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The Role of Economic Arguments in Decisions Concerning Protection of Competition

Abstract

The paper deals with obvious tendencies of economization of legal decision making under the parole of „more economic approach". It warns against the danger of a simplified „book-keeper approach" and preferring short-term economioc goals to the detriment of other social values, such as legal certainty. The economization of legal decision does not put an end to uncertainty and instead sometimes can incur other uncertainty. Modernization and economization of competition law offers more space for „ad hoc" political opportunism. Similarly, adoration of the short-term consumer welfare can cause long-term negative consequences for the very existence of competiton which is the best friend of the consumers. Trade-offs between short-term and temporal efficiences and the intensity and quality of competition are dangerous. It sometimes contravenes the substance of law as a guardian of civilization values and the expression of human social and psychological needs. A human being has never been (and is not even today) some „homo economicus". The concept of the enhanced economic rationality (more economic approach) in a particular case to the detriment of the competition as such (as a goal in itself) seems to have been overcome in the practice of the Court of the EU.

Keywords: *more economic approach, protection of competition, antitrust, consumer welfare, conflict of goals.*

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Rola argumentów ekonomicznych w decyzjach dotyczących ochrony konkurencji

Streszczenie

Artykuł omawia ewidentne tendencje ekonomizacji decyzji prawnych wydawanych pod hasłem „bardziej ekonomicznego podejścia". Ostrzega przed niebezpieczeństwem uproszczonego „podejścia księgowego" i preferowania krótkoterminowych celów ekonomicznych ze szkodą dla takich wartości społecznych, jak pewność prawa. Ekonomizacja decyzji prawnych nie kładzie kresu niepewności, a wręcz czasami może prowadzić do pojawienia się innego rodzaju niepewności. Modernizacja i ekonomizacja prawa konkurencji daje więcej przestrzeni dla doraźnego oportunizmu politycznego. Podobnie przesadna aprobata dla krótkoterminowego interesu konsumenta może powodować długoterminowe negatywne konsekwencje dla istnienia konkurencji, będącej najlepszym przyjacielem konsumenta. Kompromis pomiędzy krótkoterminową i chwilową wydajnością a intensywnością i jakością konkurencji są niebezpieczne. Czasami narusza to istotę prawa, jako strażnika wartości cywilizacji oraz wyrazu ludzkich potrzeb społecznych i psychologicznych. Człowiek nigdy nie był (i nawet obecnie nie jest) czymś w rodzaju „homo economicus". Koncepcja zwiększonej ekonomicznej wymierności (bardziej ekonomiczne podejście) w konkretnej sprawie, ze szkodą dla konkurencji jako takiej (jako celu samego w sobie), wydaje się zostać przezwyciężona w praktyce funkcjonowania Sądu UE.

Słowa kluczowe: *bardziej ekonomiczne podejście, ochrona konkurencji, antymonopolowy, dobro konsumenta, konflikt celów.*

Introductory Remarks

Any economic analytical methods in competition law may merely serve in terms of technical and verifying tools of legal deliberation instrument; they never can (even not partially) substitute such a legal deliberation that takes into account non-economic values and opens space for solving (and not just only calculating) conflict of goals.

Antitrust is not just about microeconomics. The use of quantifiable data may be fascinating (by its apparent clearness and expliciteness) but, on the other hand, it might be potentially dangerous due to its suggestive (though not real) uniquiness and explicitness.

The mystery of putting real world into abstract numbers and neglecting non- rational and non-economic incentives in decision making and acting of competitors and consumers is a traditional objection. Pretending of „long-sightedness" of competition authorities with regard to the future development of the market and to the future conduct of the participants migt be more viable and trustworthy with use of „hard" data and economic models.

Nevertheless, numbers are nothing but tools of concretization of meaning and perception that are suitable to reliable quantifying. Of course, economic analysis is not necessarily identical with using numbers and guantified data. Qualitative and value-based assessment of many economic data is inevitable as well.

In this sense, numbers can be understood as another kind of words that are similarly just symbols of what we are thinking and talking about. Numbers – analogous to words – are subject to both encoding by their authors and decoding by their recipients. Both numbers and words are abstract and do inevitably need interpretation that does not *discover* their real content but instead in fact only *creates* this more precise content.

Depending on this process both words and numbers may be either virtual and abstract names pretty far from reality, or true and fitting description of what is really happening. From this point of view, the soft law (and antirust soft law as well) is – among other things – a tool to reduce the uncertainty of words (and sometimes of numbers, too) and to enhance the predictability of decision making.

There is no serious reason to deny unprecise words in favour of „precise" numbers for the numbers only seem and pretend to be precise and they have to be interpreted in qualitative and contextual terms; on the other side, there is no reason to deny numbers as a quantifying tool of verbal uncertainty and fuzziness; words are often substantially better off when supplemented with numbers. More economic approach in antitrust law is just a kind of enhanced accent on economic grounds of analyses and of legal reasoning of decisions and not on substituting of complex antitrust considerations by calculating some strange numbers.

No simple numbers mirroring data without context can give us answers to fundamental questions on priorities and effectiveness. Easy measurement of data and creating of formula is no guarantee of giving us a correct or best answer[1]. Well known „MacNamara's

[1] Cf. K. M. Davidson, *Numerology and the Mismeasurement of Competition Laws,*Commentary, 29.9. 2008, www.antitrust.org., p. 2 ff.

Fallacy"[2] is instructive as a disincentive example: „The first step is to measure whatever can be easily measured. This is okay as far as it goes. The second step is to disregard what can't be measured or give it an arbitrary quantitative value. This is artificial or misledading. The third step is to presume that what can't be measured easily really isn't very important. This is blindness. The fourth step is to say that what can't be easily measured does not really exist. This is suicide".

The economist E. F. Schumacher stated that considering economics as the contents of life is a „deadly disease" because unlimited growth does not fit into a limited life. The disease resembles an alcohol or drug addiction[3]. Economic calculations that permeate almost everything, do not bypass law either. The economic costs and benefits of not only economic but also legal options are specified and a balance is sought between them. The economic approach is justified as long as it is applied as one of ancillary and additional criteria. However, a problem arises if the economic criterion prevails and law becomes some kind of a subspecies of applied microeconomics. Fortunately, every society may be asumed to contain norms which will be asserted even despite their economic inefficiency[4]. Louis Brandeis, the former and distinguished US Supreme Court judge once said that „a lawyer who never studies economics has a strong tendency of becoming a public enemy". I dare to add some cheaky supplement: „... whereas an economist who is not interested in the wider social impacts of economic measure has already become such an enemy".

The economization of (competition) law is a manifestation of anticonservative (liberalization) trends that are perceptible not only on the academic level but also in legislation and in the practice of applying law. Law tends to be perceived as a function of economy and a tool for applying economic arguments and values. Law should be an object, passively (for better or worse) expressing the economic substance of a social phenomenon and aiming mostly or exclusively at achieving the economic purpose of regulation. What is striking is the similarity between this kind of thinking and the unilateral character of Marxist materialism with its teaching on the primacy of economics and the derived character of other social structures.

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[2] Referring to use of quantifiable data (such as body counts, number of bombs dropped, number of villages „pacified" during the Viet Nam War – see J. Flynn, „125 U. Pa. L. Rev" 1182 a n. 9, as reported by Cf. K. M. Davidson, referred above, *ibidem*.

[3] Cf. E. Fromm, *Mít nebo být?,* „Naše vojsko", Praha 1996, p. 127.

[4] H. B. Schäfer, C. Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts*, „Springer Verlag", Berlin 2000, p. 9.

1. Conflict of Economic and Other Values in Law

Fortunately, law also (and very often especially) expresses and asserts other than economic values. In doing so, it must tally with the value orientation of the society, which economists need not necessarily like. What are seemingly exact rules expressed in words and the much more vague principles behind them are actually genetic and functional parts of a single normative unit composed of „hard" and „soft" norms. The fact that their relation must be specified and ascertained only in each *individual* case or *typologically* delimited *group of cases* puts practising lawyers and, above all, judges into an unpleasant situation of uncertainty, as well as the inspiring and creative position of co-makers of legal regulation[5].

The *economic* criterion is only one of many possible approaches and is subject to hierarchic relations with respect to other value criteria. It may be stated, in a somewhat simplified way, that lawyers tend to identify law with application of principles set by law. They do not seek solutions that are economically right; instead they look for such solutions that are in harmony with the interpretation of set rules. Economists think differently: they do not start with legal principles but the market situation and the practice they have to face[6].

Methodological and practical problems are also raised by the unquantified (and probably also unmodulatable) relationship between economic and non-economic goals, such as social welfare, harmonious and sustainable development, quality of life, and economic convergence, which is the primary goal in European law and which necessarily the adoption of sub-optimal („non-economic") current decisions in the interest of future optimal development or state[7].

Economic efficiency does not give a final answer to the normative question about the goals of competition law. Various societies may tend to give various answers to the same question at various times. The protection of consumer preferences (which are, in addition, mostly short-term) can hardly be justified as the only relevant normative standard: what is needed is a wider and broader interdisciplinary approach that would also respect that "competition as such" and "fairness" may constitute normative concepts and values shared by people. As a result, they are relevant[8], and cannot be excluded from a potential normative specification.

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[5] See Z. Kühn, *Aplikace práva ve složitých případech*, Nakladatelství Karolinum, Praha 2002.
[6] Cf. M. Hutchings, *The Competition between Law and Economics*, „E.C.L.R." 2004, No 9, p. 531.
[7] See J. Bejček, *Cílové konflikty v soutěžním právu*, „Právník" 2007, No 6, pp. 663-689.
[8] Cf. W. Kerber, *Should Competition Law Promote Efficiency?* Unpublished draft, 2nd ASCOLA Conference, Paris, 8. 9. 2006, pp. 20 -21.

2. The Economic Criterion Does not Mean the Removal of Uncertainty

There is a false opinion that „legal" stands for „fuzzy" and „uncertain", whereas „economic" means „precise" and „certain"; instead, the actual „preaching" of economy is not a guarantee of precision and objectivity. Even if the clear personal interests behind some economic criteria are disregarded, one will face a methodological problem of how to express the economic character of this or that solution.

The language of economy with its concepts and methodology often seems to be more precise; however, the discipline is predominantly based (similar to the language of law and its methodology) on „soft data". Value-oriented and conventionalist criteria are not only the necessary prerequisites for legal rgulations but also for any conception of economic efficiency. Similarly to law that is not aimed at creating a perfect society or to create a society, that in theory, would be perfect if only the law worked as planned[9], neither economics has such a role. Neither law nor economy is „... all encompassing vehicles for accomplishing any beneficent end but [...] a far more limited tool"[10].

The problem is that neither economists (and not only lawyers) know exactly what some terms really mean. Therefore, we can talk not only about open-textured laws but about open textured economic terms as well. Comparably to law terms and concepts, neither economic terms and concepts are offen well defined self-evident. *Content* certainty in such areas as competition law (where economic reality is comprehensively assessed) was illusory also under the previous system which did not lay such an emphasis on the economic approach. Equally illusory are demands for such certainty after the change of the system: the certainty is not – just as the so-called "justice" – from this world. The more significant the pragmatic orientation emphasizing the economic principle is, "the higher uncertainty will have to be adopted in order to reach an economically coherent interpretation of rules"[11].

So, for example even the notion of efficiency is disputable. Generally, three kinds of efficiencies are recognised[12]:

- *allocative* efficiency, which corresponds to the situation in which the services and goods are allocated to the consumers (in the wide sense of the word, i.e. not only the

[9] Cf. R. A. Cass, *Competition in Antitrust Regulation: Law beyond Limits,* „Journal of Competition Law & Economics" 2010, No 6 (1), p. 122.
[10] *Ibidem*.
[11] Ehlemann, Atanasiu, cited in J. Venit, *Brave New World: the Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty*, „CMLR" 2003, No 40, p. 574.
[12] Cf. e. g. P. Arreda, L. Kaplow, *Antitrust Analysis*, "Aspen Law & Business", 5th ed., New York 1997, p. 5 ff.

end consumers, but also the so-called production consumers) according to the prices which they are willing to pay; these prices will not be higher than the marginal costs of the production. This efficiency will become true in the situation of perfect competition, where the producer cannot influence the market price by limiting the production, and therefore is not interested in doing so[13]. Situations are called ineffective with regard to allocation, when the strong subjects in the market have the ability to influence the price by limiting the production and the price will be higher than marginal costs[14]. Agreements or mergers that are directed towards strengthening the market force may stimulate the tendencies towards allocative inefficiency[15];

- *productive* efficiency, which stands for the production of goods and providing services with the lowest possible costs. Market output is maximized through the best combination of inputs, which means that the least possible volume of sources (common richness) is used for the production of the given goods or providing the given services[16];
- *dynamic* efficiency is reached when the producers constantly innovate and develop new products as a part of the fight for market shares by gaining new customers.

In an ideal case, economic competition should support the economic efficiency in its allocative and productive forms, while encouraging innovations at the same time. The problem is that the three components of efficiency need not be necessarily consistent. When a certain agreement or conduct between competitors is assessed, tension may arise between the components[17].

For example, mergers can contribute to savings due to extent and range of goods (*economies of scale and scope*) and thus fulfil the productive efficiency. On the other hand, the merged subject might reach higher market power, and thus also the ability to reach "over-competitive" prices, which interferes with allocative efficiency. Market power may further lead the strong subject to the neglecting of innovations (as e.g. high barriers to entry the market discourage possible interested persons). Then it is necessary to consider whether the

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[13] Cf. S. Bishop, D. Walker, *The Economics of EC Competition – Concepts, Application and Measurement*, 2nd ed., Sweet & Maxwell 2002, pp. 20-21.

[14] Marginal costs are the increase of the costs necessary for the production of another supplementary unit on the output (or by lowering the overall costs as a result of diminishing the output of one unit). Cf. Samuelson – Nordhaus, *Ekonomie*, Svoboda, Praha 1991, p. 974.

[15] D. Geradin, *Efficiency Claims in EC Competition Law and Sector-Specific Regulation*, draft paper, Workshop on Comparative Competition Law (The Evolution of European Competition Law – Whose Regulation, Which Regulation?), Firenze 12-13.11.2004, p. 3.

[16] Cf. R. Whish, *Competition Law*, Butterworths, 4th ed., 2001, p. 3.

[17] D. Geradin, *ibidem*, shows this illustriously on some examples I am taking over.

advantage of productive efficiency (the costs saved by the merger) will be passed on to the consumer (which would be a compensation of the disadvantageous consequences of a higher market concentration), or whether they remain in the hands of the merged subject in the form of higher profit.

Similarly controversial is also the doctrine – created by the European case law – on the access to the so-called *essential facilities*, owned or operated by a monopoly or a dominant subject. On one hand, such enforced access strengthens the competition in subsequent (subordinate) markets (e.g. access to the distribution electrical network strengthens the competition in the market of electricity distribution), but on the other hand, it might hinder the motivation of the dominant operator of the network to innovation, which might weaken the dynamic efficiency.

Innovation motives might, however, be arguments for those who struggle to have access to the essential facilities, as well as for those who own these facilities and thanks to the savings due to the size reach higher productive efficiency and can thus invest part of the higher profit into innovations and the development of new technologies.

An inevitable and very uneasy task of the anti-trust authorities thus lies in performing a comprehensive test that would consider all possible effects and their consequences. "Consumer welfare", which is used as the first aggregate criterion of the European competition law[18], seems to suggest rather that it is the allocative efficiency that is looked upon in the first place (so that the consumers get a significant part of the efficiency growth)[19] – the profit of the producer in itself is not sufficient as a consequence of higher efficiency.

On top of that – apart form the notion of consumer welfare, indefinite already by its qualitative essence – there is also a problem of the transfer of real and alleged welfare and guaranties and instruments of securing the declared transfers of substantial part of the profit for the consumers in the future. At the same time we have to be careful in not preferring the short-term transfers of the savings to the consumer (short-term consumer welfare); the successful subjects have to be granted sufficient resources for investment and future innovations[20].

The unified internal market in itself is a tool of economic efficiency – removing the barriers of free movement on one hand stimulates competition between producers and thus contributes to allocative efficiency; the size of the integrated market makes it possible to

[18] Cf. Bishop – Walker, op. cit., p. 24.
[19] See D. Geradin, op. cit., p. 3.
[20] Cf. S. Bishop, D. Walker, op. cit., p. 26.

profit from the advantages of the economies of scale and thus contribute to productive efficiency; further, the size of the integrated market is stimulating for the spread of innovations in member states, by which it contributes also to the dynamic efficiency[21].

3. Economic Approach Does not Mean Absence of Political Influence ...

Competition policy that routes competition law is s a kind of policy nothing but balancing of various interests and their optimization. Quite naturally, the interest in the protection of competition must be confronted with other values and interests which significance and order come as a result of the formation of *political* will. Because of the fact that competition policy is nothing but a policy, it must, from time to time, be opportune by its very nature. Opportunism may, however, be only an exception and not a rule. The faith that for example bad companies will be pushed out of the market and substituted by more efficient competitors has not been verified in practice as the last developments in banking sector prove. As some commentators argue, economy (despite assertion of economists about its independence as a science, divorced from its partner, political philosophy) ironically "...became more politically entangled than ever"[22].

However, the latest developments in European competition law (towards "economization" of the evaluation of the competitive conduct and competitive structures) indicate the danger that specific and immediate (though short-term) economic interests of particular fields – which may be specifically enumerated and may temporarily prove as beneficial for consumers – may subdue the earlier emphasis on the more general and long-term rationality of the support of competition, whose advantages lie mostly in the future and cannot – unlike specific short-term benefits for particular fields – be so easily quantified. If we agree that the "...caution against allowing antitrust law to be used in ways that can suppress competition was salutary one"[23], we should agree simultaneously, that allowing short term economic arguments to prevail over the long term and dynamic competition as a process supporting productive, allocative and long term dynamic competition, is detrimental. The reliance on economic rationality of self-healing free markets with as few regulations as possible (automatic market corrections) may be labeled[24] as "half Social

[21] See D. Geradin, op. cit., p. 4.
[22] Cf. K. M. Davidson, *Reality Be Damned: The Legacy of Chicago School Economics*, „The American Interest" December 2009, p. 8.
[23] Cf. R.A. Cass, op. cit. , p. 152.
[24] Cf. K. M. Davidson, *Reality Be Damned...* , op.cit, p. 3.

Darwinist and half Newtonian: the survival of the fittest modulated by action/reaction sequences".

The interventions of the state in some fields may not be automatically considered as cases of imposition of some dignified state will against the will of regulated subjects. In some cases, such regulation is actually welcome, with interest groups initiating such imposition and lobbying for its adoption. It is clear that the more general goals under which regulation is asserted may be significantly distorted by private interests of the initiators of regulation who use a trustworthy pretext of public interest to actually assert primarily their own group interests.

Political influences need not be asserted only on the legislative level but also on the level of application. This holds both generally (by affecting the formulation of methodological guidelines and notices) and when deciding individual cases (by having a direct or indirect political impact on officials, officers and even judges)[25].

Clear and transparent rules narrow down the space for administrative discretion, and, consequently, also the potential arbitrariness of decision-making. This, of course, holds mostly for rules of the "per se" kind. The growing number of criteria that are to be taken into account (i.e. with the increasing differentiation of rules) actually open up more space for political interventions and defensive or tactically offensive steps taken by the participants.

4. Economic Approach Does not Mean the „Case by Case Method"

There is a general agreement that profound economic analyses of impacts on the welfare can reasonably be carried out only in a small number of cases. Also the competition policy based on rules relies on an economic assessment, which typically has the form of a *normative* prohibition of certain conduct that is *on average* (i.e. *usually*) harmful from the point of view of welfare (either the total welfare or consumers' welfare) and thus uneconomical. Economic criteria are also present in the exceptions contained in statutes and it is only up to a relevant subject to properly subsume its specific situation under a statutory exception[26]. The dichotomy between the economic approach to law, identified with the *case-by-case* analysis on one hand and the normative approaches based on decision-making according to rules on the other, is artificial and false. Rules express the *average* economic

[25] What is typical are instances of political influence (also on the governmental level) meant to foil the merger of competitors as a strategic tool of competition.
[26] Cf. § 3(4) of the Act on Protection of Competition.

rationality without necessarily having to coincide with *individual* rationality in every single case.

Where some conduct is, with a high degree of probability and in the majority of cases, undesirable, then its prohibition will be set by the *per se* rule (possibly with a specification of exceptions). It is not reasonable to expend means, increase legal uncertainty and waste time by complex economic analyses in every individual case. This does not mean that some conduct under the *per se* rule cannot under any circumstances have some positive effect in some specific case[27].

The question therefore is not whether it is rules or discretion that should be prioritized but how adequately the rules are economically justified[28]. "More economic approach" is not a requirement contradicting the normativeness of competition law and it does not mean a supportive argument or an appeal for unilateral ad hoc economic analyses on the case-by-case basis.

A balanced assessment of the efficiencies[29] with respect to, e.g. anti-competitive effects of mergers, is a crucial issue of competition policy. It is not sufficient to state that a merger will result in savings, and obstructing such a merger would then essentially mean objecting to savings obtained in companies in an internal manner[30]; the actual notion of savings needs to be translated to some "common denominator". Despite the insufficient methodological and theoretical complexity, such problems must be dealt with in actual decision-making practice more or less intuitively. The necessary and very difficult task of antitrust authorities is to carry out a complex test that would take all these possible effects and their implications into consideration. "Consumer welfare", which nowadays tends to be

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[27] This could be illustrated with an analogy from the area of criminal law. Although some offences may sometimes result in a benefit to the society (i.e. not only to the offender), they will not cease to be criminal offences on account of that. The special circumstances of the case, the motivations of the offender and the impact of the consequences, etc. may be taken into account by the court when ruling on the kind and length of punishment.

[28] According to J. Vickers (*Abuse of Market Power*, „Economic Journal" 2005, No 115, p. 260), the opinion that law on the abuse of dominance should have stronger foundations does not mean that statutory rules should be replaced by discretionary decision-making, with the latter based on whatever is considered as desirable from the economic perspective and applied on a case-by-case basis (cited after Christiansen and Kerber, op. cit., p. 239).

[29] The benefits can be possible, more or less probable, purely economic and broader, company-internal and society-wide, long-term and short-term, etc.

[30] Cf. K. Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, „Antitrust Law Journal" 2005, vol. 72, p. 406. See also G. Knieps, *Wettbewerbsökonomie,* Berlin-Heidelberg: Springer Verlag 2005, p. 132 ff. Knieps argues that a well-founded economic analysis is necessary that will balance the various positive and negative effects of mergers in order to avoid two essential mistakes: the prohibition of mergers beneficial for the national economy and the approval of mergers whose negative impacts outweigh the potential rise in efficiency.

proclaimed as the first and foremost criterion of the European competition law[31], rather indicates that it takes into consideration mostly the allocative efficiency (so that consumers can receive a significant part of the accession of efficiency)[32] – it is thus not sufficient if increased efficiency results only in increasing the producers' gains.

5. Economic Approach and Consumer Welfare .... or „Welfare"?

Economic approach usually swears on consumer welfare. I can't get rid of an impression that economists consider a consumer as if he were *homo economicus rationalis* even if they know that it does not correspond to the reality. Practical businessmen are able to make use of the irrationality of an average consumer and substitue it by their own economic rationality and to constitute an artificial consumer welfare that has to be pursued and that is then declared as a main goal of the competition law.

Artificially created and supported „needs" of consumers and their satisfying are called „consumer welfare" despite pushing the consumers into the debt-trap and not seldom into bankrupcy. Long term manipulation with artificially stepping-up consumption on credit is detrimental to economics in long term. Even the antitrust supporting pursuing of this kind of consumer welfare on credit is to blame for it is a tool of a bubble-founded pseudoprosperity and of a consumer pseudowelfare on credit. What used to be a shame (in the industrial period), namely to be indebted, gradually converted into a citizen and patriot virtue („use up today, pay tomorrow").

The shift to *more* economic approach means *less* reliance on long term impact of free competition and some kind of trade-off with contributions of reduced competition to the newly asserted fundamental goal of competition law – to consumer welfare that is more valuable than paranoid purity of a free competiton as an only tool. More economic approach assets the consumer welfare in an absolute sense and the competition is just a tool of achieving that. The support of economically measurable welfare in the society is obvious. I guess that more economic approach may slide down to the microeconomic level and moreover in short term.

One may gain impression as if in a conflict between competition and efficiency the former might have never won. Sometimes a kind of normative individualism may be asserted

[31] Cf. S. Bishop, M. Walker, *The Economics of EC Competition Law*, Sweet & Maxwell, London 2002, p. 24.
[32] D. Geradin, op. cit., p. 3.

that derivates all social values from short term preferrences of individual memebers of society (consumers).

Short term efficiency in price and/or volume is preferred to other values labeled as illusory ones, such as economic freedom and freedom of competition.[33] Short term consumer oriented economization should be assessed in context with a set of some protected and untradable rights of competitors. Protection of competition (and not of consumer) does not necessarily mean that everything must be measured by the (short-term, as a rule) impact on consumers[34]. Competition law promotes not only economic efficiency but economic freedom and plurality, too and therefore antitrust is not identifiable with a simple competitive darwinism that we are recently witnissing. The value of long term sustainable competitive and innovative markets and of dynamic efficiency must not be automatically disregarded in favour of short term allocative or productive efficiency.

The question whose welfare should be pursued and promoted by the law is eminently of value nature. „A more economic approach" in a sense of short term benefits for consumers (and long term prevalence of big business) is a kind of an articulation (and a way of achieving) a group interest.

6. A More Economic Approach Does not Mean Pretending Non-Existing Economic Rationality of both Consumers and Firms

Well known limited rationality of consumers and their preferring of short-term benefits would mean resignation on long term restriction of competition. Some argue that consumers should be protected both from information assymetry and frome their own irrationality and that the limited rationality leads to situations in which the more mistakes consumers do the more opportunity they face. Classical wisdom that the choice is always advantageous for consumers is therefore questionable[35]. People usually prefer smaller advantage achiavable immediately to a bigger one that is postponed, even if slightly[36]. Consumer welfare might be seen even in inflation of new products and services that

[33] See W. Kerber, op. cit., pp. 6, 12.
[34] Cf. *ibidem*, pp. 17 – 19.
[35] Cf. R. Smith, S. King, *Does Competition Law Adequately Protect Consumers?*, „E.C.L.R." 2007, No 7, p. 413.
[36] A representative research in the UK showed that typically people with law level of education would prefer 45 pounds profit within 3 days to 70 pounds profit achievable by 3 months. Cf. A. J. Novák, *Myslet na budoucnost je zdravé*, „Hospodářské noviny", 15.9.2009, p. 26. The analogy with short term oriented conduct of political representatives ignoring future for the sake of short term pseudogoals (public choice) is evident. By the way, just the politicians in fact ironically decide on statutes defining what complies with consumers´ interests....

depreciate former investments and force to make new ones. Dynamic efficiency may lead to shorter life cycle of the products motivated by the effort to support demand for a new model – is that really a genuine consumer welfare?

Consumer that is in a situation of assymetric information is easy to be flooded with many possibilities of choice and offering other choices (i.e. enhancing the competition) might lead to his or her unsofisticated and economically suboptimal decision making that is far from reasoning of *homo economicus*. Consumer decisions of this kind objectively infringe competition for they send a false signal distorting alocative efficiency. Consumer behaviour is not just result of exogenous factors combined with consumers' rational consideration. Endogenous factors of decision making have to be taken into consideration.

It might be presumed that a sofisticated and well informed (not naive and dewy) consumer would not need any other protection than competition law. Though, it is not true, for even such a consumer yields to intuitive decision making and has no „patent" for economic rationality that is declared for the antitrust law protection. Neither competition law nor judge deliberation can remove psychologically based endogenous irrationality and to ensure perfect economic rationality of decision making.

The firms are – as a rule – better off in terms of the rationality of their conduct. It is due to the fact that they are professionals and therefore more capable to remove the information assymetry. Nevertheless the firms are not protected from the devil of irrationality. At least two sources of such irrationality are identifiable at the first glance: first – formalized corporate structures leading to suboptimal and inflexible proceeding of relevant information, and second: personal (human) features of decision makers that may override „computed corporate rationality". So, e.g. the merging is not rarely found on the „hubris hypothesis" – managers often overestimate themselves in an effort to become even bigger players and acquire competitiors without thourough economic calculations (Building-Empire-Strategy). There is a number of studies evidencing that mergers are no fast and simple way to enhance entrepreneurial success. Mergers are sometimes referred to as deathtraps[37].

Similarly, false assumption of perfect rationality of firms and of making no mistakes in their decision making processs may stay behind the requirement of recoupement test that is

[37] Cf. S. A. Jansen, (*Mergers & Acquisitions*, Gabler Verlag, Wiesbaden, 2001 (foreword); he argues with referrence to Moody agency that 60 per cent of mergers were assessed negatively in the years 1999–2001. Only some mergers led to efficiences. Nevertheless, overhelming majority of mergers has been cleared – for the risk is up to the merging parties and antitrust authorities do not care about profitability of merging companies.

required in accordance with the economic apporach in predatory pricing cases more in the EU (unlike US-approach). Relying on a recoupment test might exclude predation even if it were commited by managers with their own personal motivation to exclude rivals even if it would not be profitable for the firm itself[38].

We can conclude that „more economic approach" does not mean pretending non-existing economic rationality of both consumers and firms; just the opposite: it presupposes involving this irrationality as a natural and omnipresent ingredient of any economic decision making. Exclusively *rational* approach (even if „a more economic" one) not considering the *irrationality* of decision making entities would be *irrational* in itself and therefore „less economic" in its *real* impact. „Bright-line" tests used by economists[39] can be useful in most cases but blind relying on them may be comparably detrimental as using blind per-se legal rules that are called in question by the „more economic" approaches.

A truly *economic* approach should not consist in a formal test but it must be able to explain where the test is not fully satisfactory and what other viewpoint or analysis should be applied. It is in my mind very similar to using legel *per-se* rule (even if not economically reasoned and substantiated in each particular case) that alowe exemptions.

We can e.g. imagine the Areeda – Turner test[40] as an insufficient bright-line rule. There may be predation even without the alleged „predator" incurring *losses*, but ... simply making *fewer profits* than it would under a competitive strategy. This occurs, for instance, in signalling models of predation, where entrants are characterized by assymetric information and the predator sets low (but not necessarily lower than costs) proces in order to manipulate the rivals' belief, and induce it to think that the incumbent is too efficient for entry to be profitable"[41]. Mechanical use of a „bright- line" Areeda – Turner test may lead in this way to false conclusion that that is no predation despite its real existence.

Conclusion

The economic approach is apparent mainly in the area of antitrust law because it is closely linked with the regulation of economics. However, the role of technocratically and

[38] Cf. A. Motta, *The European Commission´s Guidance Communication on Article 82,* „E.C.L.R." 2009, No 12, p. 596.
[39] More details see in F. M. Fisher, *Economic Analysis and „Bright-Line" Tests,* „Journal of Competition Law and Economics" 2007, No 4 (1), p. 129 – 153.
[40] The price charged by the dominant firm is below average varible costs and the firm is presumed to act in an exclusionary way.
[41] A. Motta, op. cit. p. 597.

economically oriented ideas and their immediate impact on the practice of interpretation and application, as well as legislation, should not be overestimated. The broader social (and not only economic) considerations warn against the fashionable unilateral "economization" of legal decision-making.

The economic approach towards law could also lead to the resigned attitude of the kind "I'd rather bear an injustice than waste time (as the economically most expensive asset) to fight it". This goes against the legal feeling and social sense of law, as it was uniquely described by R. Jhering more than a hundred years ago[42]. Arguing that "law is idealism"[43], Jhering would not have any understanding whatsoever for this kind of "economic" approach.

European law is, on one hand, a source of the economic approach but, on the other, it serves to "correct" the *purely* economic approach, which would threaten the common market, social cohesion and consumer welfare.

Nowadays, the question mark connected with the envisaged giving up the "more economic approach" seems to have disappeared[44]. The EU Commission was not ready to set a concise and consistent set of rules concerning the use of the "more economic approach" and the Court finally refused the possibility of preferring the more economic approach to the value of the undistorted competition[45]. The competitive process as such is the primary goal of the competition law and the consumer welfare is subsequently nothing but a natural consequence of the protection of competition.

Law has always been the guardian of civilization values and the expression of human social and psychological needs, often even regardless of the economic dimension. In previous practice, the idea of "homo oeconomicus" has never formed a real basis for both private law and public law[46]. It may only be hoped that the liberalizing trends of economic reductionism that we are witnessing at present will prove to be a mere accentuation of one important aspect of assessment in legislation and judicial decisions rather than a sign of a trend of preferred subordinating law (containing and mirroring broader complex of social values) to narrower economic concerns.

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[42] R. Jhering, *Boj za právo*, Knihovna rozhledů XVIII, Praha 1897.
[43] *Ibidem*, p. 66.
[44] See P. Behrens, *Abschied vom more economic approach*? [in:] *Recht, Ordnung und Wettbewerb*, Festschrift zum 70. Geburtstag von Wernhard Möschel, Nomos Verlag 2011, 1. Auflage, p. 115 ff. Similarly W. Frenz, *Abschied vom more economic approach*, „Wettbewerb im Recht und Praxis" 2013, No 4, p. 428 ff.
[45] See the case GlaxoSmithKline Services, T 268/01, from 27.9.2006, esp. Point 119, as referred to in Behrens (p. 116, 130), Frenz (p. 429, 435).
[46] G. Radbruch, *Vorschule der Rechtsphilosophie*, Göttingen: Vandenhoeck & Ruprecht 1965, p. 101.