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Article

Predictability: a mistreated virtue of competition law

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ABSTRACT

Lacking predictability of enforcement hinders the deterrent function of competition law. This article shows that academic analyses of optimal competition rules do not always treat this factor adequately, paying instead excessive attention to the problem of error. Sometimes, predictability is completely ignored as a relevant factor. At other times, it is taken into account but its effects are framed in a way that undermines their significance. This article further discusses three possible reasons why a part of competition law and economics scholarship engages in such mistreatment of predictability. First, it may be a result of writing convenience. Secondly, the role of predictability in selecting the optimal competition rule may simply be misunderstood. Thirdly, the role of predictability may be belittled intentionally in order to advocate rules benefiting the interests of competition practitioners and/or defendants. This article also briefly explores how problematic each reason is and what solutions might be available.

KEYWORDS: Predictability, Legal certainty, Industrial organization, Error-cost approach, Decision theory, Academic writing
JEL CLASSIFICATIONS: K21, K42, L40

I. INTRODUCTION

A significant part of competition law and economics scholarship, often advanced under the banner of the error-cost approach or decision theory, consists in identifying and proposing rules with the highest net societal benefit. The benefit of a rule is seen in harmful business conduct prevented by its enforcement. The cost is the eventual prevented benign conduct as well as resources expended by businesses and public bodies in connection with the rule. Many contributions to this scholarship, however, fail to take as a factor relevant for such a cost–benefit analysis the ability of the rule's addressees to predict the outcomes of its enforcement.

The present article reveals and analyses this mistreatment of predictability in competition law and economics literature. It shows that predictability is sometimes not taken into account

at all, which leads to an exaggerated emphasis on avoiding enforcement errors.[1] Alternatively, predictability may actually be considered by the literature but its effects are framed in a way that undermines their importance.[2] This article further proposes three possible explanations as to why the literature fails to do justice to predictability. First, it may be for mere writing convenience.[3] Secondly, the subject matter may be genuinely misunderstood.[4] And, thirdly, the mistreatment of predictability may be an intentional strategy to advance the private interests of competition practitioners and/or defendants.[5] This article also discusses possible solutions.

Not taking enforcement predictability seriously may be costly to society.[6] When it is not possible to anticipate sufficiently well which conduct will be found to constitute a violation, competition law fails to achieve what it is supposed to. Businesses are not discouraged from behaving harmfully (under-deterrence) as well as discouraged from behaving benignly (over-deterrence). That is to say that enforcement predictability is a condition necessary for competition law to perform its role. At the same time, the content of competition law is being greatly shaped by the academic debate.[7] This happens not only when makers and enforcers of competition rules explicitly refer to academic sources[8] but also when they rely on them without reference[9] or even more broadly when these sources shape their background beliefs. Academic writings also exert a major impact on what is being taught to future generations of competition officials at universities. To be fully recognized and fostered by actual law and policy, enforcement predictability hence needs to be given appropriate weight also by competition law and economics scholarship.

This article is structured as follows. Section II describes how predictability contributes to the objective of competition law. Section III analyses the different ways in which predictability is mistreated in the literature. Section IV discusses what reasons may drive this mistreatment. Section V concludes by discussing possible solutions and calling for predictability to be taken more seriously.

II. PREDICTABILITY OF COMPETITION LAW

This section describes the role of predictability in competition law[10] in order to provide a baseline for the following section, which analyses how scholarship diverges from this baseline. It is explained here that predictability of enforcement outcomes is indispensable for the main mechanism through which competition law achieves its objective of preventing business conduct that causes competitive harm (without preventing conduct that does not, ie benign

[1] 'Ignoring predictability' Section.
[2] 'Treating effects of unpredictability as secondary' and 'Framing mis-deterrence as error' Sections.
[3] 'Convenience' Section.
[4] 'Misjudgement' Section.
[5] 'Strategy' Section.
[6] 'Effects of predictability' Section.
[7] See, eg Deborah L Rhode, 'Legal Scholarship' (2002) 115 Harvard Law Rev 1327, 1328 ('Legal scholarship can have significant effects on judicial decisions, legislative policies, administrative practices, and cultural attitudes.'). An obvious competition law example is the influence of the Chicago School on US antitrust and, arguably, also on EU competition law. See, eg Ryan R Stones, 'The Chicago School and the Formal Rule of Law' (2019) 14 J Compet Law Econ 527, 527. The impact of scholarship on actual law and policy is also demonstrated by the huge amounts of money channelled to it through sponsorship by big business. See Jan Broulík, 'Cultural Capture of Competition Policy: Exploring the Risk in the US and the EU' (2022) 45 World Compet 159, 167.
[8] See, eg Richard Lippitt, 'Intellectual Honesty, Industry and Interest Sponsored Professional Works, and Full Disclosure: Is the Viewpoint Earning the Money, or Is the Money Earning the Viewpoint' (2001) 47 Wayne Law Rev 1075, 1081 (noting that the Supreme Court in *GTE Sylvania* justified the transition from the per se rule to the rule of reason by the scholarly opinion and cited to nine scholarly law articles).
[9] See, eg Tamara R Piety, 'In Praise of Legal Scholarship' (2017) 25 William and Mary Bill of Rights Journal 801, 822.
[10] This section largely relies on the analysis presented in Jan Broulík, 'Preventing Anticompetitive Conduct Directly and Indirectly: Accuracy Versus Predictability' (2019) 64 Antitrust Bull 115.

conduct). This section also discusses the role of accuracy of competition law enforcement and its relationship to predictability.

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 and others: '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.'[11] 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'.[12] For instance, a federal agency enforcing US competition laws believes that 'deterrence is perhaps the single most important ultimate outcome of [its] work'.[13] And a then judge of an EU court argued that 'competition law produces its effects principally through [the indirect mechanism]'.[14]

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'.[15] 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 four for abuses of dominance.[16] And a statistical simulation of cartel enforcement concluded that harm prevented by the indirect mechanism is overwhelmingly greater than harm detected by enforcers.[17] 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.

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.[18] 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

[11] Paolo Buccirossi and others, 'Deterrence in Competition Law' in Martin Peitz and Yossi Spiegel (eds), *The Analysis of Competition Policy and Sectoral Regulation* (World Scientific 2014) 427.

[12] Stephen Davies, Franco Mariuzzo and Peter L Ormosi, 'Quantifying the Deterrent Effect of Anticartel Enforcement' (2018) 56 Econ Inq 1933, 1933.

[13] Phillip Nelson and Su Sun, 'Consumer Savings from Merger Enforcement: A Review of the Antitrust Agencies' Estimates' (2001) 69 Antitrust Law J 921, 939.

[14] 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 Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2009: The Evaluation of Evidence and Its Judicial Review in Competition Cases* (Hart 2011) 257.

[15] AE Rodriguez and Ashok Menon, *The Limits of Competition Policy: The Shortcomings of Antitrust in Developing and Reforming Economies* (Kluwer Law International 2010) 43.

[16] Deloitte, 'The Deterrent Effect of Competition Enforcement by the OFT' (2007) <http://webarchive.nationalarchives.gov.uk/20140402141250/http:/www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf> accessed 22 September 2023. For a discussion of the study and its results see Fiammetta Gordon and David Squires, 'The Deterrent Effect of UK Competition Enforcement' (2008) 156 De Economist 411; Stephen W Davies and Peter L Ormosi, 'A Comparative Assessment of Methodologies Used to Evaluate Competition Policy' (2012) 8 J Compet Law Econ 769, 796.

[17] Davies, Mariuzzo and Ormosi (n 12) 1948.

[18] Stefan Voigt and André Schmidt, *Making European Merger Policy More Predictable* (Springer 2005) 1.

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 of the resulting mis-deterrence, ie over- and/or under-deterrence.[19]

Another attribute of competition law enforcement is its accuracy, ie 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 and not stopping benign conduct. Higher accuracy also fosters the indirect mechanism because, to avoid mis-deterrence, harmful conduct needs to be found unlawful (rather than lawful) and, at the same time, benign conduct must not be found unlawful.

In its remainder, this article will focus on the indirect mechanism due to its mentioned primacy. As stated above, this mechanism needs both predictability and accuracy 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'[20] 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.

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:[21] 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.[22] Between these two extremes, there is a spectrum of moderately differentiated rules mandating some extent of fact-finding.[23]

The more differentiated a competition rule is, the more difficult it is to predict the outcomes of its enforcement.[24] Consider, for example, Hawk and Denaeijer's view: 'An analysis

[19] One may sometimes hear opinions that a certain degree of unpredictability is beneficial because it discourages potential infringers from exploiting eventual loopholes in the law. As noted by Crane, however, this holds for behaviour that has generally low social value such as sexual harassment. Daniel A Crane, 'Rules Versus Standards in Antitrust Adjudication' (2007) 64 Wash Lee Law Rev 49, 85. Competition law, in contrast, concerns an area where 'Most of the conduct adjacent to the harmful conduct is valuable'. ibid 86. Chilling this conduct through unpredictability is hence undesirable.

[20] Louis Kaplow, 'The Value of Accuracy in Adjudication: An Economic Analysis' (1994) 23 J Leg Stud 307, 309.

[21] Arndt Christiansen and Wolfgang Kerber, 'Competition Policy with Optimally Differentiated Rules Instead of "Per se Rules vs Rule of Reason"' (2006) 2 J Compet Law Econ 215, 221.

[22] The literature uses various other notions capturing—roughly—the same concept as differentiation, for instance complexity. See, eg Louis Kaplow, 'A Model of the Optimal Complexity of Legal Rules' (1995) 11 J Law Econ Organ 150, 150.

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

[24] See, eg Barbara E Baarsma, 'Rewriting European Competition Law from an Economic Perspective' (2011) 7 Eur Compet J 559, 583; Christiansen and Kerber (n 21) 219; Frank H Easterbrook, 'The Limits of Antitrust' (1984) 63 Tex Law Rev 1, 155 ('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' (14 June 2016) 11 <https://ssrn.com/abstract=2795797> accessed 22 September 2023; Luis Ortiz Blanco and Alfonso Lamadrid de Pablo, 'Expert Economic Evidence and Effects-based Assessments in Competition Law Cases' in Massimo Merola and Jacques Derenne (eds), *The Role of the*

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.'[25] Higher differentiation of competition rules brings about unpredictability because it is difficult for businesses to anticipate the outcome of complex factual assessments required to apply such rules.[26] These assessments require 'some degree of judgment on the part of the enforcer'[27] and lead to 'an analytical conclusion'[28] that is often far from given. Perhaps the major source of unpredictability is then modelling assumptions because 'a large number of results can often be reversed by making an alternative assumption'.[29] Since various assumptions may seem to represent the reality sufficiently well, it will often be difficult for businesses to anticipate which ones will be adopted by the enforcer.

In contrast, the 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.[30] 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 mis-deterrence.

III. MISTREATMENT OF PREDICTABILITY

This section discusses how academic analyses of optimal competition rules mistreat enforcement predictability as a relevant consideration, usually in conjunction with overrating the role of enforcement accuracy. The fact that such mistreatment exists is in a certain sense 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

Court of Justice of the European Union in Competition Law Cases (Bruylant 2012) 311 (assessing the 'effects-based legality test' as 'hardly administrable' and thus hardly predictable (internal quotation marks omitted)); Michael J Trebilcock and Edward M Iacobucci, 'Designing Competition Law Institutions' (2002) 25 World Compet 361, 367; Roger Van den Bergh, 'The More Economic Approach in European Competition Law: Is More Too Much or Not Enough?' in Mitja Kovač and Ann-Sophie Vandenberghe (eds), *Economic Evidence in EU Competition Law* (Intersentia 2016) 35 ('[A] full consideration of all potential efficiency benefits and possible anticompetitive consequences leads to extremely complicated assessment and unpredictable outcomes.'); Denis Waelbroeck and Donald Slater, 'The Scope of Object vs Effects under Article 101 TFEU' in Jacques Bourgeois and Denis Waelbroeck (eds), *Ten Years of Effects-based Approach in EU Competition Law: State of Play and Perspectives* (Bruylant 2012) 203; cf Mark A Lemley and Christopher R Leslie, 'Categorical Analysis in Antitrust Jurisprudence' (2008) 93 Iowa Law Rev 1207, 1258 ('Properly implemented, per se rules are bright-line rules that provide certainty.')

[25] Barry E Hawk and Nathalie Denaeijer, 'The Development of Articles 81 and 82 EC Treaty: Legal Certainty' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2000: The Modernization of EC Antitrust Policy* (Hart Publishing 2001) 136.

[26] cf Easterbrook (n 24) 11 ('The welfare implications of most forms of business conduct are beyond our ken. If we assembled twelve economists and gave them all the available data about a business practice, plus an unlimited computer budget, we would not get agreement about whether the practice promoted consumers' welfare or economic efficiency more broadly defined.').

[27] Waelbroeck and Slater (n 24) 203.

[28] Mark S Massel, 'Legal and Economic Aspects of Competition' (1960) 1960 Duke Law J 157, 184.

[29] Simon Bishop, 'Snake-Oil with Mathematics Is Still Snake-Oil: Why Recent Trends in the Application of So-Called Sophisticated Economics Is Hindering Good Competition Policy Enforcement' (2013) 9 Eur Compet J 67, 69.

[30] Eg Justin Lindeboom, 'Formalism in Competition Law' (2022) 18 J Compet Law Econ 832, 871.

highlights error as the essential factor within the analysis. And, although it may perhaps not be 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 case will be correct.[31] The framework itself has little to say about the predictability of such case-by-case optimalizations of fact-finding.

In any case, the present section moves beyond these issues of labelling to diagnosing how exactly predictability gets mistreated. It identifies three ways in which academic commentary fails to regard it properly. First, predictability may get outright neglected as a relevant factor. In the other two cases, the analysis does take the effects of (un)predictability into account, framing them nevertheless in a fashion that undermines their significance. Namely, the effects are sometimes regarded as only a secondary consideration that is similar to resources expended on the operation of competition law. Alternatively, the effects of lacking predictability are not sufficiently distinguished from error and its effects. The section provides examples of academic writing illustrating these treatments of (un)predictability.

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 as the only factor relevant for the design of competition rules as the enforcement accuracy that they generate. Consider Hylton and Salinger, who say that 'the best rule minimizes the total costs of error'.[32] They then turn to relative frequencies of type-I and type-II errors and to the relative magnitudes of the costs brought about by the errors as criteria to select optimal competition rules.[33] 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.[34]

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.[35] They include resources spent by public bodies as well as private parties on litigation, by public bodies on detection and investigation of suspicious conduct, and by private parties on compliance. These costs encompass the 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

[31] See, eg C Frederick Beckner III and Steven C Salop, 'Decision Theory and Antitrust Rules' (1999) 67 Antitrust Law J 41.

[32] Keith N Hylton and Michael Salinger, 'Tying Law and Policy: A Decision-Theoretic Approach' (2001) 69 Antitrust Law J 469, 500. Hylton and Salinger explicitly assume that administrative costs are identical regardless how differentiated a competition rule 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 actual analysis of optimal competition rules completely ignores this consideration.

[33] ibid 501.

[34] Baarsma (n 24). 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.

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

called 'direct costs',[36] 'direct transaction costs',[37] 'direct costs of litigation',[38] and 'enforcement costs'.[39]

Administrative costs increase with differentiation of competition rules. This is because more criteria are to be considered and a deeper investigation becomes necessary.[40] 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'.[41] Easterbrook talks about minimizing the sum of 'the costs of error and information'.[42] 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'.[43] Evans and Padilla select an optimal competition rule by comparing costs of error and administrative costs.[44] 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.[45]

As explained above, however, to devise optimal competition laws, one actually 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.[46] As unpredictability of enforcement increases with rule differentiation, ignoring the costs of unpredictability will necessarily lead to advocating rules differentiated more than optimal.

Treating effects of unpredictability as secondary

Another way to mistreat predictability is by framing the costs brought about by its absence as only a secondary consideration. Consider for instance Lianos, Korah, and Siciliani, who distinguish between *substantive* and *procedural* costs.[47] They argue the former category to

[36] Oliver Budzinski, 'Modern Industrial Economics: Open Problems and Possible Limits' in Josef Drexl, Wolfgang Kerber and Rupprecht Podszun (eds), *Competition Policy and the Economic Approach: Foundations and Limitations* (Edward Elgar 2011) 127.

[37] Paul L Joskow, 'Transaction Cost Economics, Antitrust Rules, and Remedies' (2002) 18 J Law Econ Organ 95, 97.

[38] John E Lopatka and William H Page, 'Economic Authority and the Limits of Expertise in Antitrust Cases' (2005) 90 Cornell Law Rev 617, 639.

[39] Wouter PJ Wils, 'The Judgment of the EU General Court in *Intel* and the So-Called More Economic Approach to Abuse of Dominance' (2014) 37 World Compet 405, 427.

[40] Christiansen and Kerber (n 21) 233.

[41] Daniel L Rubinfeld, 'Econometrics in the Courtroom' (1985) 85 Columbia Law Rev 1048, 1051.

[42] Frank H Easterbrook, 'Ignorance and Antitrust' in Thomas M Jorde and David J Teece (eds), *Antitrust, Innovation, and Competitiveness* (OUP 1992) 121.

[43] Beckner and Salop (n 31) 51.

[44] David S Evans and A Jorge Padilla, 'Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach' (2005) 72 U Chi Law Rev 73, 95. Curiously, the introduction of the article (p 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.

[45] Maarten Pieter Schinkel, 'Forensic Economics in Competition Law Enforcement' (2008) 4 J Compet Law Econ 1, 19.

[46] See Budzinski (n 36) 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 and Pak (n 35) 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 (n 39) 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.').

[47] Ioannis Lianos, Valentine Korah and Paolo Siciliani, *Competition Law: Analysis, Cases and Materials* (OUP 2019) 488.

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 this joint category in opposition to costs of error. Consider for instance Baker, who contrasts costs of errors with 'transaction costs associated with the use of legal process'[48] and whose footnote elaborating on the latter mentions the situation when 'uncertainty about legal rules chills beneficial conduct or means that those rules fail to deter harmful conduct'.[49] Similarly, Tom and Pak as well as Christiansen and Kerber distinguish between costs of error on the one hand and 'costs of decision-making',[50] respectively 'regulation costs'[51] on the other, with the latter categories encompassing not only resources spent because of competition law but also mis-deterrence resulting from unpredictability.[52]

Calling costs of unpredictability non-substantive or otherwise grouping them with administrative costs, however, obscures their true nature and suggests that they constitute a consideration of only a secondary order. The primary consideration in the search for an optimal competition rule is its effects on business conduct. After all, as discussed above, competition law exists in order to prevent (only) its harmful variety. In contrast, resources that need to be spent to produce the effect on conduct are merely secondary. They are a necessary evil that we are willing to accept if it is outweighed by the benefits of influencing business conduct. Crucially, predictability—just as accuracy—concerns the former point, not the latter! When it is lacking, competition law does not steer business conduct as it should because mis-deterrence arises. Grouping it with administrative costs rather than with accuracy obscures this centrality of enforcement predictability to the core mission of competition law.

Framing mis-deterrence as error

Yet another way in which the literature fails to give predictability its due is by describing the mis-deterrence effects of its absence 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'.[53] Similarly, Bennet and Collins present type-I error 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.[54] And Katsoulacos and Ulph even go so far as to denote as type-I error any prevented benign conduct and as type-II error any non-prevented harmful conduct.[55]

[48] Jonathan B Baker, 'Taking the Error Out of Error Cost Analysis: What's Wrong with Antitrust's Right' (2015) 80 Antitrust Law J 1, 5.
[49] ibid 5 n 17.
[50] Tom and Pak (n 35) 394.
[51] Christiansen and Kerber (n 21) 223.
[52] Tom and Pak (n 35) 399; Christiansen and Kerber (n 21) 231.
[53] Hylton and Salinger (n 32) 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.').
[54] Matthew Bennett and Philip Collins, 'The Law and Economics of Information Sharing: The Good, the Bad and the Ugly' (2010) 6 Eur Compet J 311, 313.
[55] Yannis Katsoulacos and David Ulph, 'On Optimal Legal Standards for Competition Policy: A General Welfare-Based Analysis' (2009) 57 J Ind Econ 410, 421 ('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.').

This use of the error language is misleading. The notion of an error in actuality describes a quality of enforcement decisions, not their effects on business conduct. And, crucially, there may be other causes of mis-deterrence than error, prominently including unpredictability.[56]

Framing all mis-deterrence in terms of error undermines the significance of predictability as a factor in determining the optimal competition rule. To a less diligent reader, it may suggest that over- and under-deterrence are actually problems associated exclusively with error.[57] And, in addition, rendering 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—complicates the debate about the actual causes of mis-deterrence, including unpredictability.

IV. REASONS FOR MISTREATMENT

This section discusses what reasons could possibly stand behind the scholarly mistreatment of enforcement predictability in one or more of the manners described in the previous section. It suggests three such reasons. First, it may be for mere writing convenience. Second, the subject matter may be genuinely misunderstood. And, third, the mistreatment of predictability may be an intentional strategy to advance the private interests of competition practitioners and/or defendants. The order in which the reasons are listed reflects how serious a problem they pose: from the least to the most serious. This section examines each reason on a general level, as it is virtually impossible to draw causal connections between the specific reasons and individual pieces of academic writing. It is also discussed whether the given reason could be remedied by educating competition scholars—for instance through the present article—about the importance of (explicitly recognizing) enforcement predictability.[58]

Convenience

One possible explanation for the inadequate treatment of (un)predictability by scholarship on optimal competition rules may be writing convenience. In this situation, authors are aware that their analysis does not fully recognize the role that enforcement predictability actually plays. But they do not find it necessary to address this issue in the given piece of writing.

For example, as regards the outright ignoring of predictability as a factor co-determining optimal competition rules, it may follow from the given academic piece 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 errors, may be just a result of the authors not finding a less ambiguous expression.

This reason for mistreating predictability of competition law appears to be the least troubling one. The authors do understand the importance of predictability, and perhaps even acknowledge it in their other writings. They 'only' fail to convey it to the reader in (the specific piece of) their scholarship. It is hence possible that this reason could be remedied relatively easily, by drawing the scholars' attention to how their approach may—as shown in the previous section—mislead the reader to underappreciate the importance of predictability.

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

[57] This holds even if the commentator explicitly explains that 'error' in his writing includes also instances of over- and under-deterrence caused by other factors, especially if this explanation appears—as it typically does—only in a footnote.

[58] Other possible solutions are explored in the concluding section.

In order that such mislead does not take place, the scholars ought to fully recognize the role of predictability not only in their own mind but also in their respective contribution. For instance, if the contribution does not consider predictability as a relevant factor because its scope is confined only to the realm of the direct prevention mechanism, the contribution needs to recognize this limitation explicitly and inform the reader 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 make clear 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, such use is to be avoided. One may instead easily speak about (instances of) over- and under-deterrence, or perhaps over- and under-prevention if the direct mechanism is to be included as well.

Misjudgement

Competition law and economics literature may further be mistreating predictability simply because its role is not fully comprehended by the authors. For instance, one may fail to realize 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—that businesses are always able to anticipate enforcement outcomes.

It is sometimes argued that a preference for accurate—and thus unpredictable—competition rules is baked directly into the discipline of economics. According to Baker and Bresnahan, economists prefer that all circumstances of each case be considered.[59] 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.[60] And Manne and Wright hold that 'many antitrust economists support' competition rules 'that attempt to determine fully the competitive effects of a given practice on a case-by-case basis'.[61] 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.[62]

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.'[63] 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, ie administrative costs and costs

[59] Jonathan B Baker and Timothy F Bresnahan, 'Economic Evidence in Antitrust: Defining Markets and Measuring Market Power' in Paolo Buccirossi (ed), *Handbook of Antitrust Economics* (The MIT Press 2008) 3 ('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.').

[60] Christiansen and Kerber (n 21) 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.').

[61] Geoffrey A Manne and Joshua D Wright, 'Innovation and the Limits of Antitrust' (2010) 6 J Compet Law Econ 153, 163 n 28.

[62] Bennett and Collins (54) 312 ('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.').

[63] Jorge Padilla, 'The Role of Economics in EU Competition Law: From Monti's Reform to the State Aid Modernization Package' (28 September 2015) 7 <https://ssrn.com/abstract=2666591> accessed 22 September 2023 (footnotes omitted).

of unpredictability, it may well be optimal to accept some extent of the 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.[64] 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'.[65] It revolves around the issue of competitive harm.[66] In contrast, industrial organization has very little to say about the effects exerted by the law, including the role of predictability.[67] These effects are studied by other subfields of (legal-)economics, which, however, wield only limited influence in the discourse about optimal competition rules. This corresponds with Van den Bergh's observation that the economic approach to competition law often fails to fully acknowledge the costs of unpredictability and to integrate them into its analysis.[68]

Seen from a slightly different angle, underappreciation of the role of predictability is a symptom of economic—or more precisely industrial organization—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 it, 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'.[69] 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 economic logic.

However, as already suggested, it is rather the other way around. What defies economic logic is ignoring that extensive economics-based assessments of individual cases do not have only benefits but also costs. Consequently, as aptly put by Van den Bergh, 'also the use of economics in antitrust law must pass a cost-benefit test'.[70] Crucially to our purposes here, the relevant costs include not only the resources spent by businesses and enforcers on carrying out the economic assessments[71] (ie administrative costs as they were discussed above) but also the mis-deterrence caused by the businesses not being sure what conclusions enforcers will arrive at. A comprehensive analysis of optimal competition rules will necessarily take these costs into account, too.

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

[64] Arndt Christiansen and Christian Ewald, 'Best Practices for Expert Economic Opinions – Key Element of Forensic Economics in Competition Law' in Kai Hüschelrath and Heike Schweitzer (eds), *Public and Private Enforcement of Competition Law in Europe* (Springer 2014) 143.

[65] Luís MB Cabral, *Introduction to Industrial Organization* (MIT Press 2000) 3.

[66] Budzinski (n 36) 129 ('Modern industrial economics is a theory of *competitive harm*.').

[67] Jan Broulík, 'Two Contexts for Economics in Competition Law: Deterrence Effects and Competitive Effects' in Klaus Mathis and Avishalom Tor (eds), *New Developments in Competition Law and Economics* (Springer 2019) 40.

[68] Roger Van den Bergh, 'The 'More Economic Approach' and the Pluralist Tradition of European Competition Law' in Dieter Schmidtchen, Max Albert and Stefan Voigt (eds), *The More Economic Approach to European Competition Law* (Mohr Siebeck 2007) 33.

[69] Van den Bergh (n 24) 13.

[70] ibid 40. See also Cass R Sunstein, 'The Autonomy of Law in Law and Economics' (1997) 21 Harv J Law Public Policy 89, 90 ('[S]ometimes cost-benefit analysis itself may fail cost-benefit analysis.').

[71] See, eg Andrew I Gavil, 'The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System: Lessons from the American Experience' (2008) 4 J Compet Law Econ 177, 195 ('Economic analysis . . . typically comes only at significant cost to the parties, enforcement agencies, and the courts.').

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 the 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 remedied by simply reminding scholars to be more complete in their writing. To be sure, it theoretically should be possible to educate competition scholars about why enforcement predictability matters. However, this may be extremely challenging insofar as the underappreciation of predictability is entrenched in the mindset of an entire economic sub-discipline. With this sub-discipline being arguably the most prominent one in the context of competition policy, scholarly work that it generates may moreover have a significant influence on the content of actual competition rules.

Strategy

The last possibility is that competition law and economics literature underrates predictability on purpose to the authors' own benefit. This benefit may accrue in two different ways. First, authors may themselves profit from unpredictable rules. Namely, it is quite common that those contributing to the scholarly competition discourse do at the same time counsel and represent clients in private practice.[72] 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.[73] All in all, arguing for less predictable competition rules thus amounts to arguing for more business opportunities for competition practitioners.[74]

Second, scholars may wilfully underappreciate predictability because it is of advantage to businesses that might or do violate competition law.[75] 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 should not 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

[72] Wils (n 39) 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.').

[73] David J Gerber, 'Global Competition Law Convergence: Potential Roles for Economics' in Theodore Eisenberg and Giovanni B. Ramello (eds), *Comparative Law and Economics* (Edward Elgar 2016) 226 ('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 and Lamadrid de Pablo (n 24) 310 (arguing that the effects-based approach to competition law 'can . . . be the source of substantial benefits for both . . . lawyers and economic consultants').

[74] See Louis Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 Duke Law J 557, 620 ('The legal profession is not indifferent to how laws are designed. Since . . . 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.').

[75] It is also possible to argue the opposite, ie that less differentiated rules are better for potential infringers. This is because such rules are more likely to contain loopholes that can be exploited. See, eg Julian JZ Polaris, 'Backstop Ambiguity: A Proposal for Balancing Specificity and Ambiguity in Financial Regulation' (2014) 33 Yale Law Policy Rev 231, 233. This argument is not further considered here because it, obviously, cannot explain the underappreciation of predictability by competition scholarship.

discourages them from even trying their luck in the first place.[76] 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'.[77]

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, ie a highly differentiated rule, 'in practice, . . . is little more than a euphemism for nonliability'.[78] 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.[79] 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 restrict 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,[80] 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 exclusively chosen to prohibit cases involving object restrictions'.[81] 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.[82] To summarize, 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, give 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.[83] 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. This is to say that underplaying the importance of predictability is only one of many strategies that may be adopted to further the interests of defendants.

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'.[84] As the main clients of competition practitioners are

[76] Clayton J Masterman, 'The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law' (2016) 69 Vanderbilt Law Rev 1387, 1393.

[77] Bennett and Collins (54) 313.

[78] Richard A Posner, 'The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision' (1977) 45 U Chic Law Rev 1, 14. For a list of other sources making a similar claim, see Crane (n 19) 64.

[79] Michael A Carrier, 'Rule of Reason: An Empirical Update for the 21st Century' (2009) 16 George Mason Law Rev 827, 830.

[80] Bennett and Collins (54) 313.

[81] Anne C. Witt, 'The Enforcement of Article 101 TFEU: What Has Happened to the Effects Analysis?' (2018) 55 Common Mark Law Rev 417, 446.

[82] ibid. See also Damien MB Gerard, 'The Effects-based Approach under Article 101 TFEU and Its Paradoxes: Modernisation at War with Itself?' in Jacques Bourgeois and Denis Waelbroeck (eds), *Ten Years of Effects-based Approach in EU Competition Law: State of Play and Perspectives* (Bruylant 2012) 27.

[83] Baker (n 48) 37. See also Herbert Hovenkamp and Fiona Scott Morton, 'Framing the Chicago School of Antitrust Analysis' (2020) 168 U Pa Law Rev 1843, 1870.

[84] William E Kovacic, 'The Influence of Economics on Antitrust Law' (1992) 30 Econ Inq 294, 297 n 9.

potential and actual violators of competition rules,[85] the research and publications will be 'especially suited to defending the conduct of their likeliest clients',[86] ie they will advance arguments against competition law liability. The same of course, and perhaps even more fittingly, applies also to competition lawyers.

Another possibility is that actual and potential litigants fund scholarly commentary that corresponds with their needs.[87] Outside the domain of competition law, for instance, Exxon sponsored writings by a Harvard law professor on why punitive damages awards are inappropriate just when it was appealing a punitive damages award of 5 billion dollars.[88] Also in US antitrust, 'Since 1970, ... corporations have extensively funded ... research by individual academics, academic institutes, think tanks, and foundations'.[89] Hovenkamp and Scott Morton then specifically contend that some of the anti-interventionist scholarship of the Chicago School was sponsored by businesses that profited from non-intervention.[90]

There are two ways in which private funding may influence the content of academic writing. First, the litigants may directly commission a piece of scholarship advocating a specific position. This again seems possible especially with regard to lawyers and economists combining academic publishing with work in private practice. As observed by Lianos, publications may then be just one of multiple tools to convince the decision-makers to decide in favour of the clients.[91]

Alternatively, instead of hiring an academic and providing instructions on what to write, the litigants may select authors who hold congenial pre-existing views and financially support them and their institutions. Strictly speaking, this possibility does not belong to the current sub-section because it is the litigants, not academics, who are behaving strategically in order that predictability be underrated in the literature. The academics here genuinely, albeit mistakenly, believe the respective arguments to be sound, which eventuality was discussed in the previous sub-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 scholars, be it about the importance of predictability itself or of the presentation of this importance in their writing. If the scholars 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 different stakeholder groups will cancel out each other's influence. The interests of those who may engage in and benefit from competitively harmful conduct are much more concentrated than those of who may

[85] Broulík (n 7) 173.

[86] Andrew I Gavil, 'Competition Policy, Economics and Economists: Are We Expecting Too Much?' in Barry E. Hawk (ed), *International Antitrust Law & Policy: Fordham Corporate Law Institute Conference 2005* (Juris Publishing 2006) 596.

[87] Lopatka and Page (n 38) 697 ('Both government and private litigants may produce scholarly literature in briefs in order to reinforce the positions they wish to take.').

[88] Lippitt (n 8) 1087.

[89] Kovacic (n 84) 296 (footnotes omitted). See also Gavil (n 86) 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)).

[90] Hovenkamp and Scott Morton (n 83) 1851.

[91] Ioannis Lianos, "Judging' Economists: Economic Expertise in Competition Law Litigation: A European View' in Ioannis Lianos and Ioannis Kokkoris (eds), *The Reform of EC Competition Law: New Challenges* (Kluwer Law International 2010) 233 ('[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.').

suffer harm.[92] That is why the former are the main clients of competition practitioners[93] and spend considerably more on the funding of academic writing.[94] As a result, even if one believes that outright commissioning of partial scholarship is rare, these other dynamics may still well skew the discourse towards competition rules that excessively favour actual and potential infringers.

V. CONCLUSION

Competition laws in the USA as well as Europe have been for some time relying significantly on individual assessments of competitive effects in every case.[95] While the enforcement outcomes of such a case-by-case effects-based approach may be more accurate, they are often very difficult to anticipate by businesses to whom competition law is addressed.[96] The resultant enforcement unpredictability threatens to undermine the objective of competition law by bringing about over- as well as under-deterrence.

As demonstrated by the present article, the issue of enforcement predictability is often not reflected properly either by law or economics scholarship on optimal competition rules. Some writings ignore this factor completely and others play it down in one way or another. This scholarly mistreatment of predictability might have—whether intentionally or not—contributed to the adoption of the case-by-case approach and, in any case, could now be standing in the way of reconsidering it.

The big question is what could be done to ensure that enforcement predictability is given its due in the literature, beyond educating competition scholars about (explicitly recognizing) its importance. One solution might be to weed out contributions that fail to appreciate predictability by means of peer review. However, insofar as the irrelevance of this factor is entrenched in the disciplinary mindset, as in the case of industrial organization economics, there may simply be no reviewers to do so. As for authors' conflicts of interest, those need to be disclosed[97] and there must be consequences for failing to do so. 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.

A perhaps even more important point does not concern academics as authors of the scholarship but legislators, public servants, and judges responsible for the design of competition rules as its consumers. 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.[98] Not least, they need to pay attention to the mentioned conflict-of-interest disclosures. The ensuing vigilance should help them identify and avoid unhelpful contributions to the debate.

[92] Broulík (n 7) 163.
[93] ibid 173.
[94] Hovenkamp and Scott Morton (n 83) 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 (n 84) 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.').
[95] See, eg Bruce Wardhaugh, *Competition, Effect and Pedictability: Rule of Law and the Economic Approach to Competition* (Hart 2020) 1.
[96] See, eg ibid 2.
[97] cf Gavil (n 86) 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.').
[98] See ibid ('When courts turn to commentary . . ., they must do so with their eyes open to the possibilities of . . . interest group economics.'); Lopatka and Page (n 38) 697 ('Although funded scholarship may be of high quality, courts should be conscious of its partisan origins and view it with some degree of skepticism, just as they take note of hired-gun expert testimony.').

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'.[99] Is it not rather worrying that those who invoked predictability of competition law as a reason to modernize competition law by making it more economics-based[100] 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.

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[99] ten Kate (n 24) 11.

[100] See, eg David J Gerber, 'Searching for a Modernized Voice: Economics, Institutions, and Predictability in European Competition Law' (2014) 37 Fordham Int Law J 1421, 1436.