Effects

In the previous Section we already saw that the rule of reason in US antitrust law incorporates conduct-specific rules that formalize the decision-making process. This Section aims to provide a more general discussion on the relationship between formalism and the notion of anti-competitive effects, in particular in the context of the development of a "more economic" or "effects-based" approach in EU competition law.

As "form" and "effects" are usually dichotomized in competition law, this Section will first discuss the form–effects distinction as it is typically used in case law and scholarship, and will try to flesh out its conceptual characteristics (VI.A). In a second step, this Section will problematize the idea of looking at "effects" rather than "form" as such, by showing how the formalization of economic knowledge translates into specific, "effects-based" legal formalisms (VI.B–D).

A. The Form–Effects Distinction

[151] T.F. Cotter, FTC v. Actavis, Inc.*: When Is the Rule of Reason Not the Rule of Reason?*, 15 MINN. J. L. SCI. & TECH. 41 (2014).

The form–effects distinction has been used extensively in critical analyses of, in particular, the 1950s and 1960s antitrust case law of the US Supreme Court as well as, more recently, the application of EU competition law to vertical agreements and unilateral conduct by dominant undertakings. In the US, this distinction has also been adopted by the Supreme Court, which since the late 1970s has renounced the use of "formalistic distinctions" and "formalistic legal doctrine" in several landmark antitrust cases.[152] Moreover, it is widely held that the substitution of "effects-based analysis" for "formalistic distinctions" has been a positive development.[153]

In Europe, the form–effects distinction has not been adopted by the EU courts,[154] but nevertheless plays a significant role in EU competition law scholarship, indicating so-called "form-based" or "formalistic" and "effects-based" approaches to EU competition law.[155] This Section will mainly refer to the discussion in Europe, where the form–effects distinction is currently a more central aspect of the academic debate.

According to the expert report on the reform of Article 102 TFEU by the Economic Advisory Group for Competition Policy (EAGCP) – arguably one of the intellectual foundations of the contemporary discussion about the form–effects distinction in Europe – the "form" of some business conduct is taken to mean the "class" or "category" to which the conduct belongs, for instance predatory pricing or fidelity rebates.[156] An effects-based approach, according to the EAGCP, "would start out from the effects of anticompetitive

[152] In the US, see e.g. Continental Television, Inc. v. GTE Sylvania, Inc., *supra* note 125 at 59, and Leegin Creative Leather Products. v. PSKS, Inc., *supra* note 126 at 887–888 (distinguishing respectively "formalistic line drawing" and "formalistic legal doctrine" from "demonstrable economic effect"); and Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 466–467 (1992) (stating that "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law"). The latter statement was recalled in Ohio et al v. American Express Co. et al, *supra* note 130 at 10–11.

[153] See e.g. H. Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583 (2019). This apparent consensus is currently being challenged by scholars in the "Neo-Brandeisian" tradition, some of whom are arguing for a more stringent and form-based application of US antitrust law, e.g. L.M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 564 (2017); L.M. Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMP. L. & PRACTICE 131 (2018) T. WU, THE CURSE OF BIGNESS (2018). See also the SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY'S REPORT INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (2020), which proposes the (re-)introduction of various formalistic rules concerning, e.g., vertical mergers (392–395) and monopolization (395–398).

[154] But see e.g. the Opinion of Advocate General Wahl in Intel Corp. v. European Commission, C-413/14 P, EU:C:2016:788, para. 41, 86–107; Groupement des cartes bancaires, C-67/13, *supra* note 91, para. 53–58 (observing that the notion of a "restriction by object" must be interpreted restrictively because otherwise the Commission would be exempted from the obligation to prove the actual effects of allegedly anti-competitive conduct).

[155] For an analysis of the move from an allegedly "form-based" to an "effects-based" approach, see e.g. R. van den Bergh, *The More Economic Approach in European Competition Law: Is More Too Much or Not Enough?*, in ECONOMIC EVIDENCE IN EU COMPETITION LAW (M. Kovac and A.-S. Vandenberghe eds., 2016); A.C. WITT, THE MORE ECONOMIC APPROACH TO EU ANTITRUST LAW (2016), with further references.

[156] REPORT BY THE ECONOMIC ADVISORY GROUP FOR COMPETITION POLICY ON "AN ECONOMIC APPROACH TO ARTICLE 82", 5 (July 2005), available at https://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf.

conduct, such as exclusion of competitors in the same market or in a horizontally or vertically related market one, and consider the competitive harm that is inflicted on consumers".[157]

In the scholarly literature, the notion of a form-based or formalistic approach is usually associated with a per se prohibition of certain types of business conduct, or a qualified per se prohibition, which combines a prima facie per se prohibition with the possibility for the defendant(s) to justify the conduct.[158] An effects-based approach, by contrast, would require the plaintiff to demonstrate actual or probable anti-competitive effects on the market in order to find even a prima facie infringement (subject to objective justification, for instance by Article 101(3) TFEU or the possibility for objective justification in Article 102 TFEU).[159] Similarly, others have identified the "form-based" approach as the use of "presumptions" that apply as soon as "certain conditions" are fulfilled, while the "effects-based" approach would require evidence of anti-competitive effects in an individual case.[160] Other formulations include a distinction between looking at the "characteristics" of conduct (form-based) versus looking at the welfare effects of conduct in a specific case.[161]

Notwithstanding a wide variety of slightly different formulations, most accounts of the form–effects distinction appear to emphasize a tension between the "type" of conduct and the specific circumstances of the individual case. This tension is certainly not specific to competition law and has been analyzed abundantly, albeit mostly using different terminology, in hermeneutic theory.[162]

Nonetheless, the terminology used in distinguishing form and effect is often ambiguous. For instance, the actual effects of business conduct surely are among its "characteristics". Furthermore, while the association between legal formalism and per se prohibitions is clear, it remains unclear (1) to what extent an effects-based analysis is really at odds with per se rules,

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[157] *Id.* at 6.

[158] E.g. N. Petit, *From Formalism to Effects? The Commission's Communication on Enforcement Priorities in Applying Article 82 EC*, 32 WORLD COMP. 485 (2009).

[159] *Id*.

[160] Witt for instance refers to the Commission's Article 82 EC Enforcement Priorities to describe an effect-based approach as requiring an "in-depth assessment of the likely effects on competition and consumer welfare […] in every single case on the basis of qualitative and, where possible and appropriate, quantitative evidence, rather than by means of form-based presumptions" (A.C. Witt, *The European Court of Justice and the More Economic Approach to EU Competition Law – Is the Tide Turning?*, 64 ANTITRUST BULLETIN 172 (2019). See for a similar idea of a form-based approach, P. Gorecki, *Form- Versus Effects-Based Approaches to the Abuse of a Dominant Position: The Case of* Ticketmaster Ireland, 2 J. COMP. L. & ECON. 533 (2006).

[161] P. van Wijck, *Loyalty Rebates and the More Economic Approach to EU Competition Law*, EUR. COMP. J., https://doi.org/10.1080/17441056.2020.1834973 (2020).

[162] See e.g. J. Derrida, *The Force of Law: The Mystical Foundations of Authority*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3, 23 (D. Cornell, M. Rosenfeld and D. Gray Carlson eds., 1992): "Each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely". On the relationship between the rule and the individual case in hermeneutics, see generally J.D. CAPUTO, HERMENEUTICS 219–243 (2018).

including per se legality rules, and (2) whether, in light of the discussion about the structured rule of reason above, an effects-based approach can be equated with an all-things-considered approach to competition law.

In order to clarify the relationship between "form" and "effect", I will try to flesh out the essence of what competition law scholars mean when they refer to a "form-based" approach. My description is not based on one scholarly theory in particular, but rather aims to identify the key aspects of the "form-based" approach as that concept is generally used in competition law scholarship.

The basic target of criticisms of "form-based" approaches to competition law is *legal doctrine that brings certain types of business conduct within a class where that is allegedly not warranted*. Such legal doctrine is then said to be "formalistic" or "form-based" according to a two-step reasoning: firstly, as a result of subsuming a type of conduct under a specific legal class, it is legally inferred that the conduct is legal or illegal without a case-specific assessment. Secondly, that legal inference is either (1) wrong, or (2) has too high a chance of being wrong in a concrete case, or (3) leads to arbitrary results.

Before discussing these three possible conclusions in more detail, I should note at this stage that whether an inference is "wrong" or "arbitrary" depends obviously on the alleged goal that is to be attained. In this sense, the choice between formalism and all-things-considered decision-making presupposes agreement on goals. As we shall see in regard to some examples discussed below, some discussions about (and accusations of) formalism may be misguided, insofar as they reflect disagreement about the goals rather than the modalities of competition law.[163]

The three possible conclusions mentioned as part of the second step refer to different types of criticism, all of which are usually associated with a critique of "form-based" reasoning. For instance, many of the Chicago School's criticisms of US antitrust law in the 1950s and 1960s made the claim that certain form-based inferences were simply wrong: practices that were banned were actually not anti-competitive, but rather pro-competitive.[164]

Some scholarly criticism of the ECJ's case law on Article 102 TFEU suggested something slightly different, namely that the form-based inferences of the case law had too high a chance

[163] On the relationship between formalism and the goals of competition law, see further Section VII *infra*.
[164] See generally POSNER, ANTITRUST LAW, *supra* note 71; R.H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

of leading to erroneous outcomes in concrete cases. Critique of the ECJ's *Hoffmann La Roche* judgment would be of this second type.[165]

The third conclusion's argument is that the form-based inferences treat functionally similar types of conduct differently, or functionally dissimilar types of conduct similarly. For instance, the ECJ's distinctive treatment of loyalty rebates and price-cutting practices is sometimes said to be mistaken or arbitrary because both types of conduct are, or should be regarded as, functionally similar from a competition law perspective.[166]

These three types of critique reflect quite different arguments, and while arguments of this sort all tend to use the term "formalistic" or "form-based" against their targets, not all of them appear to criticize the relevant doctrine of being formalistic in the legal-theoretical sense of decision-making constrained by rules.

For instance, the claim that subsuming a type of business conduct under a legal class leads to a wrong result does not mean that the application of rules is altogether wrong. According to some scholars, the Chicago school's criticisms against then-prevailing legal doctrines can be read as calling for per se legal rather than per se illegal rules.[167] Accordingly, quite often debates about allegedly erroneous categories are about goals rather than about formalism. If one is committed to allocative efficiency or total welfare as the supreme goal of competition law, many per se illegality rules associated with the early Harvard School are "wrong". This is not because they are formalistic but because the legal form itself – rather than its applications – is incongruent with the purported objective of competition law. For this reason, Posner endorsed a per se legality approach in respect of distribution agreements – an approach no less formalistic than the antitrust jurisprudence in the 1950s and 1960s, but according to Posner more suited to what he believed to be the goals of US antitrust law.[168]

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[165] See e.g. D. Geradin, *Loyalty Rebates after* Intel*: Time for the European Court of Justice to Overrule* Hoffmann-La Roche, 11 J. COMP. L. & ECON. 579 (2015); van Wijck, *Loyalty Rebates*, *supra* note 161.

[166] See e.g. P. Ibáñez Colomo, *AG Wahl in* Intel*, or The Value of Realism and Consistency in the Context of Article 102 TFEU*, CONCURRENCES 21 (2017) (agreeing with AG Wahl that rebates, selective price cuts and margin squeezes should be treated similarly). See also the European Commission's Enforcement priorities in applying Article 82 EC to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, para. 23, which considers conditional rebates as a type of price-based exclusionary conduct and consequently proposes a price/cost test.

[167] E.g. R.A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHIC. L. REV. 6 (1981). On the Chicago School's commitments to the formal rule of law, see R. Stones, *The Chicago School and the Formal Rule of Law*, 14 J. COMP. L. & ECON. 527 (2018).

[168] See esp. Posner, *The Next Step*, *supra* note 167. Posner does not assert that *all* vertical restrictions in distribution are pro-competitive. Accordingly, he accepts that his proposed rule is formalistic, but argues that it is preferable to a more complex rule because a per se legality approach "would serve […] to lighten the burden on the courts and to lift a cloud of debilitating doubt from practices that are usually and perhaps always procompetitive" (*id.* at 23).

Turning to the third conclusion mentioned above, the fact that some legal classes are wrong because they do not correspond to economically similar and dissimilar types of conduct, is not by definition an argument against legal formalism. Rather, the argument could be read as saying that legal rules should be amended so as to correspond as precisely as possible to the specific economic effects of specific types of conduct.[169]

Likewise, a number of the EAGCP Report's proposals for an "effects-based" approach mainly involve a change in the substance, not the form, of the legal tests which apply to Article 102 TFEU. While the substance of a legal test can be such that the norm becomes less formalistic,[170] this appears to not necessarily be the case in the EAGCP's Report, whose proposals for reform include rule-like prescriptions. For instance, the report states that a form-based rule against predatory pricing would be that "the incumbent cannot lower its price below a certain threshold", while the preferred effects-based rule would be "whenever you have a financially strong incumbent/financially weak entrant, the incumbent cannot invest in losses beyond a certain threshold (to be defined with reference to possible practices)".[171] It is clear that both rules are highly formalistic because they prescribe clearly the manner in which the decision-maker should identify competitive harm. "Form-based", therefore, seems to refer merely to a specific kind of categorization of conduct which is deemed obsolete or otherwise arbitrary.

The argument that form-based inferences by definition have too high a chance of resulting in wrong outcomes in individual cases, however, is a genuine argument against legal formalism.[172] After all, this argument is premised on the merit of assessing each case

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[169] For this argument, see e.g. Lemley and Leslie, *Categorical Analysis*, *supra* note 7; Lianos, *Categorical Thinking*, *supra* note 7.

[170] This is particularly likely if the substance of the legal test is made more abstract. The more abstract the norm, typically the more the norm is given content on an *ex post* basis, i.e. becomes more like a "standard".

[171] REPORT BY THE ECONOMIC ADVISORY GROUP FOR COMPETITION POLICY, *supra* note 156 at 7.

[172] The key term here is "by definition", which distinguishes this argument from the abovementioned argument that some legal classes are wrong because they do not correspond to economically similar and dissimilar conduct. One may of course criticize some legal classification because it does not sufficiently precisely correspond to economically similar and dissimilar conducts and for that reason is too likely to result in wrong outcomes in individual cases. In my reading of his Opinion in *Intel*, AG Wahl proposes two categories of rebates as the most economically sound classification of rebates, and subsequently rejects formalism in respect of the second category of rebates comprising all non-quantity rebates. See Advocate General Wahl in Intel Corp. v. European Commission, C-413/14 P, *supra* note 154, para. 81–84, 94–107. However, AG Wahl's analysis is muddled by the fact that he does claim that loyalty rebates are "presumptively unlawful" and compares them to a restriction of competition by object in Article 101 TFEU (*id.*, para. 82). A presumption of unlawfulness is hard to square with an all-things-considered analysis along the lines proposed by AG Wahl both conceptually and normatively, since it raises the question of what justifies a presumption of unlawfulness if, indeed, "the effects of exclusivity are context-dependent" (*id.*, para. 94). My understanding of AG Wahl's approach is that he only introduces the presumption of unlawfulness to reconcile his approach with the Court's judgment in *Hoffmann La Roche* (Hoffmann-La Roche & Co. AG v. Commission of the European Communities, 85/76, EU:C:1979:36), while that presumption is quickly disposed once the dominant undertaking raises any claim that its rebate system is not

individually based on all relevant circumstances. Instead of categorizing some type of business conduct and inferring its anti-competitive nature from that category – with the risk of false positives or false negatives – decision-makers should approach each case individually and decide on the basis of all relevant considerations.[173]

In his Opinion in the *Intel* case, Advocate General Wahl offers the most explicit and coherent proposal for an "effects-based" approach to the treatment of loyalty rebates under Article 102 TFEU.[174] The Advocate General emphasizes the need for an analysis of all relevant circumstances for all rebates other than quantity rebates.[175] This approach, whatever one may think of its merits,[176] is indeed the most straightforward and logical alternative to legal formalism or decision-making constrained by legal rules. According to Advocate General Wahl, the General Court's *Intel* judgment's three-part categorization of rebates is particularly problematic because the formalistic assumption of unlawfulness cannot be rebutted if it is based on form.[177] In other words, according to Advocate General Wahl the formalism of the tripartite categorization is unwarranted because it has too high a risk of erroneous outcomes in individual cases.[178] It is exactly for this reason that Advocate General Wahl proposed an all-things-considered analysis in light of the objective of maximizing efficiency, which he considers to be the main purpose of EU competition law.[179]

In conclusion, the distinction between form and effect is often more elusive than helpful, since it is unclear what the distinction means to particular persons, and not all arguments against a so-called "form-based" approach amount to a rejection of formalism in the legal-theoretical sense central to this article. Often, it is the substance of the legal categories which is criticized, rather than the legal categories as such. This brings us to an underlying problem,

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capable of harming competition. In that case (and, presumably, the undertaking will *always* raise such a claim), the presumption is eliminated and the case ought to be decided on the basis of an all-things-considered analysis.

[173] See e.g. Orbach, *The Durability*, *supra* note 7.

[174] Advocate General Wahl in Intel Corp. v. European Commission, C-413/14 P, *supra* note 154.

[175] *Id*., para. 101–105.

[176] For a critical analysis of the Opinion, see I. LIANOS AND V. KORAH WITH P. SICILIANI, COMPETITION LAW 940–945 (2019). Cf. with D. Geradin, *The Opinion of AG Wahl in* Intel*: Bringing Coherence and Wisdom into the CJEU's Pricing Abuses Case-Law*, TILEC DISCUSSION PAPER No. 2016-034 (2016); N. Petit, *The Advocate General's Opinion in* Intel v Commission*: Eight Points of Common Sense for Consideration by the CJEU*, CONCURRENCES 1 (2017).

[177] This is questionable in view of the possibility for objective justification. See e.g. W. Wils, *The Judgment of the EU General Court in* Intel *and the So-Called More Economic Approach to Abuse of Dominance*, 37 WORLD COMP. 405, 425–427 (2014). This points at the difference between formalism or presumptive formalism on the one hand and the combination of a rule and an exception on the other hand, as noted in Section II *supra*. In my reading of the ECJ's case law on Article 102 TFEU, the objective justification is an implied exception to the prohibition of abuse of a dominant position.

[178] Advocate General Wahl in Intel Corp. v. European Commission, C-413/14 P, *supra* note 154, para. 75–78, 89–100.

[179] *Id.*, para. 41: "given its economic character, competition law aims, in the final analysis, to enhance efficiency".

namely the question of what exactly *replaces* formalism in the various proposals for an "effects-based" approach to competition law.

The juxtaposition of "form" and "effects" is so entrenched in competition law discourse that it seems patently clear that abandoning a "form-based" approach – for instance in Advocate General Wahl's Opinion in *Intel* – implies an alternative that is indeed "anti-formalistic". As Wils observed, however, all human thinking is based on categorization, and legal analysis is not any different in this regard.[180] However, analyzing the "effects" of business conduct does influence the way in which the decision-maker's discretion is restricted. As I aim to show in the remainder of this Section, this influence does not necessarily make competition law decision-making less formalistic, and it is in fact quite likely to make it *more* formalistic than "traditional" competition law. In order to arrive at this conclusion, we first need a small detour into the notion of economic formalism.

B. Economic Formalism

This article's theoretical framework centers on *legal* formalism or the application of formalism in legal reasoning. Formalism and formalization, however, play an important role in numerous scientific disciplines, including economics. This sub-section aims to show how formalism is ubiquitous in contemporary economic science, including competition economics, and how that influences legal formalism and the legal analysis of anti-competitive effects.

Contrary to its legal counterpart, formalism in economics is usually portrayed in a positive way. After the Second World War, economics increasingly adopted the language and method of mathematics, which went hand in hand with an increasing formalization of economic science.[181] The formalist program in economics has been described as striving to "self-contained rule following" within "deductive systems that are independent of content".[182] More specifically, Backhouse distinguished between three meanings of formalism which influenced economics: (i) axiomatization, referring to the reduction of knowledge to a limited set of axioms, from which all other propositions are logically derived; (ii) mathematization, meaning the use of mathematics techniques in economic arguments; and (iii) methodological formalism,

[180] Wils, *The Judgment of the EU General Court in* Intel, *supra* note 177 at 421–422.
[181] G. Debreu, *The Mathematization of Economic Theory*, 81 AM. ECON. REV. 1 (1991)
[182] V. Chick, *On Knowing One's Place: The Role of Formalism in Economics*, 108 ECON. J. 1859, 1859 (1998).

referring to the acceptance of a particular set of methods which are used to solve certain types of problems.[183]

Importantly, formalization is also central to neoclassical economics, which became the "mainstream" school of economics in the second half of the twentieth century.[184] Neoclassical economics may be very roughly described as the "paradigm"[185] or "research program"[186] which departs from three ontological assumptions: (1) people have preferences among outcomes, (2) people act independently on the basis of full and relevant information, and (3) individuals maximize utility, while firms maximize profits.[187] These ontological assumptions are strongly connected to predictive power as the central epistemological principle, following Milton Friedman's instrumentalist methodology, according to which the strength of a theory does not depend on the correspondence of its assumptions with reality, but exclusively on the extent to which the theory can accurately predict real events.[188] This implies that logical inference and predictive power are central parts of the neoclassical school of economics. The methodological counterpart of neoclassical economics' epistemology entails an increased reliance on formalization and mathematical modelling since the 1950s.[189]

There are, however, important differences between economic formalism and legal formalism. Among these differences is the fact that economic formalism applies mainly to economics as a *science* while legal formalism is mainly used in legal *adjudication* (and other

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[183] R.E. Backhouse, *If Mathematics Is Informal, Then Perhaps We Should Accept That Economics Must Be Informal Too*, 108 *Economic Journal* 1848, 1848–1849 (1998).

[184] Social, political and legal philosopher Roberto Mangabeira Unger goes as far as to say that marginalist economics is based on the premise that "the uncovering of new facts need never lead to a change in the basic marginalist analysis of the economy" (R. MANGABEIRA UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK 126 (1987). Consequently, economics aims to shield its core hypotheses from empirical or normative critique by claiming neutrality from both normative evaluation and empirical verification and employing "techniques of avoidance" in order to counter normative or empirical criticism (*id*. at 133–135). Other schools of economics may, of course, rely less on formal methods and theoretical assumptions. One notable example is the use of experimental methods in development economics. However, neoclassical economics, in many ways, remains the central paradigm in economic science, including in competition economics.

[185] T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2012).

[186] I. Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, reprinted in THE METHODOLOGY OF SCIENTIFIC RESEARCH PROGRAMMES (J. Worrall and G. Currie eds., 1978).

[187] E. Roy Weintraub, *Neoclassical Economics*, in CONCISE ENCYCLOPEDIA OF ECONOMICS (2002). Cf. C. Arnsperger and Y. Varoufakis, *What Is Neoclassical Economics? The Three Axioms Responsible for its Theoretical Oeuvre, Practical Irrelevance and, Thus, Discursive Power*, 1 *Panoeconomicus* 5 (2006), who define neoclassical economics with reference to methodological individualism, methodological instrumentalism and methodological equilibration as its fundamental axioms. For an overview of different conceptions of the neoclassical school – as well as a plea for abandoning the term – see, T. Lawson, *What Is This "School" Called Neoclassical Economics?*, 37 CAMBRIDGE J. ECON. 947 (2013).

[188] M. Friedman, *The Methodology of Positive Economics*, in ESSAYS IN POSITIVE ECONOMICS (1953).

[189] Y.P. YONAY, THE STRUGGLE OVER THE SOUL OF ECONOMICS (1998). See also, D. MCCLOSKEY, THE RHETORIC OF ECONOMICS (1998); B.P. STIGUM, TOWARDS A FORMAL SCIENCE OF ECONOMICS: THE AXIOMATIC METHOD IN ECONOMICS AND ECONOMETRICS (1990). For a critical perspective on formalization in economics, see H.K.H. WOO, WHAT'S WRONG WITH FORMALIZATION IN ECONOMICS: AN EPISTEMOLOGICAL CRITIQUE (1986). See also Chick; *On Knowing One's Place*, *supra* note 182.

applications of the law to facts).[190] While economic formalism may also be conceptualized as a system of "decision-making" in economic science – albeit without the obligation to "solve" a case[191] – there is nothing like a normative obligation for the economist to take into account only a limited set of facts or to decide on the basis of a set of rules which disregards the full set of factual information available.[192] In other words, while formalization inevitably involves a simplification of the factual world – usually by means of mathematical models – the possible degree of sophistication of this formalization is principally unlimited, were it not for the limitations of time (and human intelligence). Formalism as excluding facts from the decision-making process by rules is, therefore, not an appropriate explanation of economic formalism.

However, the use of formal methods in economics does influence the modalities of legal analysis. As economic knowledge is "translated" into legal language and legal rules,[193] the formal character of contemporary economics is likely to translate into *formalistic* legal rules which reflect the ontological assumptions and formalistic inferences that have been established by economic science. In other words, if the content of competition law is largely based on economic knowledge, and current economic knowledge consists mostly of formal assumptions and models, the content of competition law is likely to consist largely of formalistic rules as well.

It is also important to note in this regard that any formalism in economic theory is subject to possible falsification by empirical data.[194] However, the same is certainly not true for *legal* formalisms, which can only be explicitly or implicitly overruled. Thus, if economic assumptions that have been translated into legal rules are proved wrong from an economic point of view, this does not affect the validity of the corresponding legal rules at least until the latter are overruled by appropriate legislative or judicial decision-making. Charges of "formalistic" legal rules are often raised precisely in situations in which the legal reality yet has to catch up with developments in economic theory.

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[190] There is, of course, a long tradition of "legal science" as "legal formalism" and of attempts to construct a deterministic "snap-shot" of the entire legal system and all of the normative interactions among its norms.

[191] One could imagine an economist being forced to "solve" a case on the basis of economic science, in which case his or her position would be functionally equivalent to a judge's obligation to "solve" to a case on the basis of the law. We would subsequently be able to assess the degree of formalism that both the economist and the judge apply in their analysis.

[192] I am thankful to Martin Holterman for raising this point. However, otherwise relevant facts may in practice be excluded from the scientific process of discovery as a "decision-making procedure" if they are deemed irrelevant by the "paradigm" or "research program" in which the economist operates. I leave this point aside here.

[193] On the translation of economic knowledge, see I. Lianos, *Lost in Translation? Towards a Theory of Economic Transplants*, 62 CURRENT LEGAL PROBLEMS 346 (2009).

[194] I am grateful to an anonymous reviewer for raising this point.

This "mirroring" of economic formalism and legal formalism in competition law can be seen in the actual operation of "more economic" and "effects-based" approaches to EU competition law and US antitrust law. The next sub-section will discuss how "effects-based" competition law typically does *not* involve a case-by-case analysis of the unique characteristics of each case, but rather subsumes the factual circumstances of a case under general rules about the functioning of markets and what we believe to be the distinction between generally "anti-competitive" and "pro-competitive" practices.[195] Afterwards, sub-section VI.D. will provide some concrete examples of "effects-based formalistic" rules in both EU competition law and US antitrust law.

C. The Effects-Based Approach and Legal Formalism

As mentioned above, an effects-based approach to competition law appears to entail a case-by-case analysis of whether anti-competitive effects have occurred or are likely to occur. The term "effects-based" in this regard suggests that a finding of antitrust liability must be based on empirical evidence of (actual or likely) anti-competitive effects. This suggestion, I believe, is largely misleading.

Most conceptions of effects-based approaches to competition law draw heavily, if not exclusively, on economic theories of harm, which comprise theoretical models of reality.[196] As a result of the prevalence of formalization and form-based reasoning in (neoclassical) economic theory, effects-based approaches to competition law usually rely on a number of assumptions and a limited set of intuitions about rational behavior in specific circumstances to derive conclusions as to whether a certain type of business conduct or the individual circumstances of a case are anti-competitive, i.e. lead to actual or likely anti-competitive effects. In practice, this

[195] These rules about the functioning of markets and what we believe to be the distinction between generally "anti-competitive" and "pro-competitive" practices" typically originate as "economic rules", that is propositions of economic science, and are subsequently "translated" into legal rules (see also Lianos, *Lost in Translation?*, *supra* note 193). See Section VI.D. *infra*.

[196] I do not mean to suggest that theories of harm or economic theories in general are merely "speculative" or that it has not been properly tested against empirical data. What I do claim, however, is that the use of economic theories of harm to specific competition law cases often does not entail an empirical verification of the validity of the theory *in that specific case*. This is quite obvious because such verification could arguably only take place on the basis of an analysis of the specific factual circumstances of the case that would be so elaborate that one would not need the theory of harm to establish anti-competitive effect in the first place, except as a heuristic device to identify the relevant facts.

may even be inevitable because it would be unworkable to decide each individual case on the basis of its empirically demonstrated economic effects.[197]

Actual empirical data and concrete evidence of anti-competitive effects play a relatively limited role in competition law adjudication, outside specific situations such as the calculation of damages. In cases where such empirical data *appears* to play an important role – the European Commission's decisions in *Intel*,[198] *Google Shopping*[199] and *Google Android*[200] come to mind – the extensive collections of data are themselves not dispositive. It is true that empirical data such as internet traffic diverted from comparison shopping websites to Google's own comparison shopping services, for instance, provides valuable information about the characteristics of the relevant market(s). The relevant *legal* conclusions – that the effects of the relevant business conduct are "anti-competitive" rather than "pro-competitive" – are however not inferred from the data itself. Instead, these conclusions are drawn on the basis of distinctions, such as the one between "anti-competitive foreclosure" and "competition on the merits".[201] These distinctions are, however, theoretical rather than empirical, and they are necessary to connect the available empirical data to certain legal qualifications.[202] At most,

[197] This is especially true for both merger control and abuse of dominance and monopolization cases. Merger control necessarily relies on prospective analysis so that actual empirical effects in the case at hand by definition have not yet materialized. The regulation of dominant undertakings by Article 102 TFEU and section 2 Sherman Act 1890 aims to avoid the negative effects of anti-competitive conduct. Accordingly, enforcement aims to prohibit anti-competitive conduct by dominant undertakings before the detrimental effects on competitors and consumers have actually materialized. In addition to these normative considerations, a hypothetical, purely ad hoc, effects-based approach raises deep problems of causation and the question of what counts as an "effect". See to this end A. ten Kate, *Hundred Years Rule of Reason versus Rule of Law* (14 June 2016), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795797, who rightly observes that "[w]hen there is an effect, there is a cause […] Usually, an effect is produced by many different causes and a single cause may have many different effects, but when the discussion is about the pro- and anti-competitive effects of a specific conduct, such secondary causes and effects are often swept under the carpet or dealt with by what I call a triple-E assumption (Everything Else Equal)" (*id.* at 4–5).

[198] European Commission, Decision relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, Case COMP/C-3/37.990, *Intel*, D(2009)3726 final.

[199] European Commission, Decision relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area, Case AT.39740, *Google Search (Shopping)*, C(2017) 4444 final.

[200] European Commission, Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement, Case AT.40099, *Google Android*, C(2018) 4761 final.

[201] See e.g. Case AT.39740, *Google Search (Shopping)*, C(2017) 4444 final, paras. 341–342, 596, 649.

[202] Of course, categorizing conduct as either "anti-competitive foreclosure" or "competition on the merits" is typically based on economic knowledge and experience as regards the types of conduct that lead – by and large – to anti-competitive or rather pro-competitive outcomes, or to the attainment or some other purpose such as allocative efficiency. The same applies to distinctions which serve a similar function of distinguishing between desirable and undesirable conduct, such as *Leistungswettbewerb* and *Behinderungswettbewerb*, or the use of specific legal tests such as the raising-rivals-costs test or the no-economic-sense test. In this sense the content of a categorization is obviously based on empirical data, but this need not be – and almost never is – empirical data regarding the specific conduct *of the individual case at hand*.

empirical data can provide information that supports multiple economic narratives focusing on either pro-competitive or anti-competitive effects.[203]

Moreover, the fact that conclusions regarding the anti-competitiveness of specific types of conduct are theoretical is arguably part of the nature of competition law. Distinguishing between pro-competitive and anti-competitive conduct is often difficult because they cannot be clearly demarcated, and in a case-by-case analysis the distinction is artificial in many respects.[204] Consequently, abstract definitions of what constitutes an "anti-competitive effect" often cannot be linked to case-by-case determinations of such anti-competitive effects. For example, in his sophisticated analysis of the EU case law, Ibáñez Colomo concludes that

> "an analysis of the case law suggests that the relevant question [to determinate anti-competitive effects] in this regard is whether the ability and/or incentive to compete are harmed to such an extent that competitive pressure is reduced".[205]

If one looks at any individual case, however, it is clear that *all* conduct by which an undertaking competes with its competitors has at least the aim, and often the effect, of harming competitors' ability and incentive to compete, and reducing competitive pressure. Even competition on the merits can lead to a reduction of competitive pressure if the undertaking in question is successful. This problem of distinguishing between pro-competitive and anti-competitive conduct *in an individual case* is precisely the reason why the structuralist approach in US antitrust and the early Ordoliberal thinkers in Germany proposed specific categories that would distinguish between legal and illegal *types* of conduct.[206] Even Chicago School thinkers have

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[203] REPORT BY THE ECONOMIC ADVISORY GROUP FOR COMPETITION POLICY, *supra* note 156 at 14: "[S]ince many practices can have pro- as well as anticompetitive effects, merely alluding to the possibility of a story is not sufficient. The required ingredients of the story [of competitive harm] must therefore be properly spelled out and shown to be present [...] In any given case in practice, however, one may have to examine several effects at once; in this situation, an encompassing formal analysis may not be feasible. However, for each particular effect that is considered, the arguments that are made should be grounded in formal analysis. At this level the analysis should rely on models as tools to assess the validity of the argument in its relation to the facts, as well as internal consistency, and consistency with the other arguments that are given". See also e.g. M.S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N. C. L. REV. 219, 250–258 (1995); F.H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1706–1709 (1986).

[204] For instance, exclusion of competition within a firm is excluded from the scope of competition law, while from an empirical, economic perspective there is no obvious reason why competition law should only be interested in competition between firms and not in competition within firms. This point has been made by numerous scholars, including by F. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1, 1–2 (1984).

[205] Ibáñez Colomo, *Anticompetitive Effects*, *supra* note 96 at 337.

[206] On legal categorization under the structuralist approach, see esp. C. KAYSEN AND D. TURNER; ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS chs. 3–5 (1965); on the varieties of legal categorization in Ordoliberal thinking, see P. Behrens, *The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU*, in ABUSIVE PRACTICES IN COMPETITION LAW (F. Di Porto and R. Podszun eds., 2018); E.

acknowledged that it is often impossible in individual cases to actually measure "pro-competitive" and "anti-competitive" effects directly, let alone balance them, and that the best competition law can do is work with general presumptions about the functioning of markets.[207]

This problem occurs particularly, but not exclusively, in monopolization and abuse of dominance cases, where, at bottom, fierce competition against (smaller) competitors cannot be distinguished categorically from attempts to exclude those competitors from the market. As a result, competition lawyers have tried to devise specific principles and legal tests that distinguish types of pro-competitive conduct from types of anti-competitive conduct based on general economic knowledge and predictions as to how markets are likely to develop. Such principles and tests include substantive legal tests but also, for instance, the rule in EU competition law that a dominant undertaking has a "special responsibility" not to harm the competitive process.[208] However, when looking at the specific facts of a specific case, distinguishing between anti-competitive and pro-competitive effects often seems close to impossible.

Consequently, the contemporary, "effects-based" approach is essentially an equally, if not more formalistic approach that employs assumptions, categories and inferences based on formal economic methods, which are translated into formalistic legal tests that aim to incorporate economic knowledge.[209] Indeed, most proponents of what they call "effects-based" approaches argue not in favor of abandoning legal categorizations altogether. They rather aim to modify the substantive legal tests and categories so that they better reflect contemporary economic knowledge.[210] As a result, the legal rules of an economics-informed competition law

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Deutscher and S. Makris, *Exploring the Ordoliberal Paradigm: The Competition–Democracy Nexus*, 11 COMP. L. REV. 181 (2016); H. Schweitzer, *The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC*, in EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC (D. Ehlermann and M. Marquis eds., 2008).

[207] Easterbrook, *The Limits of Antitrust*, *supra* note 204.

[208] See e.g. NV Nederlandsche Banden Industrie Michelin v. Commission of the European Communities, 322/81, EU:C:1983:313, para. 57; France Télécom SA v. Commission of the European Communities, C-202/07, EU:C:2009:214, para. 105; Deutsche Telekom AG v. European Commission, C-280/08, EU:C:2010:603, para. 176. While the special responsibility rule does no by itself indicate what types of conduct are abusive, it helps to shape more specific theories of harm and forms of abuse by imposing a general obligation onto dominant undertakings that is not borne by non-dominant undertakings.

[209] In the context of the prohibition of monopolization and abuse of a dominant position, one may distinguish, among others, between the raising rivals' costs test (see T. Krattenmaker and S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L. J. 209 (1986) and S. Salop and D. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983)); the exclusion of as efficient competitors test (see POSNER, ANTITRUST LAW, *supra* note 71 at 194–196); and the sacrifice of present profits test (see P. Areeda and D. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975)).

[210] See e.g. Ibáñez Colomo, *AG Wahl in* Intel, *supra* note 166; Lemley and Leslie, *Categorical Analysis*, *supra* note 7; Lianos, *Categorical Thinking*, *supra* note 7.

are likely to be at least equally, if not *more* formalistic than the "form-based approach", as will be shown in the next sub-section.

D. Effects Analysis and Legal Formalism in Practice

The reproduction of legal formalism is particularly apparent from critiques of "form-based" reasoning that focus on the arbitrary results of existent legal categorizations. Some Chicago School scholars inferred from several economic assumptions and hypotheses that a "per se legality" approach would be optimal for all but a small number of practices.[211] Also more nuanced approaches proposing "effects-based" approaches to competition law often boil down to specific legal rules, and the same is true for numerous legal tests that have been devised by courts to analyze the anti-competitive effects of specific types of conduct.

A good example of such a proposed change is the As Efficient Competitor Test (AECT). According to some scholars, in monopolization and abuse of dominance cases, the AECT is better suited than competing tests – such as an anti-competitive foreclosure test – to distinguish between pro-competitive conduct and anti-competitive conduct.[212] The AECT, however, is more formalistic than the foreclosure test because the latter allows the decision-maker to take into account more considerations, including in particular the degree to which competitive pressure is reduced by excluding less efficient competitors.[213] The AECT, by contrast, posits a specific benchmark which decision-makers ought to follow. If the decision-maker aims to find out whether an abuse of a dominant position has taken place, (s)he can no longer take into account foreclosure effects vis-à-vis less efficient competitors, even if such effects may, in this specific case, have a competition-distorting effect.[214] In this regard, if the AECT is a rule that aims to attain the objective of protecting competition, it constitutes a legal formalism because it prevents decision-makers from deciding on the basis of all considerations that are relevant to the purpose of protecting competition.

It is important to note that proponents of the AECT might argue in response that the goal of protecting "competition" is nothing but protecting competition among equally efficient

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[211] See generally, BORK, THE ANTITRUST PARADOX, *supra* note 164.
[212] See e.g. POSNER, ANTITRUST LAW, *supra* note 71 at 194–196. See also Advocate General Wahl in Intel Corp. v. European Commission, C-413/14 P, *supra* note 154, para. 164–165.
[213] E. ELHAUGE AND D. GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 576 (2007); Hovenkamp, *The Harvard and Chicago Schools and the Dominant Firm*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 116–117 (R. Pitofsky ed., 2008).
[214] E.g. A.S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L. J. 941 (2002); ELHAUGE AND GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS, *supra* note 213 at 576.

competitors. In that case, the AECT would not be formalistic because protecting equally efficient competitors is itself the relevant purpose, rather than a rule that serves to attain the purpose of protecting "competition". While some would indeed advance such an understanding of the AECT and the purpose of competition law,[215] once one is committed to the purpose of "protecting competition" in general, there is no reason why competition among equally efficient competitors is the *only* relevant aspect of "competition".[216]

This interaction between economic formalism, legal formalism and all-things-considered analysis is also reflected in several parts of the US and EU competition case law. In the US, for instance, after the Chicago school's criticism of the case law's expansive approach to monopolization in the 1950s and 1960s,[217] the Supreme Court substantially narrowed the scope of section 2 of the Sherman Act 1890 through a number of formalistic presumptions of legality, which were informed by certain assumptions from (particular schools of) economics.[218] This can be illustrated by the approach in *Brooke Group* towards price-setting and, more generally, the *laissez faire* approach towards monopolistic conduct in *Trinko*.

In *Brooke Group*, the Supreme Court ruled that above incremental cost pricing is per se legal under section 2,[219] contrary to legal and economic scholarship that had emphasized possible exclusionary effects of above-cost pricing.[220] However, the Court emphasized the risk of type 1 errors as well as the practical impossibility for courts to distinguish between pro-competitive and anti-competitive prices above cost.[221] The result is a clear and formalistic

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[215] See e.g. P. Ibanez Colomo, *Why Article 102 TFEU Is About Equally Efficient Rivals: Legal Certainty, Causality and Competition on the Merits*, CHILLING COMPETITION, 10 May 2021, available athttps://chillingcompetition.com/2021/05/10/why-article-102-tfeu-is-about-equally-efficient-rivals-legal-certainty-causality-and-competition-on-the-merits/.

[216] E.g. ELHAUGE AND GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS, *supra* note 213 at 576; Ioannis Lianos, *The Price/Non Price Exclusionary Abuses Dichotomy: A Critical Appraisal*, CONCURRENCES (2009), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1398943. See also European Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, [2009] OJ C45/7, para. 24.

[217] A. Director and E.H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281 (1956); R.H. Bork and W.S. Bowman Jr., *The Crisis of Antitrust*, 65 COLUMBIA L. REV. 363 (1965); BORK, THE ANTITRUST PARADOX, *supra* note 164; POSNER, ANTITRUST LAW, *supra* note 71.

[218] On the conservative nature of the types of economics that have informed the Chicago School and the Supreme Court's Chicago-inspired case law, see e.g. T.E. Kauper, *Influence of Conservative Economic Analysis on the Development of the Law of Antitrust*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (R. Pitofsky ed., 2008).

[219] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[220] See e.g. P. Milgrom and J. Roberts, *Predation, Reputation and Entry Deterrence*, 27 J. ECON. THEORY 280 (1982); Edlin, *Stopping Above-Cost Predatory Pricing*, *supra* note 214. Cf. e.g. E. Elhauge, *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory – and the Implications for Defining Costs and Market Power*, 112 YALE L. J. 681 (2002).

[221] Brooke Group Ltd., *supra* note 219 at 223: "the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting".

demarcation between per se legal price-setting and – provided that the recoupment criterion is proved – illegal price-setting under section 2.[222] This legal formalism is based on certain form-based economic theories that are "transplanted" into the form of legal rules.[223] Academic criticism of the *Brooke Group* legal test is typically based on alternative economic theories of harm or empirical evidence that aims to show that the form-based economic theories informing the law on price-cutting by dominant undertakings are obsolete or otherwise inaccurate.[224]

In *Trinko*, the Supreme Court similarly limited the scope of section 2 of the Sherman Act 1890 by adhering to a rule-based *laissez faire* approach. It emphasized, first of all, that charging monopoly prices is not a violation of section 2 because "it is an important element of the free-market system" and "[t]he opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place".[225] The Supreme Court also emphasized the risk of false positive interventions to the detriment of competition, and the practical inability of courts to impose and supervise a duty to deal.[226] As a whole, the *Trinko* judgment substantially reduces the possibility for decision-makers to decide, on the balance of all relevant circumstances of each case, that monopolization has occured: monopoly prices – at least in the short term – are in any case excluded from the decision-making process as relevant considerations, and with respect to refusals to deal, decision-makers can only intervene in highly limited circumstances.

In EU competition law, we see a similar interaction between economic and legal formalism. Although arguably EU competition law is less informed by strong beliefs about the self-correcting capacity of markets, which translates into a more nuanced, post-Chicago-like approach, we can identify a number of legal rules that are informed by formal economic knowledge and which aim to structure the analysis of anti-competitive effects.

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[222] *Id*.; Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc, 127 U.S. 1069 (2007).
[223] Lianos, *Lost in Translation?*, *supra* note 193.
[224] Kauper, *Influence of Conservative Economic Analysis*, *supra* note 218. In EU law, the approach towards price-based conduct by dominant undertakings is somewhat less formalistic than under section 2 Sherman Act 1890. As regards price discrimination, for instance, in *Post Danmark I* the Court provided an all-things-considered test to assess whether price-setting strategies should be deemed anti-competitive (Post Danmark A/S v. Konkurrencerådet, C-209/10, EU:C:2012:172, para. 39). This analysis, however, still contains certain formalistic elements, such as the rule that prices above average total costs do not have anti-competitive effects (*id.*, para. 36). The degree of formalism appears to be higher in respect of predatory pricing. In AKZO Chemie BV v. Commission of the European Communities, C-62/86, EU:C:1991:286, para. 71–72, the Court held that prices below average variable costs are abusive, and prices between average variable costs and average total costs are abusive if they are determined as part of a plan for eliminating a competitor. Thus, for prices above average variable costs the Court introduced a specific rule as opposed to requiring an all-things-considered analysis that would include more factors than merely the fact that prices are below average total costs and the existence of a plan to eliminate a competitor.
[225] Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. __ (2004), at 7.
[226] *Id.* at 15.

In respect of Article 101(1) TFEU, restrictions "by effect", like the by object category, have to be established in light of the economic and legal context of the agreement.[227] More specifically, the Court has held that the anti-competitive nature of the effects of an agreement ought to be assessed in light of the competition that would have occurred in the absence of the agreement.[228] Although the effects category in Article 101(1) TFEU, like rule of reason analysis in US antitrust law, is sometimes conceived as an all-things-considered analysis based on the specific facts of each case[229] – and this is true as a matter of legal principle[230] – in practice specific types of agreements are subject to specific effects-based but formalistic tests. In other words, rather than a genuine balancing approach, the Court has provided formulaic criteria to structure the way in which anti-competitive and pro-competitive effects are taken into account.[231]

According to the ancillary restraints doctrine in EU competition law, for example, an anti-competitive clause falls outside the scope of Article 101(1) TFEU if it is ancillary to a broader agreement that is, overall, pro-competitive.[232] The central doctrinal test that has to be applied in this regard involves the identification of an overall, pro-competitive rationale and the necessity of the anti-competitive clause for the agreement as a whole.[233] It is clear that this approach does amount to neither an unconstrained, all-things-considered analysis of the agreement, nor the balancing of pro-competitive and anti-competitive effects in general. The analysis of ancillary restraints is rule-like and, thus, formalistic.[234]

To give another example, in *Delimitis* the Court introduced a two-step test in order to prove an anti-competitive effect of an exclusive purchasing agreement.[235] That test is formalistic

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[227] Société Technique Minière, 56/65, *supra* note 90, p. 250; Stergios Delimitis v. Henninger Bräu AG, C-234/89, EU:C:1991:91, para. 20–27.
[228] Société Technique Minière, 56/65, *supra* note 90, p. 250; MasterCard Inc. and Others, C-382/12 P, *supra* note 94, para. 162; Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v. Asociación de Usuarios de Servicios Bancarios, C-238/05, EU:C:2006:734, para. 49; Generics (UK) Ltd and Others v. Competition and Markets Authority, C-307/18, EU:C:2020:52, para. 116
[229] On the limited nature of the effects analysis in Article 101(1) TFEU, and specifically on the lack of "balancing" pro-competitive and anti-competitive effects, see however European Commission, Guidelines on the application of Article 81(3) of the Treaty, *supra* note 121, para. 30–31; MONTI, EC COMPETITION LAW, *supra* note 121 at 29–31; G. Monti, *EU Competition Law and the Rule of Reason Revisited*, TILEC DISCUSSION PAPER DP 2020-021 (2020).
[230] Société Technique Minière, 56/65, *supra* note 90, p. 250.
[231] See Monti, *EU Competition Law*, *supra* note 229.
[232] For an overview and analysis of case law, see LIANOS AND KORAH WITH SICILIANI, *supra* note 176 at 588–628.
[233] See e.g. Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis, 161/84, EU:C:1986:41, para. 13–22; Gøttrup-Klim e.a. Grovvareforeninger v. Dansk Landbrugs Grovvareselskab AmbA, C-250/92, EU:C:1994:413, para. 31–45, Remia BV and Others v. Commission of the European Communities, 42/84, EU:C:1985:327, para. 17–20.
[234] European Commission, Guidelines on the application of Article 81(3) of the Treaty, *supra* note 121, para. 31
[235] Delimitis v. Henninger Bräu AG, C-234/89, *supra* note 227, para. 14–27. Having defined the relevant market(s), it must first be established whether "the nature and extent of those agreements in their totality,

because it introduces a specific legal rule that may prevent a decision-maker from concluding, for instance, that a single exclusive purchasing agreement has appreciable anti-competitive effects even if it is not part of a "bundle" of similar agreements which have the cumulative effect of foreclosing market access.[236]

Intel offers a particularly interesting case. As mentioned above, Advocate General Wahl's Opinion provides a remarkably anti-formalistic approach to all rebates other than quantity rebates.[237] It is not immediately apparent how his proposed analysis of "all the circumstances" constrains decision-making.[238] The Court's judgment, however, while including a large variety of considerations to be taken into account in the analysis of loyalty rebates, nonetheless resorts to the AECT as a key legal formalism.[239] This allows the Court to constrain the decision-making discretion of the Commission at least to a sufficient degree as to allow for judicial review.[240]

Analysis of anti-competitive effects, therefore, does not necessarily mean all-things-considered decision-making, just as an inquiry into a possibly anti-competitive object does not necessarily mean a rule-based approach. If one compares *Cartes bancaires* and *Budapest Bank* to *Delimitis* and *Pronuptia*, it even seems that the case law on the effects category is *more* formulaic than the one on by object restrictions. This can be understood in the light of the characteristics of both categories. The effects category is prone to develop into a Brandeisian kind of rule of reason to the detriment of legal certainty and administrability. Formalization through rules may indeed be necessary to avoid a situation in which all circumstances are relevant, and thus nothing is dispositive. By contrast, the dangers of broadening the scope of the by object category too much are also clear.[241] Including *more* considerations in the contextual analysis is a logical remedy to avoid over-inclusion. It is by no means paradoxical, therefore, that the case law on "by object" restrictions has moved towards a decrease in formalism, while the case law on "by effect" restrictions has moved towards increased

comprising all similar contracts tying a large number of points of sale to several national producers" negatively affect the "real concrete possibilities for a new competitor to penetrate the bundle of contracts" (*id.*, para. 19–21). Only if the bundle of exclusive purchasing agreement leads to foreclosure of new competitors, in a second step it must be established that "the agreement in question [makes] a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context" (*id.*, para. 27).

[236] *Id.*, para. 27.

[237] See Section VI.A. *supra*.

[238] Advocate General Wahl in Intel Corp. v. European Commission, C-413/14 P, *supra* note 154, para. 101–107.

[239] Intel Corp v. European Commission, C-413/14 P, EU:C:2017:632, para. 138–139.

[240] On the institutional dimensions of legal formalism, among others in the context of the *Intel* judgment, see further Section VII.A. *infra*.

[241] See recently e.g. Groupement des cartes bancaires, C-67/13, *supra* note 91, para. 58. See also Graham, *Methods For Determining Whether an Agreement Restricts Competition*, *supra* note 111.

formalization through fact-specific rules and criteria. Or, as Schauer more generally observed, rules tend to become more standard-like over time, while standards tend to become more rule-like.[242]

The same might well be true for the per se rule and the rule of reason in US antitrust law. The former has, as we have seen, been devised as a strict legal formalism, but because of the undesired consequences that this approach entailed, most of the case law after *Trenton Potteries* centers rather on the *limits* of that rule, thus *in*formalizing its original scope. Reversely, while the rule of reason had originally been conceived as an all-things-considered analysis, this analysis has been consistently formalized in subsequent case law on specific types of conduct.

VII. Formalism and Type 1 and Type 2 Errors: An Institutional Perspective

Formalism is widely associated with type 1 errors (false positives) and type 2 errors (false negatives), and the related concepts of over- and under-inclusiveness of norms.[243] As we have seen above, this association between rule-based decision-making and over- and under-inclusiveness cannot be denied. If rule-based decision-making means anything at all, it must mean decision-making by abstraction from a certain number of individual facts or circumstances. It is in this sense that, as Schauer observes, rules are inherently over- and under-inclusive.[244]

The association between formalism and type 1 and type 2 errors, however, is more complex. Any useful association between formalism and type 1 and type 2 errors must be based on the relative error-cost framework of rule-based decision-making as opposed to all-things-considered decision-making. In the context of a case-specific, all-things-considered decision, it is nonsensical to speak of over-inclusiveness and under-inclusiveness because there is only one decision. That decision, however, may happen to be a type 1 or type 2 error, if the decision-maker fails to make the right decision in light of the relevant purpose(s), whatever they may be.

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[242] Schauer, *The Convergence*, *supra* note 54.
[243] In the competition law literature, see e.g. Easterbrook, *The Limits of Antitrust*, *supra* note 204; D.A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 86–91 (2007); POSNER, ANTITRUST LAW, *supra* note 71 at 39–43.
[244] See generally SCHAUER, PLAYING BY THE RULES, *supra* note 46, esp. chs. 2 and 3.

Therefore, while the terms over- and under-inclusiveness only make sense for rule-based decision-making, the terms type 1 and type 2 errors are relevant to both rule-based and all-things-considered decision-making. This raises the familiar question of whether the former is more likely to lead to such errors, and what factors are relevant in determining the relative error-cost framework for both types of decision-making. Most of the discussions about this error-cost framework are premised on the fact that rule-based decision-making leads to more type 1 and type 2 errors, but entails other advantages such as increased legal certainty and predictability.[245]

It is not entirely obvious, however, how formalism and rule-based decision-making are related to both more legal certainty and a higher risk of decisional errors, and especially why legal certainty and decisional errors are, supposedly, inversely correlated. The answer, in my view, is fundamentally *institutional*. In order to clarify this point, we need to return to Schauer's conceptual work on formalism, and more specifically his observations about the relationship between formalism and predictability.

A. Type 1 and Type 2 Errors and Decisional Jurisdiction

Using the familiar example of the "no vehicles in the park" rule, Schauer starts his discussion about type 1 and type 2 errors with the equally familiar problem of over- and under-inclusiveness. The "no vehicles in the park" rule inevitably leads to cases in which a decision-maker is confronted with a situation that clearly falls within the ambit of the rule – consider again, for example, an old war tank being placed at a war memorial in the park – but in which (s)he would prefer to have the decisional jurisdiction not to apply the rule. The *possibility* that such situations occur, according to Schauer, leads to reduced legal certainty:

> "It is the jurisdiction to determine that only some vehicles fit the purpose of the rule that undermines the confidence that all vehicles will be prohibited. No longer is it the case that anything that is a vehicle, a moderately accessible category, is excluded. Instead, the category is now that of vehicles whose prohibition will serve the purposes of the "no vehicles in the park" rule, a potentially far more controversial category".[246]

[245] E.g. Kaplow, *Rules Versus Standards*, *supra* note 53.
[246] Schauer, *Formalism*, *supra* note 38 at 540.

So far, this is familiar territory for competition lawyers. Indeed, whatever be the merits of a per se illegality rule against, for example, loyalty rebates, at least it does not grant decision-makers, including both competition authorities and courts, the jurisdiction to determine whether this particular loyalty rebate serves the purpose(s) of Article 102 TFEU. This lack of decisional jurisdiction creates predictability.

However, the link between predictability and formalism runs deeper. Continuing his discussion, Schauer notes that predictability and formalism are linked because the degree of formalism affects both the number of norm applications that are correct according to the norm itself and the chance that the decision-maker reaches an erroneous result:[247]

> "[T]he key to understanding the relationship of ruleness to predictability is the idea of decisional jurisdiction. The issue is not whether the statue serves the purpose of the 'no vehicles in the park' rule. It is whether giving some decisionmaker jurisdiction to determine what the rule's purpose is (as well as jurisdiction to determine whether some item fits that purpose) injects a possibility of variance substantially greater than that involved in giving a decisionmaker jurisdiction solely to determine whether some particular is or is not a vehicle. Note also that the jurisdictional question has a double aspect. When we grant jurisdiction we are first concerned with the range of equally correct decisions that might be made in the exercise of that jurisdiction. If there is no authoritative statement of the purpose behind the 'no vehicles in the park' rule, granting jurisdiction to determine that purpose would allow a decisionmaker to decide whether the purpose is to preserve quiet, to prevent air pollution, or to prevent accidents, and each of these determinations would be equally correct. In addition to increasing the range of correct decisions, however, certain grants of jurisdiction increase the likelihood of erroneous determinations. Compare 'No vehicles in the park' with 'The park is closed to vehicles whose greatest horizontal perimeter dimension, when added to their greatest vertical perimeter dimension, exceeds the lesser of (a) sixty-eight feet, six inches and (b) the greatest horizontal perimeter dimension, added to the greatest vertical perimeter dimension, of the average of the largest passenger automobile manufactured in the United States by the three largest automobile manufacturers in the preceding year.' The second adds no inherent variability, but it certainly compounds the possibility of decisionmaker

[247] I use the term "norm" here instead of "rule" because this argument applies to both rules and standards, if one wishes to maintain that distinction. In other words, whether something is called a rule or a standard, the point is that the more specific the prescriptions of the norm, the fewer outcomes of applying that norm are "correct".

error. Creating the jurisdiction to determine whether the purposes of a rule are served undermines predictability by allowing the determination of any of several possible purposes; in addition, the creation of that jurisdiction engenders the possibility that those who exercise it might just get it wrong".[248]

Consequently, Schauer associates the jurisdiction to decide on the purposes of a rule and the question of whether a specific case should be subsumed under the rule – i.e. the *opposite* of formalism – with less predictability but a *higher* risk of erroneous decisions. In competition law discourse, by contrast, formalism is usually associated with more predictability but also more erroneous decisions, which translates into an association between, on the one hand, less formalism and, on the other hand, less predictability but a *lower* risk of erroneous decisions.

This discrepancy between Schauer's observations and competition law discourse reflects the latter's belief in the rationality of case-by-case decision-making by expert institutions. The virtue of case-by-case decision-making is that the decision-maker can, and should, determine whether there is an actual or likely restriction of competition in this specific case. This approach also means, as Schauer notes, that the decision-maker "just gets it wrong". Some proponents of a rule-based approach to competition law indeed emphasized the risk of erroneous decisions in case-by-case, all-things-considered decision-making because of the imperfection of decision-makers and the impossibility to foresee all of the effects of an ad hoc intervention.[249] However, this appears to be a minority position in competition law scholarship, a point to which I will return below.

First, however, let us discuss in some more depth the relationship between formalism, predictability and decisional jurisdiction. Some examples from EU competition law may help to illustrate this relationship.[250] For instance, in *Metro I*, the Court held that selective

[248] Schauer, *Formalism*, *supra* note 38 at 540–41.

[249] E.g. A. Christiansen and W. Kerber, *Competition Policy with Optimally Differentiated Rules Instead of "Per Se Rules vs. Rule of Reason"*, MARBURGER VOLKSWIRTSCHAFTLICHE BEITRÄGE No. 2006/06 (2006).

[250] US antitrust law also offers ample examples that illustrate the relationship between formalism and decisional jurisdiction. For instance, the Supreme Court's judgment in Ohio et al v. American Express Co. et al, *supra* note 130, limits the decisional jurisdiction of lower federal courts to find a violation of section 1 Sherman Act 1890 on the basis of direct evidence of anti-competitive effects if market power on a single market comprising both sides of the platform has not been demonstrated (see Section V *supra*). In this Section, I use examples from EU competition law instead of US antitrust law because the former's lack of a doctrine of *stare decisis* results in a more complex relationship towards formalism. Although the ECJ *de facto* applies a system of precedent, there is no doctrine of stare decisis in EU law (see generally M.A. JACOB, PRECEDENTS AND CASE-BASED REASONING IN THE EUROPEAN COURT OF JUSTICE: UNFINISHED BUSINESS (2014)). If one is required to follow past precedent *anyway*, the choice between formalistic and non-formalistic reasoning is often a false one, and the allocation of decisional jurisdiction is naturally more "rigid". In EU law, by contrast, there is no obligation for the Court to stick to past decisions if they are deemed incorrect or otherwise undesirable. The choice between following the rule and deciding on the basis of the particular circumstances of the case becomes particularly prominent if pre-

distribution systems constitute an aspect of competition and are compatible with Article 101(1) TFEU, as long as resellers are chosen on the basis of objective criteria of a qualitative nature, and these criteria are applied uniformly for all potential resellers and do not go further than necessary.[251] The *Metro I* conditions provide a formalistic test to assess by proxy whether the pro-competitive effects of a selective distribution system exceed its anti-competitive effects. However, in *Metro II* the Court concluded that although "simple" selective distribution systems that comply with the *Metro I* criteria are compatible with Article 101(1) TFEU,

> "there may nevertheless be a restriction or elimination of competition where the existence of a certain number of such systems does not leave any room for other forms of distribution based on a different type of competition policy or results in a rigidity in price structure which is not counterbalanced by other aspects of competition between products of the same brand and by the existence of effective competition between different brands".[252]

In light of the criteria from *Metro I*, the Court's reasoning in *Metro II* is functionally similar to the argument that even though a war tank, placed in the park as a memorial, meets all the criteria of being a vehicle, it is nevertheless not prohibited. In both cases, the decision-maker chooses *not* to apply the rule formalistically because this would not contribute to the goals of the rule (protecting competition and protecting tranquility and safety, respectively). The freedom of the Court in *Metro II* not to apply the formalistic approach it had introduced in *Metro II* shows how formalism and non-formalism are, in the end, about the freedom of the decision-maker not to be constrained by pre-existing rules and to decide, for themselves, what would be the best solution in the present case, all-things-considered. Equally importantly, in addition to the "horizontal" relationship between the ECJ's judgments in *Metro I* and *Metro II*, there is also an important "vertical" dimension to decisional jurisdiction which pertains to the relationship between courts and administrative authorities. The abovementioned passage in *Metro II* could also be read as allowing the Commission not to follow the *Metro I* criteria in its

existing rules from (case) law do have normative weight but there is no (nearly) absolute doctrine of *stare decisis*. These examples from EU competition law show how the (jurisprudential) choice for formalistic or non-formalistic reasoning has direct repercussions for decisional jurisdiction, both horizontally (the jurisdiction of a court not to apply a previous rule which it had previously laid down) and vertically (the jurisdiction of, say, an administrative decision-maker to decide the case, all-things-considered, or to decide the case on the basis of a rule laid down by a court). On the weight of precedents, see generally F. Schauer, *Precedent*, 39 STANFORD L. REV. 571 (1987).

[251] Metro SB-Großmärkte GmbH & Co. KG v. Commission of the European Communities, 26/76, EU:C:1977:167, para. 20–27.

[252] *Id.*, para. 40.

enforcement of Article 101 TFEU against selective distribution agreements, should that lead to a better outcome, all-things-considered.

A similar picture can be seen in the ECJ's case law on the refusal to supply a new customer. This category of conduct has been associated with a formalistic, structured legal test. In *Magill*, for example, the Court introduced a four-step test to assess whether the refusal to license an intellectual property right is abusive.[253] This four-step test is formalistic in the sense that it provides precise criteria as a result of which a range of considerations can no longer be taken into account. For example, if the refusal to license does not prevent the emergence of a new product on the market, the refusal is not abusive regardless of whether, nonetheless, potential competitors offering the same or similar products are foreclosed.

Contrary to the situation in *Magill*, Microsoft's refusal to supply Sun Microsystems with the necessary information to ensure interoperability between Sun Microsystems' work group server operating systems and Microsoft Windows did not prevent the emergence of a new product.[254] According to the General Court's judgment in the *Microsoft* case, however, Microsoft's conduct did negatively affect technological development to the detriment of potential new products in the future.[255] More broadly, the General Court observed that the *Magill* criteria did not exhaust the exceptional circumstances in which a refusal to supply would be abusive. Since the formulation of these criteria in *Magill* was very clear and ostensibly categorical, the General Court's departure from these rules is a clear example of non-formalistic reasoning. Compared to a formalistic reading of the *Magill* criteria, it grants the relevant national and EU decision-makers a broader jurisdiction to decide whether a refusal to supply a new customer is abusive.

The scope of the indispensability test in relation to administrative and judicial discretion was also central to *Slovak Telekom*[256] and *Google Shopping*.[257] In *Bronner*, the ECJ had concluded that a dominant undertaking is only required to grant access to a physical infrastructure if such access is indispensable for accessing the market because creating a second physical infrastructure is not economically viable.[258] This indispensability test constrains the discretion of subsequent administrative and judicial decision-makers to apply Article 102

[253] Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities, C-241/91 P and C-242/91 P, EU:C:1995:98, para. 53–56.
[254] See LIANOS AND KORAH WITH SICILIANI, *supra* note 176 at 991–992.
[255] Microsoft Corp. v. Commission of the European Communities, T-201/04, EU:T:2007:289, para. 643–665.
[256] Slovak Telekom, a.s. v. European Commission, C-165/19P, EU:C:2021:239.
[257] Google LLC, formerly Google Inc. and Alphabet, Inc. v. European Commission, T-612/17, EU:T:2021:763.
[258] Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co., C-7/97, EU:C:1998:569, para. 46.

TFEU to cases involving essential facilities. However, it remained unclear exactly to which types of situations the *Bronner* doctrine extended, because most types of abuse can be constructed as "implicit" or "constructive" refusals to deal, as Advocate General Saugmandsgaard Øe in *Slovak Telekom* observed.[259] Consequently, the ECJ in *Slovak Telekom* and the GC in *Google Shopping* limited the scope of the refusal to deal doctrine to "explicit" refusals to deal that follow an explicit request for access.[260] This refinement of the indispensability criterion is, obviously, not the result of formalistic reasoning, since it was precisely the *meaning* of the *Bronner* doctrine that was left unclear. It may be recalled from Section II.C. above that the *creation*, *amendment* or *refinement* of substantive legal tests is rarely the result of formalistic reasoning, but rather the result of a purposive (re-)construction of the law.[261] In practice, *Slovak Telekom* and *Google Shopping increase* the discretion of the Commission by *limiting* the scope of applicability of the indispensability test. In other words, by narrowing down the scope of the legal formalism – the indispensability requirement – the administrative and judicial decision-makers acquire more discretion. Since the indispensability test did not apply to the facts in *Google Shopping*, the Commission merely had to show that (i) Google had leveraged its dominant position to an adjacent market by favouring its own comparison shopping service, and (ii) this leveraging was "was liable to lead to a weakening of competition on the market".[262]

However, just as formalism in general can be both *liberating* and *limiting*,[263] a seemingly broader grant of decisional jurisdiction can also, paradoxically, limit decision-makers more than it liberates them. In the absence of the formalistic rule, the decision-maker is allowed to decide whether the conduct is anti-competitive or not, based on the specific circumstances of the case. However, removing one specific legal formalism does not automatically lead to less constrained decision-making, since the gap that this legal formalism leaves may be filled with new rules of a different kind. Considerations related to the rule of law and judicial review

[259] Opinion of AG Saugmandsgaard Øe in Deutsche Telekom v. Commission and Slovak Telekom v. Commission, C-152/19 P and C-165/19 P, EU:C:2020:678, paras. 85–89.
[260] Slovak Telekom, a.s. v. European Commission, C-165/19P, EU:C:2021:239, para. 50; Google LLC, formerly Google Inc. and Alphabet, Inc. v. European Commission, T-612/17, EU:T:2021:763, para. 232. Most explicitly, in the latter judgment the GC held that "[a] 'refusal' to supply that warrants the application of the conditions set out in the judgment of 26 November 1998, Bronner (C-7/97, EU:C:1998:569) implies (i) that it is express, that is to say, that there is a 'request' or in any event a wish 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".
[261] See in this regard also Makris, *Openness and Integrity*, *supra* note 21.
[262] Google LLC, formerly Google Inc. and Alphabet, Inc. v. European Commission, T-612/17, EU:T:2021:763, paras. 162–180, 518–541. On the role of rules and discretion in *Google Shopping*, see Lindeboom, *Rules, Discretion, and Reasoning According to Law*, *supra* note 24.
[263] See Section II *supra*.

generally would lead courts to *substitute* the absence of the formalistic rule by additional procedural and evidential standards that constrain, for instance, administrative decision-makers.[264]

A good example of this phenomenon is provided by the relationship between *Hoffmann La Roche*[265] and *Intel*.[266] In *Hoffmann La Roche,* the Court had ruled that a dominant undertaking which applies discounts conditional on the fact that the customer obtains all or most of its requirements from that undertaking abuses its dominant position.[267] This inference takes the shape of a rule because once its conditionals obtain it is no longer possible to deny the conclusion that the rebate is a loyalty rebate, and that therefore the undertaking abused its dominant position.[268]

The legal formalism regarding the abusive nature of loyalty rebates was amended in *Intel*. In that judgment, the Court did not deny the presumption that loyalty rebates as defined in *Hoffmann La Roche* are abusive. However,

> "in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects […] the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.[269]

The analysis mitigates the formalistic approach in *Hoffmann La Roche* by allowing the dominant undertaking to provide counter-evidence, which shifts the evidential burden of proof

[264] On the relationship between evidential standards and the substantive legal test, see generally A. KALINTIRI, EVIDENCE STANDARDS IN EU COMPETITION ENFORCEMENT THE EU APPROACH chs. 4 and 7 (2019). See also, specifically in the context of mergers, J. Lindeboom and Y.L. Bouzoraa, CK Telecoms *and the Assessment of Horizontal Mergers in Oligopolistic Markets: Does the More Economic Approach Entail Stricter Judicial Review?*, 5 EUR. COMP. & REG. L. REV. 423 (2021).
[265] Hoffmann-La Roche & Co. AG v Commission, *supra* note 172.
[266] Intel Corp v. European Commission, C-413/14 P, *supra* note 239.
[267] Hoffmann-La Roche & Co. AG v Commission, *supra* note 172, para. 89.
[268] According to AG Wahl's Opinion in *Intel*, however, this interpretation of *Hoffmann La Roche* is misguided (Advocate General Wahl in Intel Corp. v. European Commission, C-413/14 P, *supra* note 154, para. 80–83).
[269] Hoffmann-La Roche & Co. AG v Commission, *supra* note 172, para. 138–139.

back to the Commission. The Commission is then required to present what comes close to an all-things-considered analysis of the anti-competitive effects of the rebate system, albeit one arguably limited to the exclusion of as efficient competitors.[270] This might lead to better decision-making and fewer type 1 and type 2 errors.[271] Since the Commission's decisional discretion is supposed to be constrained by law and judicial review, however, the result of *Intel* is that the Commission is likely to be *more* constrained by (procedural and evidential) rules after *Intel* than it had been by the (substantive) rule from *Hoffmann La Roche*.[272] This has become evident after the GC's subsequent renvoi judgment in *Intel*, in which it annulled the Commission's decision for having failed to show anti-competitive effects to the requisite legal standard.[273] In this case, the more formalistic *Hoffmann La Roch* rule theoretically decreased the discretion of the Commission to apply Article 102 TFEU to cases involving loyalty rebates, but in practice mostly liberated the Commission from the burden of proving the exclusion of (as efficient) competitors. After *Intel*, the liberating formalism of *Hoffmann La Roche* has likely been replaced by a more constraining evidential formalism.

B. The Predictability/Accuracy Trade-Off

As noted above, most competition lawyers seem to have more faith in administrative and judicial decision-makers than in general rules. This is particularly apparent from discussions that contrast the *predictability* of rule-based decision-making with the *accuracy* of case-by-case decision-making.[274] Both assumptions subsequently help to establish the inverse relationship between predictability and type 1 and type 2 errors. Once the ability of a specific institution, or individual decision-makers in general, to determine the pro-competitive and anti-competitive effects of specific cases is cast in doubt, however, rule-based decision-making might be associated with *both* higher predictability *and* fewer type 1 or type 2 errors than case-

[270] On this point, see Section VI.D *supra*.
[271] On the question of whether the additional enforcement costs resulting from the ECJ's judgment in *Intel* can be offset by fewer type 1 and type 2 errors, see e.g. N. Petit, *The Judgment of the EU Court of Justice in* Intel *and the Rule of Reason in Abuse of Dominance Cases*, 43 EUR. L. REV. 728 (2018). According to Ibáñez Colomo, one of the key points of *Intel* is that dominant undertakings should have the opportunity to show that the presumed anti-competitive effects of the relevant conduct are implausible, see P. Ibáñez Colomo, *The Future of Article 102 TFEU after* Intel, 9 J. EUR. COMP. L. & PRACTICE 293 (2018).
[272] For a similar conclusion in the context of the "more economic" approach to EU merger control in CK Telecoms UK Investments Ltd v. European Commission, T-399/16, EU:T:2020:217, see Lindeboom and Bouzoraa, CK Telecoms, *supra* note 264.
[273] Intel Corporation Inc. v. European Commission, T-286/09 RENV, EU:T:2022:19.
[274] See e.g. J. Broulík, *Preventing Anticompetitive Conduct Directly and Indirectly: Accuracy versus Predictability*, 64 ANTITRUST BULLETIN 115, 120–121 (2019), with further references.

by-case decision-making. Some critics of a case-by-case approach to competition law indeed casted doubt on the ability of administrative or judicial decision-makers to decide whether individual conduct in specific cases is pro-competitive or anti-competitive.[275] Some authors associated with the Chicago School, for example, used the inevitability of erroneous decision-making at all decision-making levels to argue in favor of a limited and less interventionist type of antitrust.[276]

Nonetheless, even if a case-by-case approach runs the risk of erroneous decisions, how can it be that rule-based decision-making – which involves a necessarily cruder way of categorizing conduct – leads to *fewer* type 1 or type 2 errors? While this scenario indeed seems quite implausible, there may be at least two reasons why this could nonetheless be the case.

First, it may be the case that an all-things-considered approach in an individual case is so complex that the decision-maker is likely to err in trying to make the best decision, all-things-considered.[277] Schauer's example of a highly complex rule regarding the exact types and measurements of the vehicles that are prohibited in the park is one such example. In competition law, a highly abstract rule requiring decision-makers to prohibit "anti-competitive conduct" – without providing any further guidance – may be too complex to apply on an ad hoc basis.[278] According to some commentators, the same applies to highly specific rules such as the AECT.[279]

Second, and more fundamentally, it typically remains unclear what "erroneous" means in the first place. From the perspective of Schauer's account of formalism, an erroneous determination is a determination that deviates from the optimal determination, all-things-considered, in light of the purported purpose. Even assuming a well-defined and unitary purpose, "erroneous" can refer to both the outcome in this specific case or the aggregate result of all ad hoc, all-things-considered determinations.

Let us take the *Intel* case as an example. One way of arguing that the General Court's formalistic, tripartite categorization is prone to erroneous decision-making is to say that the categorization does not properly take into account the efficiency effects that loyalty rebates may have.[280] Another way would be to say that loyalty rebates are not always capable of

[275] E.g Christiansen and Kerber, *Competition Policy*, *supra* note 249; Easterbrook, *The Limits of Antitrust*, *supra* note 204; F.A. Hayek, *Competition as a Discovery Procedure*, 5 QUART. J. AUSTRIAN ECON. 9 (2002).
[276] See e.g. Easterbrook, *The Limits of Antitrust*, *supra* note 204.
[277] See G.A. Manne and J.D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMP. L. & ECON. 153, 195–196 (2010); Christiansen and Kerber, *Competition Policy*, *supra* note 249 at 236.
[278] See generally Hayek, *Competition as a Discovery Procedure*, *supra* note 275.
[279] Wils, *The Judgment of the EU General Court in* Intel, *supra* note 177 at 430–431.
[280] Advocate General Wahl in Intel Corp. v. European Commission, C-413/14 P, *supra* note 154, para. 89–90; Intel Corp v. European Commission, C-413/14 P, *supra* note 239, para. 140.

foreclosing as efficient competitors.[281] These arguments claim that, respectively, allowing efficient rebate systems and allowing the foreclosure of less efficient competitors lead to a more competitive market either in this specific case, or in the short term, or in the long term.

Looking at either this specific case, the short term or the long term, however, may well result in different conceptions of "erroneous determinations".[282] If one focuses merely on this specific case and the immediate effects of decision-making, it is plausible that all-things-considered decision-making will usually outperform rule-based decision-making, at least insofar as the respective rules are the product of deliberate rule-making.[283]

Looking beyond those immediate effects of the individual case, however, it may be that the general deterrence, predictability and stability of general rules may, in the longer run, outweigh the negative effects of erroneous decisions in individual cases, in light of the purpose of the rule. In turn, that raises the question of whether an application of the rule to an individual case can be conceived as "erroneous" at all even if the outcome *in that individual case* is incongruent with the purpose of the rule. The answer may be in the negative if that individual rule-application does contribute to achieving the purpose of the rule by, for instance, increased clarification of the law,[284] or communicating the social meaning of the rule.[285] In other words, even if the purpose of a rule is, say, "maximizing total welfare" and applying that rule to an individual case reduces total welfare, this does not necessarily mean that that application is erroneous, to the extent that having the rule as such may contribute to maximizing total welfare as well.[286]

The problem of identifying the error criteria in light of type 1 and type 2 errors also brings us back, of course, to the longstanding debate about the goals of competition law.[287] What

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[281] *Id*., para. 134–136.

[282] Furthermore, justifying a conception of "erroneous determination" may be based on different justificatory mechanisms depending on whether one looks at the specific case or the long term aggregation of similar cases. John Rawls similarly distinguished between the justification of a rule and the justification of a particular application of that rule, arguing that the former may be justified on consequentialist grounds, while the latter may be justified deontologically. See J. Rawls, *Two Concepts of Rules*, 64 PHILOSOPHICAL REV. 3 (1955).

[283] The picture becomes more complicated if one follows Hayek's distinction between man-made, deliberate rule-making and the emergence of spontaneous, non-man-made rules. Since the latter are the product of evolutionary processes, their application might well result in fewer type 1 and type 2 errors than both the application of man-made rules and ad hoc decision-making. See generally F.A. HAYEK, LAW, LEGISLATION AND LIBERTY. VOLUME 1: RULES AND ORDER chs. 1–2 (2013).

[284] Clarification may entail what Broulík calls an "indirect mechanism of preventing anticompetitive conduct", see Broulík, *Preventing Anticompetitive Conduct Directly and Indirectly*, *supra* note 274.

[285] On the relationship between law and social meaning, see L. Lessig, *The Regulation of Social Meaning*, 62 U. CHIC. L. REV. 943 (1995); C. Sunstein, *On the Expressive Function of Law*, 144 U. PENN. L. REV. 2021 (1996).

[286] This points again at Rawls' distinction between justifications of a rule or practice and justifications of the application of a rule or practice to a particular case. See Rawls, *Two Concepts of Rules*, *supra* note 282.

[287] In the US, see e.g. G.J. Werden, *Competition, Consumer Welfare & the Sherman Act*, 9 SEDONA CONFERENCE J. 87 (2008); B. Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253 (2013). In the

counts as "erroneous" is determined by the purposes of the relevant legal norm. However, even if one takes a "monolithic" approach to the goals of competition law by stipulating, say, consumer welfare as its sole purpose, this purpose is sufficiently elastic to include a variety of different conceptions, including short-term versus long-term consumer welfare, consumer surplus versus broader conceptions of consumer welfare, and so on.[288] Schauer's abovementioned observation about the allocation of decisional jurisdiction therefore applies to competition law even if the latter's purpose is construed narrowly. To use Schauer's words by analogy: If there is no authoritative statement of the purpose behind the prohibition of anti-competitive agreements and monopolization or abuse of dominance, granting jurisdiction to determine that purpose would allow a decision-maker to decide whether the purpose is to enhance consumer welfare, total welfare, the competitive process, and so on, and each of these determinations would be equally correct.[289] The result is fewer type 1 and type 2 errors – that is to say, on the law's own terms – but also less predictability.

What this analysis shows is that, as Schauer notes, "the key to understanding the relationship of ruleness to predictability is the idea of decisional jurisdiction": the key factor that determines the balance between formalism, legal certainty and type 1 and type 2 errors is the division of competence between the rule-maker and the decision-maker that subsequently applies the rule. For this reason, Schauer concludes that the degree of formalism and predictability is also a *normative* decision:

> "Grants of decisional jurisdiction not only increase permissible variance and the possibility of "computational" error, they also involve decisionmakers in determinations that a system may prefer to have made by someone else".[290]

In a competition law context, this ultimately brings us to two relevant questions: firstly, to what extent do we want administrative or judicial decision-makers to decide on the purposes of competition law, and secondly, to what extent do we trust these decision-makers to reach

EU, see e.g. I. Lianos, *Some Reflections on the Question of the Goals of EU Competition Law*, in HANDBOOK ON EUROPEAN COMPETITION LAW: SUBSTANTIVE ASPECTS (I. Lianos and D. Geradin eds., 2013); and in general, see also O. Andriychuk, *Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process*, 6 EUR. COMP. J. 575 (2010), and various contributions in THE GOALS OF COMPETITION LAW (D. Zimmer ed., 2012).

[288] On different conceptions of consumer welfare, see e.g. B. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMP. L. & ECON. 133 (2011); P. Akman, *"Consumer" versus "Customer": The Devil in the Details*, 37 J. LAW. & SOC. 315 (2010); Werden, *Competition, Consumer Welfare & the Sherman Act*, *supra* note 287.

[289] By analogy, Schauer, *Formalism*, *supra* note 38 at 540–541.

[290] *Id.* at 541.

correct or otherwise desirable outcomes.[291] These questions are inherently institutional and normative, and so are the questions of whether formalism is positively or negatively correlated with predictability and whether formalism is more or less likely to result in type 1 and type 2 errors.[292]

VIII. Concluding Remarks

By way of conclusion, I shall briefly elaborate on the five claims that I mentioned in the introduction, and finish with some very preliminary thoughts on further research into the meaning and relevance of formalism in various competition law jurisdictions, including in particular the US and the EU.

The first of the claims of this article centers on the *meaning* of formalism. As I have tried to show, inside and outside competition law "formalism" is a term that is used mainly pejoratively. The object of such critique is often unclear and at times nothing but a strawman. In order to say something useful about the meaning and relevance of formalism in competition law, however, it is imperative to define "formalism" and "formalistic reasoning" analytically. Drawing on Schauer's work on analytical formalism, I conceptualize "formalism" as decision-making constrained by rules.[293] Rules exclude considerations from the decision-making process. In this regard, an important function of rules is to attain certain purposes by preventing decision-makers from deciding cases on the basis of *all* relevant considerations in light of these same purposes. The more decision-making is constrained by rules, the more formalistic it is, and the less considerations are used to decide individual cases. In other words, "formalism" or rule-based decision-making should be contrasted with "all-things-considered" decision-making as a hypothetical situation in which no rule limits the considerations that can be taken into account by the decision-maker, given some purpose(s).

Applying this conception of formalism to competition law leads us, first of all, to per se rules[294] and "by object" prohibitions.[295] Per se rules are formalistic because they strongly reduce the number of considerations that are relevant in deciding whether some conduct is, for

[291] For example, outcomes may be desirable, even though they are substantively incorrect, for reasons of democratic legitimacy.
[292] For some insightful observations in US antitrust law, see Crane, *Rules Versus Standards*, *supra* note 243 at 91–95.
[293] See Section II *supra*.
[294] See Section III *supra*.
[295] See Section IV *supra*.

example, a restraint of trade in the sense of section 1 of the Sherman Act 1890. The only considerations that remain relevant are those that relate to the question of whether some conduct can be qualified as a class that is subject to a per se rule. However, while this analysis is very limited in theory, in practice US federal courts have appealed to the purposes of US antitrust law to conclude that, for example, the "fixing" of a "price" between competitors does not always constitute "horizontal price-fixing".[296] Even the most straightforward per se rule, therefore, is not always applied entirely formalistically. The same applies, more strongly, to the "by object" category in EU competition law, which operates formalistically in very specific cases such as naked horizontal price-fixing or naked output restrictions, but as a matter of legal principle requires an analysis of the legal and economic context of an agreement.[297] This can only be done by looking at the purpose(s) of EU competition law. Both per se rules and the by object category are, therefore, only formalistic to a limited degree.

Reversely, while the rule of reason in US antitrust law and the analysis of anti-competitive effects in general are in theory characterized by a low degree of formalism, in practice both tend to entail a relatively high degree of legal formalism. In US antitrust law, the rule of reason hardly functions as an unconstrained, all-things-considered analysis of all the pro-competitive and anti-competitive effects of the conduct. In practice, the rule of reason has developed into a collection of conduct-specific rules that either facilitate establishing anti-competitive effects (as for instance in *Actavis*) or rather making it virtually impossible to establish them (as for instance in *Ohio v. AMEX*).[298]

More generally, as I have tried to show, analyzing anti-competitive effects is typically a highly formalized process – both in the US and in the EU – which translates formal economic reasoning into specific legal rules. As a result, the familiar distinctions between "form" and "effect" and between "form-based" and "effects-based" approaches to competition law should be discredited as empty and rhetorical. The analysis of anti-competitive effects is often highly formalistic and actual empirical "effects" are seldomly of dispositive value.[299]

Finally, the normative relationship between formalism, type 1 and type 2 errors and legal certainty is ultimately shaped by beliefs about institutional competence and the allocation of the jurisdiction to make decisions.[300] It is widely held that there is an inverse relationship between type 1 and type 2 errors on the one hand, and legal certainty and predictability on the

[296] For this example, see Broadcast Music Inc. v. Columbia Broadcasting System Inc., *supra* note 80.
[297] See to this end the references to the case law in Section IV *supra*.
[298] See Section V *supra*.
[299] See Section VI *supra*.
[300] See Section VII *supra*.

other hand. As I have tried to show, however, this relationship is contingent upon normative beliefs about who should get to decide on the merits of an individual case and who is more likely to err in this respect. A formalistic approach may entail a higher degree of predictability and more type 1 and/or type 2 errors than a series of ad hoc, all-things-considered approaches, but neither of the two relationships are trivial. All-things-considered decision-making may be highly predictable if predictability is understood as the certainty that an optimal result in an individual case will be achieved as a result of a "discursive elucidation of the legal and factual issues that arise".[301] At the same time, all-things-considered decision-making can be associated with *more* type 1 or type 2 errors if, for instance, the subject-matter of decision-making is so complex that the decision-maker is likely to "get it wrong" by deciding on an ad hoc basis.

The fifth claim and the accompanying Section VII included some preliminary observations about the normative aspects of formalism and the allocation of decision-making powers. While this article otherwise aimed to provide a descriptive and analytical account of formalism in competition law, future research into this topic should further scrutinize the normative relevance of formalism, both substantively and institutionally. Thus, while the terms "formalism" and "form-based reasoning" have often been used to discredit all forms of decision-making that abstract from the unique characteristics of each individual case, a more sophisticated normative analysis of formalism should engage with all the positive and negative effects of rule-based decision-making, and its consequences for the institutional relationship between the legislative, administrative and judicial actors which jointly shape the content of competition law.[302]

As I mentioned in the introduction, a comparative analysis of the degree of formalism in US and EU law – and other legal orders as well – is beyond the scope of this article. Such a comparative analysis should not only focus on the substantive aspects of both legal orders, but also take account of constitutional and institutional differences. In EU competition law, for instance, the meaning and relevance of formalism is profoundly shaped by the absence of a doctrine of *stare decisis* and a generally broader endorsement of purposive interpretation.[303]

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[301] Lianos, *Categorical Thinking*, *supra* note 7 at 36, referring to Habermas' application of his theory of communicative rationality to law in J. HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 197–203 (1996).

[302] See also Crane, *Rules Versus Standards*, *supra* note 243 at 91–95.

[303] On the role of purposive interpretation in EU law, see generally M. Poiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism* (2007) 1 EUR. J. LEG. STUD. 1; G. Conway, *Levels of Generality in the Legal Reasoning of the European Court of Justice*, 14 EUR. L. J. 787 (2008); S. SEYR, DER *EFFET UTILE* IN DER RECHTSPRECHUNG DES EUGH (2008); U. Šadl, *The Role of* Effet Utile *in Preserving the Continuity and Authority of European Union Law*, 8 EUR. J. LEG. STUD. 18 (2015); G. BECK, THE LEGAL REASONING OF THE COURT OF JUSTICE OF THE EU ch. 10 (2013).

In respect of *stare decisis*, formalism and rule-based decision-making are mainly problematic when the application of a rule leads to an outcome that is erroneous, all-things-considered. For this reason, overt discussion on whether to overrule supposedly outdated precedents is a central characteristic of US antitrust jurisprudence. In EU law, by contrast, there is no obligation for the Court to stick to past decisions if they are deemed incorrect or otherwise undesirable.[304]

Secondly, purposive interpretation is inherently problematic for formalism because it means taking the purposes of the rule – at least to some degree – into account instead of merely deciding on the basis of the text of the rule.[305] In this sense, formalism is connected to textualism. And while textualism in respect of the text of, for instance, the Sherman Act 1890 is hardly useful, textualism plays an important role in US antitrust law in respect of the interpretation and application of past precedent. By contrast, since purposive interpretation is widely endorsed as a legitimate and even preferable method of interpretation in Europe, the EU courts have more leeway to interpret precedents – even where such precedents introduce a seemingly categorical rule – in light of the purported purposes of EU competition law.[306] This in turn is prone to lead to non-formalistic reasoning in respect of past precedent, for in the absence of *stare decisis* it is difficult to justify the application of a precedent if this leads to an incorrect result in the present case.[307]

These are only two considerations that may be relevant for a useful comparison between the functioning of formalism in US antitrust law and EU competition law. Adding to the need for a combined substantive and institutional analysis of the meaning and relevance of formalism in competition law and economics, these and many other questions deserve comprehensive discussion beyond rhetorical arguments against so-called "form-based" approaches to competition law and the nonsensical distinction between "form" and "effect". In this regard, this article aimed to show that the typical manner in which competition law analysis is regarded as either formalistic or not is mostly inaccurate and outworn. Legal formalism is always mitigated by contextual analysis, purposive interpretation and informal escape routes that avoid unjustified or unwanted legal qualifications. To use Schauer's words, legal

[304] See also J. Lindeboom, *Why EU Law Claims Supremacy*, 38 OXFORD J. LEG. STUD. 328, 346–349 (2018). For a theoretical analysis of the role of the ECJ in "constructing" both form and content of the EU legal system, see J. Lindeboom, *The Autonomy of EU Law: A Hartian View*, 13 EUR. J. LEG. STUD. 271 (2021).
[305] See generally Schauer, *Formalism*, *supra* note 38.
[306] See e.g. the examples mentioned in Section VII.A *supra*.
[307] The most theoretically elaborate justification of the obligation to apply the rules laid down in past judicial practice – even if that leads to an undesirable result in the present case – is provided by Ronald Dworkin's theory of law as integrity. For an illuminating analysis, see S. Hershovitz, *Integrity and Stare Decisis*, in EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN (S. Hershovitz ed., 2008).

formalism in competition law is mostly "presumptive".[308] On the other hand, a considerable degree of, indeed mostly presumptive, formalism is inevitable in light of the inherent rule-based nature of law. This inevitability of formalism in law is evidenced, most notably, by the reproduction of legal formalism in effects-based approaches to competition law. In fact, as I have tried to argue, as effects-based approaches to competition law are mostly based on highly formalized economic theory, the translation of such economic formalisms into legal rules typically *enhances*, rather than reduces, legal formalism.

Accordingly, the question is not whether we should have a "form-based" or an "effects-based" approach to competition law. Given that formalism is ubiquitous in competition law and economics, the question is rather to *which* formalisms competition law should be committed.

[308] In the context of US antitrust law, see e.g. Broadcast Music Inc. v. Columbia Broadcasting System Inc., *supra* note 80; FTC v. Actavis, Inc., *supra* note 143. In EU competition law, see e.g. Intel Corp v. European Commission, C-413/14 P, *supra* note 239; Budapest Bank Nyrt. and Others, C-228/18, *supra* note 112.