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ABSTRACT

Lacking predictability of competition-law enforcement has its costs. This paper shows that academic analyses of what competition laws should look like do not always treat this factor adequately, paying instead excessive attention to the problem of error. Namely, some analyses completely ignore unpredictability as a relevant factor. Others treat effects of unpredictability as a non-substantive consideration that is more akin to resources expended on operation of competition law than to the effects of error. And still others do not sufficiently distinguish between the mis-deterrence effects of unpredictability and of error, describing both with error-related language. The paper further discusses three possible reasons why such mistreatment of predictability may be taking place. First, it may be a result of authors' convenience. Second, it may be due to the commentator not fully comprehending the role of predictability. Third, it may be a strategic choice by the author to make competition law more aligned with the interests of competition practitioners and/or defendants. It is also briefly discussed how problematic each reason is and what solutions might be available.

Keywords: competition law and economics, industrial organization, Chicago School, antitrust, enforcement, predictability, legal certainty, accuracy, deterrence, error-cost approach, decision theory

JEL codes: K21, K42, L40

I. INTRODUCTION

An important virtue of competition-law enforcement is its predictability. When enforcement outcomes are not predictable, competition law fails to achieve its objective. Yet, in the academic economics-based discourse on what competition law should look like, predictability of enforcement outcomes is often not treated appropriately, especially when contrasted with accuracy of the outcomes. Insofar as scholarly commentary influences actual design of competition law, such mistreatment of predictability may lead to adoption of rules that are not socially optimal. This paper discusses how predictability contributes to the objective of

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competition law (Part II), how it is mistreated in the literature (Part III), and what reasons may drive this mistreatment and how they can be addressed (Part IV).

II. PREDICTABILITY OF COMPETITION LAW

This section describes the role of predictability in competition law.[1] It explains that predictability of enforcement outcomes is indispensable for the main mechanism through which competition law achieves its objective of preventing business conduct that harms competition (without preventing conduct that does not, i.e. benign conduct). The section also discusses the role of accuracy of competition-law enforcement and its relationship to predictability.

A. Primacy of the indirect mechanism

There are two different mechanisms through which competition law prevents harmful conduct. First, the direct mechanism consists in precluding or stopping the conduct through intervention in a given specific case. Second, the indirect mechanism, also known as general deterrence, relies on businesses adjusting their conduct in expectation of potential enforcement against them.

Competition law mostly achieves its objective through the indirect mechanism. Consider the following observation by Buccirossi et al: "General deterrence is typically the primary objective of law enforcement, as it can be achieved for a very large number of potential infringements without the need for these to be detected by law enforcers."[2] Even in the specific context of competition law, commentators "have long argued that the magnitude of deterred harm probably far exceeds the harm removed by direct intervention".[3] For instance, a federal agency enforcing US competition laws believes that "deterrence is perhaps the single most important ultimate outcome of [its] work."[4] And a then judge of an EU court argued that "competition law produces its effects principally through [the indirect mechanism]."[5]

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[1] This section largely relies on the analysis presented in Jan Broulík, *Preventing Anticompetitive Conduct Directly and Indirectly: Accuracy Versus Predictability*, 64 ANTITRUST BULL. 115 (2019).

[2] Paolo Buccirossi, et al., *Deterrence in Competition Law*, *in* THE ANALYSIS OF COMPETITION POLICY AND SECTORAL REGULATION 423, 427 (Martin Peitz & Yossi Spiegel eds., 2014).

[3] Stephen Davies, et al., *Quantifying the Deterrent Effect of Anticartel Enforcement*, 56 ECON. INQUIRY 1933, 1933 (2018).

[4] Phillip Nelson & Su Sun, *Consumer Savings from Merger Enforcement: A Review of the Antitrust Agencies' Estimates*, 69 ANTITRUST L.J. 921, 939 (2001).

[5] Nicolas Forwood, *The Commission's "More Economic Approach" – Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review*, *in* EUROPEAN COMPETITION LAW ANNUAL 2009: THE EVALUATION OF EVIDENCE AND ITS JUDICIAL REVIEW IN COMPETITION CASES 255, 257-58 (Claus-Dieter Ehlermann & Mel Marquis eds., 2011).

There have been attempts to verify and quantify the primacy of the indirect mechanism empirically. It is true that such attempts face major obstacles because "we rarely get to observe what would have happened if enforcement did not exist or if it existed at differing thresholds."[6] Still, a UK survey of businesses and their legal advisers found that the number of infringements deterred per each detected case was at least five for cartels, seven for other types of business agreements, and ten for abuses of dominance.[7] And a statistical simulation of cartel enforcement concluded that harm prevented by the indirect mechanism is overwhelmingly greater than harm detected by enforcers.[8] If one considers that not all harm can be remedied ex post, which is the case for instance as regards the dead-weight loss, the relative importance of the indirect mechanism will be even bigger.

B. Effects of predictability

Predictability of competition-law enforcement, often also called legal certainty, refers to how likely businesses' predictions concerning the enforcement assessment of the lawfulness of their conduct will turn out to be correct.[9] The direct mechanism does not require enforcement outcomes to be predictable because for its operation businesses do not need to know in advance that their harmful conduct would be stopped at some point. The indirect mechanism, however, relies on businesses anticipating which actions would be found lawful and which unlawful. If businesses cannot predict this well, competition law will be frustrated in achieving its objective because some benign conduct will be deterred (over-deterrence) and some harmful conduct will be not (under-deterrence).

Another attribute of competition-law enforcement is its accuracy, i.e. how likely it does not produce error. There are two types of error: type-I error occurs when a violation of competition law is found despite the conduct under scrutiny actually not being harmful and type-II error occurs when the conduct is found to be lawful despite it actually causing harm. Higher accuracy of enforcement means a greater effectiveness of its direct mechanism because it directly translates into stopping harmful conduct

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[6] A. E. RODRIGUEZ & ASHOK MENON, THE LIMITS OF COMPETITION POLICY: THE SHORTCOMINGS OF ANTITRUST IN DEVELOPING AND REFORMING ECONOMIES 43 (2010).

[7] Deloitte, *The Deterrent Effect of Competition Enforcement by the OFT* (2007), *avaliable at* http://webarchive.nationalarchives.gov.uk/20140402141250/http:/www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf. For a discussion of the study and its results see Fiammetta Gordon & David Squires, *The Deterrent Effect of UK Competition Enforcement*, 156 DE ECONOMIST 411 (2008); Stephen W. Davies & Peter L. Ormosi, *A Comparative Assessment of Methodologies Used to Evaluate Competition Policy*, 8 J. COMPETITION L. & ECON. 769, 796-97 (2012).

[8] Davies, et al., *Quantifying the Deterrent Effect of Anticartel Enforcement*, 1948.

[9] STEFAN VOIGT & ANDRÉ SCHMIDT, MAKING EUROPEAN MERGER POLICY MORE PREDICTABLE 1 (2005).

and not stopping benign conduct. Higher accuracy also fosters the indirect mechanism because, to avoid over- and under-deterrence, harmful conduct needs to be found unlawful (rather than lawful) and, at the same time, alternative benign conduct must not be found unlawful.

In its remainder, this paper will focus on the indirect mechanism due to its above-mentioned primacy. As mentioned, both predictability and accuracy are necessary conditions for this mechanism to work. Neither of them is, however, sufficient on its own. Enforcement outcomes that are perfectly accurate but completely unpredictable by businesses are just as undesirable as outcomes that are entirely predictable but always erroneous. This is to say that "greater accuracy is valuable only to the extent it involves dimensions about which individuals are informed at the time they act"[10] and, vice versa, greater predictability is valuable only to the extent it concerns findings of unlawfulness for harmful conduct and findings of lawfulness for benign conduct.

C. Predictability and differentiation of competition rules

Predictability and accuracy of competition-law enforcement are functions of the rules that are being enforced, and in particular of their "differentiation". This is a concept introduced by Christiansen and Kerber to capture the scope of fact-finding – and, consequently, of economic analysis – anticipated by the given rule:[11] At one extreme, under a minimally differentiated rule (such as a per se rule), the inquiry into the facts of the case is severely restricted. At the other extreme, under a maximally differentiated rule (such as the rule of reason), a comprehensive factual analysis needs to be performed in every case. Between these two extremes, there is a spectrum of moderately differentiated rules mandating some extent of fact-finding.[12]

The more differentiated a competition rule is, the more difficult it is to predict the outcomes of its enforcement.[13] Consider, for example,

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[10] Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 309 (1994).

[11] Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of "Per se Rules vs Rule of Reason"*, 2 J. COMPETITION L. & ECON. 215, 221 (2006).

[12] Intensity of adjudicative fact-finding depends not only on the formulation of the respective substantive rule but also on related procedural rules, such as the standard of proof. The current paper understands antitrust rules and their differentiation in this broad sense.

[13] *See, e.g.*, Barbara E. Baarsma, *Rewriting European Competition Law from an Economic Perspective*, 7 EUR. COMPETITION J. 559, 583 (2011); Christiansen & Kerber, *Competition Policy with Optimally Differentiated Rules Instead of "Per se Rules vs Rule of Reason"*, 219; Frank H. Easterbrook, *Ignorance and Antitrust*, *in* ANTITRUST, INNOVATION, AND COMPETITIVENESS 119, 155 (Thomas M. Jorde & David J. Teece eds., 1992) ("When everything is relevant, nothing is dispositive. Any one factor might or might not outweigh another, or all of the others, in the factfinder's contemplation. The formulation offers *no help to businesses planning their conduct*." (emphasis added)); Adriaan ten Kate Sr., *Hundred Years Rule of Reason Versus Rule of Law* 11 (June 14,

Hawk and Denaeijer's view: "An analysis of the competitive effects (benefits and harms) of a practice necessarily introduces some legal uncertainty. It is probably fair to say that the more refined/robust the inquiry into the actual competitive effects and justifications of a practice, the greater the uncertainty."[14] Higher differentiation of antitrust rules brings about unpredictability in two ways. First, businesses may have poor information about the facts upon which the decision applying the rules is to be based. Enforcers applying the rule ex post will often have better information than business self-assessing their compliance ex ante.[15] Second, businesses may not be sure what modeling choices adjudicators will adopt in their economic analyses. This is because a number of different models can regularly be used for a particular situation, all of which appear to represent the reality sufficiently well.[16]

2016) (unpublished working paper), *available at* https://ssrn.com/abstract=2795797; Luis Ortiz Blanco & Alfonso Lamadrid de Pablo, *Expert Economic Evidence and Effects-based Assessments in Competition Law Cases*, *in* THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN COMPETITION LAW CASES 305, 311 (Massimo Merola & Jacques Derenne eds., 2012) (assessing the "effects-based legality test" as "hardly administrable" and thus hardly predictable (internal quotation marks omitted)); Michael J. Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions*, 25 WORLD COMPETITION 361, 367 (2002); Roger 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 13, 35 (Mitja Kovač & Ann-Sophie Vandenberghe eds., 2016) ("[A] full consideration of all potential efficiency benefits and possible anticompetitive consequences leads to extremely complicated assessment and unpredictable outcomes."); Denis Waelbroeck & Donald Slater, *The Scope of Object vs Effects under Article 101 TFEU*, *in* TEN YEARS OF EFFECTS-BASED APPROACH IN EU COMPETITION LAW: STATE OF PLAY AND PERSPECTIVES 178, 203 (Jacques Bourgeois & Denis Waelbroeck eds., 2012); *cf.* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1258-59 (2008) ("Properly implemented, per se rules are bright-line rules that provide certainty.")

[14] Barry E. Hawk & Nathalie Denaeijer, *The Development of Articles 81 and 82 EC Treaty: Legal Certainty*, *in* EUROPEAN COMPETITION LAW ANNUAL 2000: THE MODERNIZATION OF EC ANTITRUST POLICY 129, 136 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2001).

[15] *See* Matthew Bennett, et al., *Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy*, *in* INTERNATIONAL ANTITRUST LAW & POLICY: FORDHAM CORPORATE LAW INSTITUTE CONFERENCE 2009 497, 511 (Barry E. Hawk ed., 2010) (considering unworkable self-assessment according to legal tests that require businesses to know (possibly secret) information about their competitors); Pierre Larouche & Maarten Pieter Schinkel, *Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to Section 2 Sherman Act*, *in* 2 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 153, 168 (Roger D. Blair & Daniel D. Sokol eds., 2015) ("The risk of information deficiency concerns chiefly information on other firms. Indeed while the dominant firm knows more about itself, and about its own conduct, than the competition authority, it may not possess the same level of information as regards rival firms customers, suppliers, and so on. It certainly holds enough information about others to be able to make business decisions, but that might not suffice for the purposes of competition law assessment, for which authorities have a number of privileges.").

[16] *E.g.*, Simon Bishop, *Snake-Oil with Mathematics Is Still Snake-Oil: Why Recent*

In contrast, accuracy of enforcement does benefit from higher differentiation. To be sure, when competition rules are highly differentiated and allow the enforcer to assess in detail the harmfulness of the conduct under scrutiny, the enforcer may make mistakes and determine as unlawful a conduct that is actually benign or as lawful that which is harmful. Still, however, there is general agreement in the literature that more extensive case analyses will lead to more accuracy and, thus, that such errors will be less common than errors entrenched in less differentiated competition rules.[17] Such rules will be over- and/or under-inclusive, which is to say that they will designate as unlawful some benign conduct and/or as lawful some harmful conduct.

This means that the indirect mechanism of competition law faces an inevitable trade-off. The higher the accuracy of competition-law enforcement, the lower its predictability. And vice versa. As both predictability and accuracy are conditions for the mechanism to work, an optimal competition rule will then show an attainable combination of these two attributes that brings about the lowest over- and under-deterrence.

III. MISTREATMENT OF PREDICTABILITY

This section identifies three different ways in which economics-based analyses of what competition laws should look like mistreat predictability of these laws as a relevant consideration, usually in conjunction with overrating the role of their accuracy. The fact that such mistreatment exists is hardly surprising. After all, the analyses are often advanced under the banner of the "error-cost approach" or the "decision-theoretic approach". As regards the former notion, it clearly highlights error as the essential factor within the analysis. Although it is perhaps not as obvious at first sight, the latter notion also champions error as the factor that matters the most: The decision-theoretic framework concerns the question whether collecting more information in a specific case is worth the consequently increased confidence that the envisioned decision in that

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Trends in the Application of So-Called Sophisticated Economics Is Hindering Good Competition Policy Enforcement, 9 EUR. COMPETITION J. 67, 69 (2013) ("Those familiar with economic theory will know that a large number of results can often be reversed by making an alternative assumption."); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153, 163 (2010) ("[A] regulator or court has a broad spectrum of models to choose from when analyzing an antitrust issue, but antitrust has not provided that decision-maker with sensible criteria for making that model selection decision."); Gregory J. Werden, *Making Economics More Useful in Competition Cases: Procedural Rules Governing Expert Opinions*, *in* INTERNATIONAL ANTITRUST LAW & POLICY: FORDHAM CORPORATE LAW INSTITUTE CONFERENCE 2005 601, 609 (Barry E. Hawk ed., 2006) ("Opposing economic experts may legitimately perceive facts differently or take different views of which facts are critical.").

[17] This is sometimes framed as the value of "flexibility". The high differentiation of a rule allows the enforcer to apply it flexibly to achieve an accurate outcome. *See, e.g.*, Trebilcock & Iacobucci, *Designing Competition Law Institutions*, 367.

case will be correct.[18] The framework itself has little to say about the predictability of such case-by-case optimalisations of fact-finding.

In any case, the present section moves beyond these issues of labelling to diagnose how exactly predictability gets mistreated. It identifies three ways in which academic discourse does not regard it properly. First, predictability gets neglected as a relevant factor. Second, effects of unpredictability are regarded as a non-substantive consideration that is more akin to resources expended on operation of competition law that to effects of error. And, third, effects of unpredictability are not sufficiently distinguished from effects of error and from error as such.

A. Ignoring predictability

The first way of mistreating predictability in discussions about what competition rules should look like is disregarding it. For instance, some authors regard only accuracy of competition rules as a factor relevant for their design. Consider Hylton and Salinger, who say that "the best rule minimizes the total costs of error."[19] They then turn to relative frequencies of type-I and type-II errors and to the relative magnitudes of the costs that the errors bring about as criteria to select optimal competition rules.[20] Nevertheless, if one adopts the above-mentioned assumption that more differentiation means less error, treating accuracy as the only relevant factor obviously heralds maximum rule differentiation. An example of this is Baarsma, who proposes to adopt maximally differentiated rules because they would facilitate maximum accuracy of enforcement.[21]

A less extreme position, which does nevertheless still ignore predictability, is to trade the benefits of accuracy against at least something, in particular against administrative costs. These costs take the form of resources spent by enforcers and – both actual and potential – defendants and plaintiffs on the operation of the competition law apparatus.[22] They include resources spent by public bodies as well as private parties on litigation, by public bodies on detection and

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[18] *See, e.g.*, C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999).

[19] Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469, 500 (2001). Hylton and Salinger explicitly assume that administrative costs are identical regardless how differentiated a competition rules is. For the meaning of administrative costs, see below. Hylton and Salinger further mention in footnote 115 that over-deterrence may be a result of "uncertainty about the law or courts' enforcement of it". Yet, their analysis of optimal competition rules completely ignores this consideration.

[20] *Id.* at 501-02.

[21] Baarsma, *Rewriting European Competition Law from an Economic Perspective*. Baarsma does mention in her final remarks that her proposal would "make the outcome of a case more unpredictable" (p. 583). She nevertheless does not seem to consider that a reason to reassess her approach.

[22] Willard K. Tom & Chul Pak, *Toward a Flexible Rule of Reason*, 68 ANTITRUST L.J. 391, 399 (2000) (speaking about "the actual resources, such as legal and judicial time, devoted to the process at any particular decisional point").

investigation of suspicious conduct, and by private parties on compliance. These costs encompass wages of people engaged in the mentioned activities and costs of the equipment that they use. Administrative costs (or their sub-categories) have also been called "direct costs",[23] "direct transaction costs",[24] "direct costs of litigation"[25] and "enforcement costs".[26]

Administrative costs increase with differentiation of competition rules. This is because more criteria are to be considered and a deeper investigation becomes necessary.[27] Put conversely, administration of bright-line rules by enforcers and private parties consumes fewer resources than administration of rules anticipating extensive fact-finding. It is thus apparent that greater accuracy, associated with more differentiated rules, comes at the price of higher administrative costs.

There are a number of academic contributions that consider only the trade-off between costs of error and administrative costs, while ignoring costs of unpredictability. Examples include for instance Rubinfeld, who contrasts "the costs to society of fact-finding errors" and "the legal costs to the private parties".[28] Easterbrook talks about minimizing the sum of "the costs of error and information".[29] Beckner and Salop propose to "minimize the sum of error costs plus the legal process costs borne by all the parties affected by the litigation, including the court itself."[30] Evans and Padilla select an optimal competition rule by comparing costs of error and administrative costs.[31] And Schinkel argues that one needs to compare "deterrence benefits" determined by the incidence of error on the one hand and "legal transaction costs" on the other.[32]

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[23] Oliver Budzinski, *Modern Industrial Economics: Open Problems and Possible Limits, in* COMPETITION POLICY AND THE ECONOMIC APPROACH: FOUNDATIONS AND LIMITATIONS 111, 127 (Josef Drexl, et al. eds., 2011).

[24] Paul L. Joskow, *Transaction Cost Economics, Antitrust Rules, and Remedies*, 18 J.L. ECON. & ORG. 95, 97 (2002).

[25] John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617, 639 (2005).

[26] Wouter P. J. Wils, *The Judgment of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance*, 37 WORLD COMPETITION 405, 427 (2014).

[27] Christiansen & Kerber, *Competition Policy with Optimally Differentiated Rules Instead of "Per se Rules vs Rule of Reason"*, 233.

[28] Daniel L. eaRubinfeld, *Econometrics in the Courtroom*, 85 COLUM. L. REV. 1048, 1051 (1985).

[29] Easterbrook, *Ignorance and Antitrust*, 121.

[30] Beckner III & Salop, *Decision Theory and Antitrust Rules*, 51.

[31] David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73, 95 (2005). Curiously, the introduction of the article (page 75) argues that competition rules should "maintain[] a degree of predictability for businesses and administrative ease for the courts", but the subsequent actual discussion on how to design legal rules ignores the topic entirely.

[32] Maarten Pieter Schinkel, *Forensic Economics in Competition Law Enforcement*, 4 J. COMPETITION L. & ECON. 1, 19 (2008).

As explained above, however, to truly establish what competition laws should look like, one needs to consider not only the accuracy of enforcement that they bring about and the resources spent because of their existence, but also the predictability of their enforcement.[33] As unpredictability of enforcement increases with rule differentiation, ignoring costs of unpredictability will necessarily lead to advocating rules differentiated more than optimal.

B. Treating effects of unpredictability as non-substantive

Another way to mistreat predictability is by framing the costs brought about by its absence as *not substantive* in nature. Consider for instance Lianos et al, who distinguish between *substantive* and *procedural* costs.[34] They argue the former category to correspond to the negative effects of type-I and type-II errors. The latter category then includes not only administrative costs but also the negative effects of unpredictability.

Other commentators may not use so ostensible labels. They do nevertheless still group costs of unpredictability with administrative costs, setting then this joint category in opposition to costs of error. Consider for instance Baker, who contrasts costs of errors with "transaction costs associated with use of legal process"[35] and whose footnote elaborating the latter mentions the situation when "uncertainty about legal rules chills beneficial conduct or means that those rules fail to deter harmful conduct".[36] Similarly, Tom and Pak as well as Christiansen and Kerber distinguish between costs of error on the one hand and "costs of decision-making",[37] respectively "regulation costs"[38] on the other, with the latter

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[33] *See* Budzinski, *Modern Industrial Economics: Open Problems and Possible Limits*, 127 ("Some authors, however, point out that the innovative instruments of an industrial-economics based competition policy are no cheap instruments but involve significant costs instead. These costs include 'direct' costs like costs of data collection, payment for expertise, computer hours, manpower as well as costs in terms of a potential extension of the duration of proceedings and possibly reduction in legal certainty." (citations omitted)); Tom & Pak, *Toward a Flexible Rule of Reason*, 399 ("A full accounting of the cost of decision making must take into account not just the actual resources, such as legal and judicial time, devoted to the process at any particular decisional point, but also the costs of uncertainty and certainty associated with any particular decision-making apparatus."); Wils, *The Judgment of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance*, 427 ("When choosing between one or another interpretation of Article 102 TFEU (for instance, between the existing EU case-law and the so-called more economic approach), all relevant effects of the choice of interpretation should be taken into account, including enforcement costs, and the degree of legal uncertainty and the corresponding allocation of risk.").

[34] IOANNIS LIANOS, et al., COMPETITION LAW: ANALYSIS, CASES AND MATERIALS 488 (2019).

[35] Jonathan B. Baker, *Taking the Error Out of Error Cost Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 5 (2015)

[36] *Id.* at 5 n.17

[37] Tom & Pak, *Toward a Flexible Rule of Reason*, 394.

[38] Christiansen & Kerber, *Competition Policy with Optimally Differentiated Rules*

categories encompassing not only resources spent because of competition law but also over- and under-deterrence resulting from unpredictability.[39]

Calling costs of unpredictability non-substantive as well as grouping them with administrative costs, however, obscures their true nature. Namely, as discussed above, the negative effects of unpredictability consist in over- and under-deterrence, which exactly the same as the negative effects of error. Put differently, predictability concerns the substantive core of what competition law aspires to do: to prevent conduct that harms competition. And a lack of predictability, just as of accuracy, frustrates this objective.

C. Framing mis-deterrence as error

Yet another way in which the literature mistreats predictability is by describing its effects in the form of over- and under-deterrence with the language of error. Consider for instance Hylton and Salinger, who include in the definition of type-I errors not only benign instances of business conduct that an adjudicator finds to be unlawful but also "benign occurrences that do not occur because of the belief that they could be challenged in court" even if they actually "would not be found in violation of the law if they went to trial".[40] Similarly, Bennet and Collins present as type-I errors situations in which "firms simply do not engage in certain activities, even though some may provide benefits", because they are unable to predict that these activities would be found in compliance with the law.[41] And Katsoulacos and Ulph denote as type-I error any prevented benign conduct and as type-II error any non-prevented harmful conduct.[42]

This use of the error language is misleading for two reasons. First, the notion of an error in actuality describes a quality of enforcement decisions, not their effects on business conduct. Second, and crucially, there may be other causes of over- and/or under-deterrence than error, prominently including unpredictability.[43] Said use of the language is undesirable even if the commentator concedes the latter point (albeit

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Instead of "Per se Rules vs Rule of Reason", 223.

[39] Tom & Pak, *Toward a Flexible Rule of Reason*, 399-400; Christiansen & Kerber, *Competition Policy with Optimally Differentiated Rules Instead of "Per se Rules vs Rule of Reason"*, 231-32.

[40] Hylton & Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 499 n.115 ("It is important to be clear, though, that a false conviction does not necessarily mean that a trial would actually occur and result in a conviction. Included in false convictions are benign occurrences that do not occur because of the belief that they could be challenged in court.").

[41] Matthew Bennett & Philip Collins, *The Law and Economics of Information Sharing: The Good, the Bad and the Ugly*, 6 EUR. COMPETITION J. 311, 313 (2010).

[42] Yannis Katsoulacos & David Ulph, *On Optimal Legal Standards for Competition Policy: A General Welfare-Based Analysis*, 57 J. INDUS. ECON. 410, 421 (2009) ("Type I and Type II errors have to be defined more widely than in the traditional decision-theoretic theoretic approach as: Type I – erroneously preventing benign actions; Type II – failure to prevent harmful actions.").

[43] Other factors include the nominal sanction or the probability of detection.

typically only in a footnote). First of all, to a less diligent reader it may still suggest that over- and under-deterrence are actually problems associated exclusively with error. And, in any case, by making the notions of type-I and type-II errors ambiguous – because they now refer not only to actual decisions but also to indirect effects of the law on business conduct – the language complicates the debate about the actual reasons behind over- and under-deterrence, including unpredictability.

IV. REASONS FOR MISTREATMENT

There are three possible reasons for why the commentary may mistreat predictability of competition law in one or more of the manners described above. First, the author may be aware that he is not treating predictability of competition law appropriately, but do so anyway out of convenience. Second, the author may not be aware that he is treating predictability inappropriately. Third, the author may be aware that he is not treating predictability of competition law appropriately, but do so anyway because it benefits him. The order in which the reasons are listed reflects how serious a problem they may pose for the actual design of competition law: from the least to the most serious. This section considers each of them in turn and explores possible solutions.

A. Convenience

One possible explanation of the inadequate treatment of (un)predictability by a commentator may be his convenience. The commentator is aware that his analysis has flaws but prefers not to address them because that is the most effortless course of action.

As regards outright ignoring of predictability as a factor co-determining what competition laws should look like, the commentator may be implicitly considering only the direct mechanism of prevention of competitive harm, for which predictability indeed plays no role. Similarly, the reason to group costs of unpredictability with administrative costs, rather than with costs of error, may be that both costs of unpredictability and administrative costs, as opposed to costs of error, increase with rule differentiation. And framing any over- and under-deterrence, including that caused by unpredictability, as type-I and type-II error, may be just a result of the commentator not finding a less ambiguous expression.

This reason for mistreating predictability of competition law appears to be the least troubling one. The commentator does understand the importance of predictability and perhaps even acknowledges it in his other writings. He "only" fails to convey it to the reader in the specific piece of scholarship as doing so would require too much effort. Even that is nevertheless undesirable because it may mislead the reader as to the value of predictability.

In order that such mislead does not take place, the commentator must recognise the role of predictability not only in his own mind but also needs

to reflect it in the respective contribution. For instance, if the contribution does not consider predictability because its scope is confined only to the realm of the direct mechanism of preventing competitive harm, the contribution needs to recognise this limitation explicitly and inform the reader briefly that things work differently in the realm of the indirect mechanism. Or, if the contribution bundles together costs of unpredictability and administrative costs, it should state that this is only because their relationship to rule differentiation has the same direction but that costs of unpredictability are in fact closer in character to costs of error. And as to the use of error language for effects of enforcement on business conduct, that is to be strictly avoided. One may easily instead speak about (instances of) over- and under-deterrence, or perhaps over- and under-prevention if the direct mechanism is to be included as well. Scholarly contributions that fail to adopt these practices should not pass peer review and be published.

B. Misjudgement

A commentator may further mistreat predictability simply because he misunderstands its role in competition law. For instance, one may not realise that competition law operates above all prospectively through the indirect mechanism, focusing consequently only on the direct one, which as explained above does not need predictability. Alternatively, one may well understand that competition law achieves its objective primarily through general deterrence, but conceive the relationship between enforcement and deterrence as rather mechanistic, assuming – perhaps unwittingly – a constant full predictability of the former.

It is sometimes argued that a preference for accurate – and thus unpredictable – competition rules is baked in directly into the discipline of economics. According to Baker and Bresnahan, economists prefer that all circumstances of each case be considered.[44] Christiansen and Kerber maintain that the tendency to perform more case-specific analyses is deemed as a logical consequence of the incorporation of more economics into competition law.[45] And Manne and Wright hold that "many antitrust economists support" competition rules "that attempt to determine fully

[44] Jonathan B. Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power*, *in* HANDBOOK OF ANTITRUST ECONOMICS 1, 3 (Paolo Buccirossi ed., 2008) ("Economists often prefer to bring all the available information to bear, whereas courts at times adopt truncated analyses that exclude certain relevant inquiries in order to reduce the costs of administering the legal system and to specify clear and simple rules that give guidance to courts and firms.").

[45] Christiansen & Kerber, *Competition Policy with Optimally Differentiated Rules Instead of "Per se Rules vs Rule of Reason"*, 219 ("As a consequence, we observe a marked tendency in competition policy and analysis both in the United States and in the EU to employ more case-specific concepts and consequently inquire more deeply into individual cases. In traditional terms this amounts to a wider application of rules of reason. This development is deemed as the logical consequence of incorporating more economics into competition law and its application.").

the competitive effects of a given practice on a case-by-case basis".[46] As reported by Bennet and Collins, some economists believe that such case-by-case determinations should be carried out even for cases of price-fixing and market-sharing.[47]

Consider Padilla's analysis as an illustration of the underlying logic: "[T]here is evidence that [some] RPM agreements may be procompetitive while others may facilitate collusion. As a matter of economics, therefore, RPM agreements should be treated on a case-by-case basis using an effects-based approach."[48] This analysis appears to reject the possibility that it may ever be socially optimal for competition-law enforcement to commit error through the application of over- or under-inclusive rules. Yet, as explained above, due to the existence of costs associated with highly differentiated competition rules, i.e. administrative costs and costs of unpredictability, it may well be optimal to accept some extent of error. Rejecting this lesson is clearly irrational.

Upon a closer look, the programmatic underestimation of the role of predictability appears to be inherent only in industrial organization as a specific sub-discipline of economics, albeit a sub-discipline that is most closely connected to competition law.[49] Industrial organization is "concerned with the workings of markets and industries, in particular the way firms compete with each other" and "its emphasis [is] on the study of the firm strategies that are characteristic of market interaction: price competition, product positioning, advertising, research and development, and so forth."[50] Budzinski adds that it revolves around the issue of competitive harm.[51] In contrast, industrial organization has very little to say about the effects of the law, including the role of predictability.[52] These effects are studied by other subfields of (legal-)economics, which, however, wield only limited influence in the economic discourse about competition rules. This corresponds with Van den Bergh's observation that the economic approach to competition law often fails to fully

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[46] Manne & Wright, *Innovation and the Limits of Antitrust*, 163 n.28.

[47] Bennett & Collins, *The Law and Economics of Information Sharing: The Good, the Bad and the Ugly*, 312-13 ("Economists sometimes argue that everything besides blatant price fixing and market sharing (and, indeed, sometimes even price fixing and market sharing) should be analysed on a case-by-case basis.").

[48] Jorge Padilla, *The Role of Economics in EU Competition Law: From Monti's Reform to the State Aid Modernization Package* 7 (Sept. 28, 2015) (unpublished working paper), *available at* https://ssrn.com/abstract=2666591 (footnotes omitted).

[49] Arndt Christiansen & Christian Ewald, *Best Practices for Expert Economic Opinions – Key Element of Forensic Economics in Competition Law*, *in* PUBLIC AND PRIVATE ENFORCEMENT OF COMPETITION LAW IN EUROPE 141, 143 (Kai Hüschelrath & Heike Schweitzer eds., 2014).

[50] LUÍS M. B. CABRAL, INTRODUCTION TO INDUSTRIAL ORGANIZATION 3 (2000).

[51] Budzinski, *Modern Industrial Economics: Open Problems and Possible Limits*, 129 ("Modern industrial economics is a theory of *competitive harm*.").

[52] Jan Broulík, *Two Contexts for Economics in Competition Law: Deterrence Effects and Competitive Effects*, *in* NEW DEVELOPMENTS IN COMPETITION LAW AND ECONOMICS, 40-42 (Klaus Mathis & Avishalom Tor eds., 2019).

acknowledge the costs of unpredictability and to integrate them in its analysis.[53]

Seen from a slightly different angle, underappreciation of the role of predictability is a symptom of economic – or more precisely industrial organisation – myopia. A "more economic" competition law is conventionally associated with a greater employment of economic tools in individual cases. Yet, making competition-law enforcement more predictable would require the exact opposite: using less economics in its course and giving up on achieving an accurate outcome in every case. As Van den Bergh put is, competition-law commentators "often are so heavily busy investigating the intricacies of the economics of competition that they lose out of sight the more fundamental questions about the use of economic theories in antitrust enforcement".[54] These fundamental questions apparently concern also predictability of such use. Eventual calls to restrict the enforcement use of economics are therefore often understood as unjustified and going against an economic logic.

However, as already suggested, it is rather the other way around. What defies economic logic is ignoring the economic effects of unpredictability associated with extensive economics-based assessments of individual cases. In other words, the use of economics in the enforcement of competition law does not have only benefits but also costs. And, consequently, "also the use of economics in antitrust law must pass a cost-benefit test."[55]

Just to be clear, one should always be free to assess *academically* whether any given instance of business conduct actually has or has not brought about competitive harm and, while doing so, to completely ignore the predictability of the assessment. But once we start discussing what constitutes optimal *legal rules*, it is simply not possible to overlook the question whether businesses are able to predict outcomes of their enforcement. Otherwise we would end up with competition rules that do not attain the objectives that we want them to attain.

Mistreating predictability because one does not realise its value appears to pose a more serious problem than the mere convenience discussed above. It cannot be solved by simply reminding scholars to be more complete in their writing. Further, the fact that underpreciation of predictability is entrenched in the mindset of an entire economic sub-discipline means that it is espoused and mutually reinforced by a great number of people. With this sub-discipline being arguably the most

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[53] Roger Van den Bergh, *The 'More Economic Approach' and the Pluralist Tradition of European Competition Law*, *in* THE MORE ECONOMIC APPROACH TO EUROPEAN COMPETITION LAW 27, 33 (Dieter Schmidtchen, et al. eds., 2007).

[54] Van den Bergh, *The More Economic Approach in European Competition Law: Is More Too Much or Not Enough?*, 13.

[55] *Id.* at 40; *see also* Cass R. Sunstein, *The Autonomy of Law in Law and Economics*, 21 HARV. J.L. & PUB. POL'Y 89, 90 (1997) ("[S]ometimes cost-benefit analysis itself may fail cost-benefit analysis.").

prominent one in the context of competition policy, scholarly commentary authored by these people may moreover have significant influence on competition rules.

It is not easy to see how academic misjudgment as to the value of predictability could be remedied. To be sure, in the short run, one might want to weed out such misjudgment from publications by the means of peer review. And, in the long run, scholars could be taught to appreaciate why competition-law enforcement needs to be predictable. However, insofar as the misjudgment is entrenched in the disciplinary mindset, it may well resist such attempts to debunk it.

C. Strategy

The last possibility is that commentators mistreat predictability intentionally to their own benefit. This benefit may accrue in two different ways. First, authors of the commentary may themselves profit from unpredictable rules. Namely, it is quite common that people contributing to the scholarly competition-law discourse do at the same time counsel and represent clients in private practice.[56] And when the law is less predictable, the clients will likely require more assistance. In addition, as greater predictability tends to be associated with less differentiated rules, downplaying predictability as a relevant factor allows one to argue for greater rule differentiation. And cases based on highly differentiated rules and the associated effects-based more-economic approach bring a great amount of work to both lawyers and economists.[57] All in all, arguing for less predictable competition rules thus amounts to arguing for more business opportunities for competition-law practitioners.[58]

Second, scholars may wilfully underappreciate predictability because

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[56] Wils, *The Judgment of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance*, 433 ("Many antitrust academics are also practitioners, or may want to become practitioners at a later stage of their career. Large parts of the publication and conference markets are also run by and for practitioners.").

[57] David J. Gerber, *Global Competition Law Convergence: Potential Roles for Economics*, *in* COMPARATIVE LAW AND ECONOMICS 206, 226 (Theodore Eisenberg & Giovanni B. Ramello eds., 2016) ("The more economics is used in competition law systems, the greater the demand for [economists'] services and their compensation for providing those services."); Ortiz Blanco & Lamadrid de Pablo, *Expert Economic Evidence and Effects-based Assessments in Competition Law Cases*, 310 (arguing that the effects-based approach to competition law "can … be the source of substantial benefits for both … lawyers and economic consultants").

[58] *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 620 (1992) ("The legal profession is not indifferent to how laws are designed. Since some of the promulgation costs and much of the costs of advice and enforcement consist of fees for lawyers' services, the profession as a whole has a general interest that tends to oppose that of society. Laws that induce individuals to seek advice more frequently or to seek advice having a higher cost, or that increase the cost of litigation, will be favorable to the economic interest of lawyers. Thus, while the bar will often have special expertise in evaluating many of the factors relevant to the design of laws, one must keep in mind that lawyers' advice on such matters may be tinged by self-interest.").

it is of advantage to businesses that might or do violate competition law. To be sure, the fact that competition-law enforcement is unpredictable is in itself not favourable to the defendants. However, as explained just below, greater differentiation of competition rules is. The ways in which this may translate into scholarly commentary advocating for such differentiation are discussed further down.

Highly differentiated competition rules tend to allow harmful conduct to avoid legal liability. Admittedly, on a theoretical level this shouldn't be the case: more differentiated rules are actually supposed to enable greater accuracy and should thus lead to harmful conduct being found in violation of the law. In reality, however, it is extremely difficult for plaintiffs to discharge their burden of proof in cases based on highly differentiated rules, which often discourages them from even trying their luck in the first place.[59] As argued by Bennet and Collins, "a case-by-case approach places a high burden on competition authorities and private claimants in bringing cases, which could result in under-enforcement and therefore insufficient deterrence of anticompetitive behaviour".[60]

These effects of highly differentiated rules have been documented on both sides of the Atlantic. Consider for instance Richard Posner's remark that the US rule of reason, i.e. a highly differentiated rule, "in practice, … is little more than a euphemism for nonliability".[61] This remark has been verified empirically by Carrier, who showed that of all 222 federal cases resolved between 1999 and 2009 on the basis of the rule of reason, the defendant won 221.[62] Even if one expects the more unequivocal cases to get settled out of court in favour of the plaintiff, this ratio is still highly remarkable.

As regards the European Union, it is possible to provide an example concerning Article 101 TFEU. This provision renders as unlawful cooperation between businesses that restricts competition either by its effect or object. The "by effect" prohibition is more differentiated than the "by object" one because it requires more extensive fact-finding,[63] especially since the introduction of the "more economic approach" in the early 2000s. Against this backdrop, Witt has observed that, since the adoption of the approach, "European competition authorities have almost

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[59] Clayton J. Masterman, *The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law*, 69 VAND. L. REV. 1387, 1393-94 (2016).

[60] Bennett & Collins, *The Law and Economics of Information Sharing: The Good, the Bad and the Ugly*, 313.

[61] Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14 (1977). For a list of other sources making a similar claim, see Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 64 (2007).

[62] Michael A. Carrier, *Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009).

[63] Bennett & Collins, *The Law and Economics of Information Sharing: The Good, the Bad and the Ugly*, 313-14.

exclusively chosen to prohibit cases involving object restrictions".[64] And she has added that "[t]he most likely explanation for this phenomenon … is that object cases are … easier and cheaper to pursue" than cases concerning restrictions by effect.[65] To summarise, from the perspective of defendants, highly differentiated competition rules associate with a lower, if any, probability that they will be found in violation of the law and sanctioned.

Put differently, underappreciation of predictability, respectively overappreciation of accuracy, gives support to competition rules that are excessively favourable to defendants. Other false arguments with similar effects include for instance exaggerating the expected size of type-I error costs relative to type-II error costs, as it has been allegedly done by the Chicago School of competition thought. As argued by Baker, this school and its successors have systemically overstated the incidence and significance of type-I errors while understating the incidence and significance of type-II errors.[66] This then allowed the academics to advocate for competition rules that made a significant share of harmful conduct difficult to challenge, if not outright lawful.

One reason why academic commentary may intentionally argue for rules that favour defendants is because its authors are at the same time practitioners who want to attract clients. As argued by Kovacic, it is for instance possible that a competition "economist's research and publications become vehicles for advertising positions that the economist will endorse for litigants in antitrust cases."[67] As the main clients of competition practitioners are potential and actual violators of competition rules,[68] the research and publications will be "especially suited to defending the conduct of their likeliest clients",[69] i.e. they will advance arguments against competition-law liability. The same of course, and perhaps even more fittingly, applies also to competition lawyers.

It is also possible that actual and potential litigants fund scholarly commentary that corresponds with their needs.[70] To illustrate,

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[64] Anne C. Witt, *The Enforcement of Article 101 TFEU: What Has Happened to the Effects Analysis?*, 55 COMMON MKT. L. REV. 417, 446 (2018).

[65] *Id.*. See also Damien M. B. Gerard, *The Effects-based Approach under Article 101 TFEU and Its Paradoxes: Modernisation at War with Itself?*, *in* TEN YEARS OF EFFECTS-BASED APPROACH IN EU COMPETITION LAW: STATE OF PLAY AND PERSPECTIVES 10, 27 (Jacques Bourgeois & Denis Waelbroeck eds., 2012).

[66] Baker, *Taking the Error Out of Error Cost Analysis: What's Wrong with Antitrust's Right*, 37. See also Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1870 (2020).

[67] William E. Kovacic, *The Influence of Economics on Antitrust Law*, 30 ECON. INQUIRY 294, 297 n.9 (1992).

[68] Jan Broulík, *Cultural Capture of Competition Policy: Exploring the Risk in the US and the EU*, 45 WORLD COMPETITION 159, 173-74 (2022).

[69] Andrew I. Gavil, *Competition Policy, Economics and Economists: Are We Expecting Too Much?*, *in* INTERNATIONAL ANTITRUST LAW & POLICY: FORDHAM CORPORATE LAW INSTITUTE CONFERENCE 2005 575, 596 (Barry E. Hawk ed., 2006).

[70] Kovacic, *The Influence of Economics on Antitrust Law*, 296-97 ("Since 1970, for

Hovenkamp and Scott Morton contend that some of the anti-interventionist scholarship of the Chicago School was sponsored by businesses that profited from non-intervention.[71]

The litigants may directly commission a piece of academic commentary advocating a specific position. This again seems possible especially with regard to lawyers and economists combining academic publishing with work in private practice. Publications may then be just one of multiple tools to convince the decision-makers to decide in favour of the clients.[72]

Alternatively, instead of hiring someone and providing instructions what to write, the litigants may select academics who hold congenial pre-existing views and financially support them and their institutions. Strictly speaking, this possibility does not belong to the current section because it is the litigants, not academics, who is behaving strategically in order that predictability be mistreated in the commentary. The academics here genuinely, albeit mistakenly, believe the respective arguments to be sound, which eventuality was discussed in the previous section.

All the same, any intentional distortion of the academic debate about what competition laws should look like presents a particularly serious problem. Unlike above, the mistreatment of predictability may not be addressed by educating the commentators, be it about the importance of predictability itself or of the presentation of this importance in the scholarship. If the commentators are selecting their arguments intentionally to achieve a certain outcome, challenging the soundness of the arguments will hardly convince them. And if they are being selected and supported by sponsors because of what they preach authentically, they can be easily replaced should they stray from the path.

It would be naïve to disregard the problem, believing that the influence of different stakeholder groups will cancel each other out. The

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example, corporations have extensively funded antitrust research by individual academics, academic institutes, think tanks, and foundations. Such inducements undoubtedly affect economists." (footnotes omitted)); Gavil, *Competition Policy, Economics and Economists: Are We Expecting Too Much?*, 596 ("Sponsored research and publications, long a staple of the medical field, have now become part of the antitrust world, as well, where they present similar ethical and professional concerns. Firms that, by virtue of their market size, tend to be repeat players in the antitrust arena may actually sponsor economic and legal commentators to undertake specific studies on issues that are of interest to them." (internal quotation marks omitted)).

[71] Hovenkamp & Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 1851-52.

[72] Ioannis Lianos, *'Judging' Economists: Economic Expertise in Competition Law Litigation: A European View*, *in* THE REFORM OF EC COMPETITION LAW: NEW CHALLENGES 185, 233 (Ioannis Lianos & Ioannis Kokkoris eds., 2010) ("[E]xchanges between expert witnesses are not confined to the courtroom but, in practice, extend to the broader academic debate, in journals, conferences, the Social Science Research Network (SSRN), etc. Preparing the public defense of a specific theory and position that is favourable to one of the parties in these academic circles is part of the strategy to establish the legitimacy and persuasiveness of the claim.").

interests of those who may engage in and benefit from harmful conduct are much more concentrated than of those who may suffer the harm.[73] That is why the former are the main clients of competition practitioners[74] and spend considerably more on the funding of scholarship.[75] As a result, even if one believes that outright commissioning of scholarship is rare, these other dynamics may still well skew the discourse towards competition rules that excessively favour actual and potential infringers.

There are some, albeit not perfect, solutions to the problem. First of all, authors of the commentary need to disclose any conflicts of interest, and readers need to take these disclosures into account.[76] Again, peer review might help to filter out some of the mistreatment of predictability, but only if a sufficient share of scholars working in the field take predictability seriously. Finally, the imbalance between the representation of wrongdoers and victims in the scholarly discourse might be to some extent remedied by publicly funded academics primarily defending the interest of the latter and, thus, being sensitive to any unjustified advocacy of too little predictability or too much rule differentiation in general.

IV. CONCLUSION

As demonstrated by this paper, scholarly commentary on what competition rules should look like has been mistreating predictability of their enforcement as a relevant factor of the analysis. This presents a serious problem because the rules may then be designed as less predictable than actually would be optimal. The ability of academic writings to exert such influence on actual decision-making has been evidenced for instance by the substantial impact of the Chicago School.[77] Also the very fact that big firms are willing to spend extraordinary amounts of money on sponsored scholarship illustrates the role that academic writings play in shaping the law.

The paper has discussed some solutions that may reduce the mistreatment of predictability in the scholarship. However, a perhaps

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[73] Broulík, *Cultural Capture of Competition Policy: Exploring the Risk in the US and the EU*, 163.

[74] *Id.* at 173-74.

[75] Hovenkamp & Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 1852 ("[E]conomic theory demonstrates that funding for antitrust research will naturally be lopsided; there is no equivalent financial incentive to fund interventionist policy work because the benefits of antitrust enforcement accrue to consumers, who are very diffuse, not particular companies or institutions."); Kovacic, *The Influence of Economics on Antitrust Law*, 296 ("A second stimulus to research in antitrust economics is the demand of various antitrust system participants for useful ideas. … The largest and most prominent part of the demand is for theories that exculpate defendants.").

[76] Gavil, *Competition Policy, Economics and Economists: Are We Expecting Too Much?*, 596 ("Often, [sponsored] papers and speeches are offered … as objective commentary; and often they lack any disclosure of the author's relationship to an interested party.").

[77] Hovenkamp & Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 1871.

even more important point concerns legislators, public servants and judges responsible for the design of competition rules as consumers of this scholarship. It is essential that these decision-makers be aware of various ways through which and the various reasons for which the commentary may not treat predictability appropriately.[78] The ensuing vigilance will help them identify and avoid unhelpful contributions to the debate.

Most of all, however, the value of predictability of competition-law enforcement needs to start receiving a more proper general recognition than it has so far. As noted by ten Kate, we should all be uncomfortable "about the relative ease with which the competition community accepts the implications of the rule of reason … for the resulting lack of legal certainty for the business community."[79] Isn't it rather worrying that those who invoked predictability of competition law as a reason to make competition law more economics-based[80] rarely warn against unpredictability caused by too much economics in enforcement? If we really want competition law that deters as much harmful and as little benign conduct as possible, we need to take this predictability seriously, too.

[78] *See* Gavil, *Competition Policy, Economics and Economists: Are We Expecting Too Much?*, 596 ("When courts turn to commentary ..., they must do so with their eyes open to the possibilities of ... interest group economics.").

[79] ten Kate Sr., *Hundred Years Rule of Reason Versus Rule of Law* 11.

[80] David J. Gerber, *Searching for a Modernized Voice: Economics, Institutions, and Predictability in European Competition Law*, 37 FORDHAM INT'L L.J. 1421, 1436 (2014).