

Marta Zalewska-Głogowska

# The More Economic Approach under Article 102 TFEU

A Legal Analysis and Comparison with US Antitrust Law



**Nomos**

<https://doi.org/10.5771/9783845282459-1>

Generiert durch IP '207.241.231.83', am 19.07.2018, 16:53:41.

Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

**Schriften des Europa-Instituts der Universität  
des Saarlandes – Rechtswissenschaft**

**Herausgegeben von**

**Professor Dr. Marc Bungenberg, LL.M.**

**Professor Dr. Thomas Giegerich, LL.M.**

**Professor Dr. Dr. Dr. h.c. mult. Georg Ress**

**Professor Dr. Torsten Stein**

**Band 105**

Marta Zalewska-Głogowska

# The More Economic Approach under Article 102 TFEU

A Legal Analysis and Comparison with US Antitrust Law



**Nomos**

**The Deutsche Nationalbibliothek** lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Saarbrücken, Universität des Saarlandes, Diss., 2016

ISBN      978-3-8487-3960-8 (Print)  
            978-3-8452-8245-9 (ePDF)

#### **British Library Cataloguing-in-Publication Data**

A catalogue record for this book is available from the British Library.

ISBN      978-3-8487-3960-8 (Print)  
            978-3-8452-8245-9 (ePDF)

#### **Library of Congress Cataloging-in-Publication Data**

Zalewska-Głogowska, Marta

The More Economic Approach under Article 102 TFEU

A Legal Analysis and Comparison with US Antitrust Law

Marta Zalewska-Głogowska

252 p.

ISBN      978-3-8487-3960-8 (Print)  
            978-3-8452-8245-9 (ePDF)

1. Edition 2017

© Nomos Verlagsgesellschaft, Baden-Baden, Germany 2017. Printed and bound in Germany.

This work is subject to copyright. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to "Verwertungsgesellschaft Wort", Munich.

No responsibility for loss caused to any individual or organization acting on or refraining from action as a result of the material in this publication can be accepted by Nomos or the author.

*Ignacemu,  
którego narodziny były dla mnie największą motywacją.*



# Table of Contents

Table of Abbreviations	11
Introduction	13
I. Chapter: Origins and Definition of the More Economic Approach	16
1. Origins of the More Economic Approach	16
1.1. General Definition of the More Economic Approach	16
1.2. American Roots of the More Economic Approach	17
1.2.1. Harvard School	18
1.2.2. Chicago School	20
1.2.3. Post-Chicago School	23
2. The More Economic Approach within the European Union	24
2.1. Main Characteristics of European Competition Policy before the Millennium	24
2.2. The Development of a More Economic Thinking in the Three Areas of EU Competition Law	37
2.2.1. Article 101 TFEU	37
2.2.2. EU Merger Control	46
2.2.3. Article 102 TFEU	52
3. Substantive, Procedural, Organisational and Practical Implications of the More Economic Approach	58
II. Chapter: Development of the More Economic Approach under Article 102 TFEU	61
1. Impetus for the Reform of Article 102 TFEU	62
1.1. Criticism of the Original Concept of Dominance	62
1.2. Criticism of the Original Concept of Abuse	66
1.3. Criticism of the Commission's Practice	69
2. Changes towards the More Economic Approach under Article 102 TFEU	73
2.1. The EAGCP Report on an Economic Approach to Article 102 TFEU	74

2.2. The 2005 Discussion Paper	76
2.3. The 2009 Priorities Paper	81
III. Chapter: The More Economic Approach in the Commission's Practice	102
1. Economic Objective(s) of Article 102 TFEU	103
2. The Concepts of Anti-competitive Foreclosure and the As-efficient Competitor Test	107
3. The Dominance Criterion	112
4. Economic Efficiencies	116
5. The Use of Quantitative Analysis	120
IV. Chapter: The More Economic Approach in Judicial Review	127
1. Teleological Interpretation of Article 102 TFEU	130
2. The More Economic Approach under the Jurisprudence of the General Court	138
2.1. General Remarks	138
2.2. Microsoft	139
2.3. Ryanair/Aer Lingus	139
2.4. AstraZeneca	142
2.5. Intel	143
3. The More Economic Approach under the Jurisprudence of the Court of Justice	147
3.1. A Wider Perspective	147
3.2. Impala	151
3.3. Wanadoo	153
3.4. GlaxoSmithKline and T-Mobile Netherlands	155
3.5. Post Danmark I	159
3.6. Tomra	162
3.7. Post Danmark II	165
V. Chapter: Challenges and Implications of the More Economic Approach under Article 102 TFEU	167
1. General Challenges and Implications of the More Economic Approach under Article 102 TFEU	168
1.1. Effects-Based versus Form-Based Approach	168
1.2. Objective(s) of Article 102 TFEU	169



1.3. Efficiency Defence	171
1.4. Innovation and Economic Growth	174
1.5. Methodological Implications	175
1.6. Symmetry	180
1.7. International Convergence	181
2. Implications of the More Economic Approach in Specific Practices	183
2.1. Exclusive Dealing	185
2.2. Tying and Bundling	191
2.3. Predatory Pricing	194
2.4. Refusal to Supply and Margin Squeeze	199
VI. Chapter: The More Economic Approach to Abuse of Dominant Position: EU versus US	204
1. The Statutes	204
2. The Origin of the More Economic Approach	211
3. Recoupment of the Losses in Predatory Pricing	216
4. Innovation and Dynamic Efficiencies	220
5. Judicial Review versus Judicial Decision	222
6. Organisational Differences	223
7. The Priorities Paper and The Section 2 Report	226
8. Economic Principles As the Basis for Convergence	229
Conclusions	232
Bibliography	239



## Table of Abbreviations

CJEU	Court of Justice of the European Union
CMLR	Common Market Law Review
DG	Directorate-General
ECLR	European Competition Law Review
EC	European Community
EEC	European Economic Community
EU	European Union
S-C-P paradigm	‘Structure-Conduct-Performance’ paradigm
SIEC test	‘Significant Impediment to Effective Competition’ test
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America

