Economic Law as an Economic Good: Queries of a European Judge

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Our topic, "Economic Law as an Economic Good ", raises interesting questions of philosophy and semantics.

What is "economic law"? Is this a general description of the rules of law (notably the rules of competition law) that are brought to bear on economic activity? Or is it, more particularly, a form of law that is related to and dependent upon the "laws of economics"? If the latter, the concept will be very different depending on whether we believe in free-market economics or Marxist economics.

In what sense might economic law be an "economic good"? Is the word "good" used as an adjective or as a noun? Is economic law "good" [adjective] in the sense that bringing the law to bear on economic activities is generally speaking, but not always, productive of economic benefit? Or is it "a good" [noun] in the sense that economic law is an economic asset (*Vermögen*) that can be deployed and exploited to produce economic advantages, and whose value will increase to the extent that the law is developed and applied?

In the hope of providing an answer to some of these questions, I will first discuss the notion of "interjurisdictional competition" that was put forward by some of the economists who took part in our conference.

A. Interjurisdictional competition

In its most radical form, the thesis, as I understand it, is that rule-makers, particularly economic regulators, should be treated as suppliers of a "product" – the product in question being the rules they make, apply or enforce. They are in competition with other rule-makers in their own country and in other countries, and are subject to the same laws of economics as the suppliers of other products. Where there is interjurisdictional competition, economic operators can influence the rule-makers by migrating to the environment where the rules are most favourable to economic activity. Where there is no competition, this exit strategy is not open. So, interjurisdictional competition is "good" because it makes rule-makers more efficient, more effective and more responsive to the market.

Another way of expressing the underlying idea seems to be this. Economic rule-making is necessarily linked to the laws of economics. The same economic laws apply to rule-makers as apply to those who conduct economic activity on the basis of those rules. Competition is an economic good. Therefore, competition between rule-makers is an economic good. To the

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extent that rule-makers are not in competition, economically undesirable results will follow. A consequence of this analysis, if I have understood it correctly, is that we should welcome a situation in which economic regulators in different countries adopt divergent approaches. The market will show which approach is more efficient from an economic point of view. Pressure for uniformity of approach, notably in the European Union, is economically damaging.

Thus, *Vaubel* argues that

> The European Community/Union suppresses interjurisdictional competition by approximating and centralizing legislation especially in the fields of taxation and regulation. (By regulation, economists mean interference with the freedom of contract). … Since the European institutions have considerable competencies but little money, they focus on regulation – especially of labour, financial and product markets. Regulation does not cost them anything – its cost has to be borne by those who have to comply with it. Interference with the freedom of contract may be justified where the contract is concluded at the expense of third parties (e.g., among the participants of a cartel or possibly a merger) but it is highly problematic in most other cases and usually inferior to tax/subsidy schemes or liability rules which internalize the "external effects" without restricting individual choice. … The Commission has a vested interest in centralization because this increases its power. … Like the Commission, the members of the European Parliament have a vested interest in centralization at the Union level because such centralization increases their power. … The justices of the European Court of Justice have a vested interest in transferring power from the member states to the European level because, by doing so, they can increase their own influence. The larger the powers of the European institutions, the more numerous, important and interesting are the cases which the European Court may decide.

This Orwellian characterisation of the activities and motives of European commissioners, parliamentarians and judges does not correspond to my personal experience. But it would be naïve on my part to claim that those who hold office in the institutions of the European Union are immune from ambition or the temptations of power. They are not unique in this respect and no-one observing the tensions between central government and regional or "devolved" governments in Britain, Spain and other countries could pretend that the institutions of Brussels and Luxembourg are uniquely prone to a desire to regulate and control.

That said, it is not necessary to justify or defend the attitudes and actions of the European institutions or their members in order to take issue with the broader proposition that "interjurisdictional competition" is, *by virtue of the laws of economics*, an economic good.

The activities of making, applying and enforcing rules are activities conducted by human beings. Laws, rules and regulatory regimes do not make or administer themselves. Opinions and attitudes change over time as to what is right, appropriate or just. Lawmakers and law-enforcers are quite as susceptible to public opinion and quite as prone to error, temptation and ambition as other human beings.

So we can accept that some rule-makers, including judges, may be motivated by a competitive desire to advance their careers, to seek the applause of the press and public, or to shine more brightly than their colleagues in the intellectual firmament. This will sometimes affect the decisions they take in making rules or applying them.

It is also true that national systems of taxation and regulation are (at least in a sense) in competition with each other, and that economic operators tend to migrate towards the system that imposes the lowest burden of taxation and the lightest regulatory regime. There are examples in abundance to show that that is so.

There are, however, other considerations that influence those who have to decide what should be the tax or regulatory regime, what should be the level of taxation, or what should be the intensity of regulatory control. Legislative choices are made for a variety of reasons – not least the preferences of the electors expressed through the ballot box. That, after all, is what democracy is supposed to be about. The electors of some western European countries, notably some of the Nordic countries, are prepared to accept a higher tax burden in exchange for enhanced social provision, both for themselves and for others.

The investment choices of economic actors *condition* the willingness of elected governments to comply with popular demand for higher public expenditure or more intensive regulation. But they do not *determine* the decisions they take. There is no economic "law" that *requires* governments to give priority to the preferences of economic actors or penalises them if they do not do so.

As regards taxation, recent events in the UK illustrate the point. Public opinion has become hostile to the favourable tax treatment of so-called "non-doms" (those who are economically active in the UK, and in some cases live there for much of the year, but are not domiciled there for tax purposes). Public opinion caused the government to propose a levy on non-doms. This led in turn to a threat on the part of the non-doms that they would leave the country, taking their economic (and in some cases philanthropic) activity with them. The threat caused the government to modify its proposal, but not to abandon it.

It remains to be seen whether, and to what extent, the levy on non-doms will in fact cause them to migrate to countries with a more favourable tax climate. Those who will be adversely affected by higher taxation can be expected to lobby against it and to utter dire warnings in the hope of influencing the decision. This may or may not cause the government to alter its policy. What matters for present purposes is that the decisions of the rule-makers are not determined exclusively by their economic effect.

Nor, since threats are frequently not carried out, does increased taxation necessarily affect the behaviour of tax-payers. The decision to move to a more tax-friendly environment will depend on many factors, including the enchantments or otherwise of life in Monte Carlo or the Cayman Islands.

Similarly, as regards the effect of regulation, both the United Kingdom and, to a lesser extent, the United States have traditionally applied "regulation with a light touch" to the financial sector. This promotes economic activity, and might be thought to illustrate the merits of interjurisdictional competition in the sense of attracting financial operators to New York or London. However, recent disturbances in financial markets have led both the UK and US governments to propose tighter regulation of the financial sector and closer co-operation in doing so, implying a diminution in interjurisdictional competition. In the United States, the reforms proposed by the Treasury Secretary would involve a shift in power from the states to the federal administration, again implying a diminution in interjurisdictional competition.

It remains to be seen whether, in the long term, concerns about the adverse consequences of regulation with a light touch will lead to a more intensive regulatory regime and a diminution of interjurisdictional competition. What cannot be contended is that experience has demonstrated the economic merits of unrestricted interjurisdictional competition.

I have a further difficulty in understanding the more extreme arguments in favour of "interjurisdictional competition". Who is said to be in competition with whom and about what? In particular, what, for this purpose, is a "jurisdiction"? Use of the expression "interjurisdictional competition" is confusing because it is insufficiently precise.

The word "jurisdiction" is used in English in several different senses. Following the original Latin term *jurisdictio*, it may be used (i) in an abstract sense, to connote the authority or power to administer justice, or more broadly the power to *apply and enforce* (but not to *make*) rules of law, or (ii) in a more concrete sense, to refer to the territory within which "jurisdiction" (in the abstract sense) may be exercised. The word is now also used in English (iii) to refer to the court or other authority that exercises jurisdiction, and thence more widely (iv) to refer to the authority that has power to *make* rules and well as the power to apply and enforce them.

In the narrow sense, "jurisdiction" corresponds to (but does not necessarily have the same meaning as) *compétence* in French and *Kompetenz* or *Zuständigkeit* in German. Using the word in this sense, lawyers are concerned with identifying the court or authority that "has jurisdiction". Which court or authority is entitled to judge the dispute or matter at issue?

The legal rules regulating "jurisdiction" in this narrow sense do not seek to identify which rules of law are to be applied by the court having jurisdiction. A French court may have jurisdiction to try a case but be required, by agreement of the parties or by the rules of private international law, to apply the law of Germany or Estonia. That is a question to be determined (in English terminology) by the rules of "conflict of laws" rather than "conflict of jurisdiction".

Using the word in this narrow technical sense, it has been said that an essential purpose of public international law is "to confer, distribute and regulate jurisdiction".[1] In the field of private international law, the purpose of the "Brussels I" Convention on *Jurisdiction* and Recognition and Enforcement of Judgments (now embodied in Regulation 44/2001/EC) is "to unify the rules of conflict of *jurisdiction* in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments".

For most lawyers, interjurisdictional conflict (in the narrow sense) is something to be avoided. "Forum shopping", which leads to concurrent litigation in more than one country, imposes non-productive costs on the parties (including economic actors) concerned. It is liable, in the end, to lead to inconsistent judicial decisions with all of which the parties cannot comply. "Brussels I" seeks to avoid such situations as does the subsequent "Brussels II" Regulation (1347/2000/EC) on matrimonial and child custody disputes. In its original form the latter Regulation was described as "possibly the most anti-family and unconciliatory piece of legislation in family law".[2] This was because the Regulation discouraged the processes of mediation, reconciliations and early settlements (as opposed,

1 Rousseau, *Principes de Droit International Public*, 93 Hague Recueil (1958, I) p. 394 ; Mann, *The Doctrine of Jurisdiction in International Law*, 111 Hague Recueil (1964, I) p. 15 and 36.

2 See www.familylawweek.co.uk/library.asp?i=803

that is, to the exercise of jurisdictional competence). There is no economic benefit (other than to the lawyers) from interjurisdictional disputes about matrimonial property or the custody of children.

Hence, also, the sustained objections over many years to the "effects doctrine", which was invoked by the US courts to justify assuming penal jurisdiction over alleged violations by foreign corporations of US antitrust law. That particular dispute is now muted because the EU and others have themselves adopted a form of effects doctrine in order to assert jurisdiction over third country nationals (including corporations). But if all states were to adopt an unrestricted version of the effects doctrine, conflicts of jurisdiction would be unavoidable. Karl Meessen has written extensively on the legal techniques by which such conflicts can be avoided.[3]

The reason why public international law and private international law seek to avoid conflicts of jurisdiction (in the technical narrow sense) is not for the economic benefit of lawyers. The purpose (over centuries of effort) is to promote legal certainty in the hope of promoting order in international relations in the public and the private sphere. It is of no advantage to economic actors, any more than anyone else, to be subjected to mutually incompatible regulatory requirements or to be subject to double jeopardy in respect of one and the same course of conduct. This consideration is all the more important in a "globalised" world where economic actors trade in many jurisdictions (in the territorial sense) and are therefore, potentially, subject to the regulators of each of them, applying not only their own rules but also their own economic theories.

It is idle to say that economic operators can "migrate" to the most favourable jurisdiction. Multinational corporations trade across jurisdictional boundaries and are liable to be caught by the effects doctrine whether or not they set up an establishment within any particular jurisdictional territory. Even quite small enterprises operating in frontier zones, such as Luxembourg, are subject to regulatory capture by more than one regulator.

It may be thought to be acceptable (within limits) that US antitrust and EU competition regulators should adopt a different attitude to the conduct of global operators such as Microsoft, and that they should issue orders or impose fines according to different legal and economic criteria. The result will be less obviously acceptable if regulators in other jurisdictions throughout the world also decide to issue orders and impose fines according to whatever criteria they may choose to adopt. Specifically, it is difficult to see what "economic good" will be achieved thereby.

Is this point of view wrong? Are lawyers mistaken in believing that the risk of exposure to incompatible regulatory requirements – let alone the actuality – is something that is to be avoided for legal and for economic reasons? If not, what is the proper scope of interjurisdictional competition that is said to produce desirable economic results?

This problem is fully discussed in *Wolfgang Kerber's* paper *The Theory of Regulatory Competition and Competition Law*. It is sufficient for me here to quote one short passage:

> General conclusions about the question whether regulatory competition is mostly beneficial or harmful are not possible. It depends crucially on the kind of regulation and the field of the law, on a number of specific circumstances and on a set of rules governing regulatory competition, whether or not regulatory competition can be recommended or should be avoided …

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3 Meesen, *Conflict of Jurisdiction under the New Restatement*, 50 Law and Contemporary Problems 47 (1987); idem, *Economic Law in Globalizing Markets* (The Hague, 2004) p. 28 et seq., 95 et seq.

The extent to which regulatory competition is workable will depend on the extent, location, social attitudes and other conditions of the "jurisdictions" in question (in the territorial sense). In some respects it will be easier for regulatory authorities to make and apply their own rules according to their own economic theory or perspective if their writ runs over a relatively large territorial area (Germany or France) or in a peripheral region with a strong sense of community obligation (Scandinavia). Most notably, it was possible to apply Marxist theory (however disastrously) in the former Soviet empire. On the other hand, experimentation with low-tax regimes seems to have been easier in relatively small states (Estonia and Ireland).

Again, the viability of interjurisdictional competition may depend on the relative strength and independence of the "jurisdiction" (*autorité; Behörde*) that makes or applies the rules. For example, the German Cartel authorities were, for a long time, able to pursue a more active regulatory policy than their counterparts in the United Kingdom where competition policy (so far as it existed) was subject to political control and interference.

There are, in effect, many variables to be taken into account. It is surely simplistic to argue that *all* rule-makers and rule-appliers are suppliers of a product (regulation); that they are *always* in competition with each other, still less that they are in *economic* competition with each other; or that the legal system, as a basis for economic activity, will work better if they are. That approach seems to me to obscure rather than assist analysis. The activities and decisions of rule-makers and rule-enforcers undoubtedly have economic consequences, but it does not follow that they are economic actors in the same sense as those engaged in industry and commerce. That is not to say that rule-makers are more virtuous than industrialists or businessmen. It is simply a plea not to say that apples are the same as oranges because they are both edible fruits.

An analysis that focuses on the merits of interjurisdictional competition to the exclusion of other political, social and (I would suggest) economic imperatives facing the rule-maker is inadequate to explain why, and in what sense, economic law is an economic good. That is not to say that human motives are irrelevant – quite the contrary – provided that one accepts that the motives in question need not necessarily be motives of self-interest. There may be may be rational or intellectual motives for adopting one course of action rather than another.

Thus, one might accept that there was a period when the European Commission, and perhaps also the European Court, attached excessive importance to harmonisation as a mechanism to promote the internal market. Differences in national legislation and regulation were perhaps too readily seen as "barriers to entry" – not least because economic operators claimed that they were.[4] On the other hand, no-one who has spent more than ten years as a judge of the European Court, as I have done, can be blind to the multifarious ways in which member states have used taxation and other forms of economic regulation as a weapon of protectionism. How are we to draw the line of demarcation

4 See the long saga of litigation before the European Court, culminating in the judgment in Joined Cases C-267/91 and C-268/91 *Keck & Mithouard* [1993] ECR I-6097. Whatever criticisms may be levelled against this judgment (and there have been many), it cannot possibly be characterised as an example of the "vested interest of the judges of the European Court in transferring power from the member states to the European level because, by doing so, they can increase their own influence".

between the merits of interjurisdictional competition and the evils of interjurisdictional protectionism? Economic theory on its own offers no answer to this question.

It seems to me that the argument in favour of interjurisdictional competition is essentially an economist's argument against harmonisation for its own sake and in favour of "subsidiarity" – in favour of allowing national, regional and even local authorities to make their own rules and take their own decisions, unless there is an overriding interest in harmonisation or uniformity? If so, the economic argument is simply the expression in other terms of the political argument that has been going on in Europe since before the Maastricht Treaty in 1992.

B. An alternative analysis

I take as a starting point what was said at the conference by *Hans Jürgen Gruss*, Chief Counsel at the World Bank: "The effectiveness and efficiency of legal institutions is a *sine qua non* of economic development".

Law and legal institutions provide the infrastructure of economic activity, in the sense that they form the background against which – or the context within which – economic activity is carried on. Effective and efficient economic activity requires effective and efficient legal institutions. Another way of putting the same point is that economic activity produces the best results if it is conducted in the context of the Rule of Law. This implies that the citizen – including the citizen as an economic operator – will be governed by known laws impartially administered.

On this view, the actions and decisions of rule-makers and regulators are not of the same logical character as the actions and decisions of economic actors. Rather, they provide the background against which – or the context in which – economic actors have to take their decisions. In this respect, "economic law" is no different from other forms of law.

This leads me to suggest a more nuanced – and, I would suggest, more realistic – approach to the question whether, and in what sense, economic law may be an economic good. For this purpose, I assume that "economic law" consists of the body of law (notably but not exclusively competition law) that is intended to condition the behaviour of economic actors. The economic actors in question include governments since the law on state aids and public procurement (which is an aspect of competition law) are directed at conduct on the part of government or government agencies that distorts competition.

It is perhaps worth noting that economic law in this sense is designed as much to condition behaviour as to prescribe results or impose penalties. This is characteristic of other aspects of law – for example, laws against gender or race discrimination – that have developed in western democracies in the latter part of the twentieth century. Ideally, the law will not need to be applied because people will refrain from behaving in a way that would attract its attention.

The concept of law as a means of conditioning human behaviour echoes the approach of Madison to the US Constitution. Madison's approach reflected the thought of those who taught him, two of whom were Scottish Calvinist ministers (pastors) - notably John Witherspoon, President of Princeton, who was one of the signatories of the Declaration of Independence. Their premise was that man is essentially sinful but capable of good actions or, as Madison put it,

> As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust; so there are other qualities in human nature, which justify a certain portion of esteem and confidence.

This led to his designing a constitution based on "checks and balances" between political institutions and political actors. [5]

A similar line of thought was pursued a hundred years later by a Scottish lawyer and politician, James Bryce, whose writings played a major part in the design of the Australian constitution (amongst others). It proceeds, to some extent, upon the same premises as to human behaviour as the interjurisdictional competition thesis discussed above, but reaches a different type of conclusion:

> Of the many analogies that have been remarked between Law in the Physical and Law in the Moral World, none is more familiar than that derived from the Newtonian astronomy, which shows us two forces always operative in our solar system. One force draws the planets towards the sun as the centre of the system, the other disposes them to fly off from it into space. So in politics, we may call the tendency which draws men or groups of men together into one organized community and keeps them there a Centripetal force, and that which makes men, or groups, break away and disperse, a Centrifugal. A political Constitution or frame of government, as the complex totality of laws embodying the principles and rules whereby the community is organized, governed and held together, is exposed to the action of both these forces. … [T]he history of every community and every constitution may be regarded as a struggle between the action of these two forces, that which draws together and that which pushes apart, that which unites and that which dissevers. … [L]egal institutions and formulae do not belong to a sphere of abstract theory but to a concrete world of fact. Their soundness is not merely a logical but also a practical soundness, that is to say, institutions and rules must represent and be suited to the particular phenomena they have to deal with in a particular country. …[T]he best way of strengthening in the long run the centripetal tendencies has been to give so much recognition and play to the centrifugal as may disarm them, and may allow the causes which make for unity to operate quietly without exciting antagonism.[6]

Applying this line of thought to economic law, the first task of the rule-maker is to identify what are the "forces" that are likely to promote, and those that are likely to hamper, the economic result that is thought to be desirable. Having identified those forces, the rule-maker must put in place the mechanisms by which the positive forces can be put to work and the negative forces restrained.

The market economy presupposes that competition between economic operators is a positive force. On the other hand, experience suggests that unrestricted competition may

5 See generally Garrett Ward Sheldon, *The Political Philosophy of James Madison* (Johns Hopkins University Press, 2001) Chapter One, and particularly *The Federalist* Paper Number LI.

6 James Bryce, *The Action of Centripetal and Centrifugal Forces on Political Constitutions*, in: *Studies in History and Jurisprudence* (Oxford, 1901) p. 216ff., at p. 217, 218 and 220.

produce undesirable results. Survival of the strongest and most ruthless is not necessarily the same, nor as economically desirable, as survival of the fittest. If the positive forces of competition are to work, competition must be fair, and the conditions of competition must not (in the words of Article 3(g) of the original EEC Treaty) be "distorted", whether by the actions of economic actors or by those of states.

It is now generally accepted in the western liberal democracies that two basic rules are required to achieve the benefits of competition while restraining the potentially harmful effects of unrestricted competition. These are, first, that anti-competitive agreements and practices between economic operators should be outlawed and, second, that economically powerful operators should not be allowed to "monopolise" the market (the Sherman Act) or "abuse a dominant position" (the EEC Treaty). In order to ensure observance of these rules, antitrust or competition regulators are invested with powers to investigate, to issue orders and, in some cases, to impose financial penalties. Such powers are liable themselves to be abused, so the regulators must themselves be subject to control by the courts. It is only if these checks and balances are put in place *and* work effectively that the desired economic good will result. This approach can be tested by reference to Articles 81 and 82 of the EC Treaty, which are now reproduced in the legislation of the Member States.

The text of Article 81(1) is, on the face of it, clear. It interdicts any agreement or practice that prevents, restricts or distorts competition. There is no provision in the text for operation of a *de minimis* rule or a "rule of reason". Consequently, if applied literally, the law requires the prohibition of some agreements and practices, even if economic analysis can show that they have a positive economic effect.

As regards Article 82, again the text seems to be clear. The mere existence of a dominant position on the market is not, of itself, economically undesirable or productive of economically damaging results. What is interdicted is "abuse" of such a position. Examples are given of such abuse, notably "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions". There is, on the other hand, no mention of "exclusionary abuses" or any "theory of harm" underlying the intention of the text such as are discussed in the Commission's discussion paper on the application of Article 82.[7]

In both cases, the question arises whether regulators and the courts should apply and enforce the text strictly and confine themselves to doing so or, on the other hand, import additional economic criteria to supplement the text. In the case of Article 81, a partial answer is provided by Article 81(3) which provides for the prohibition in Article 81(1) to be "declared inapplicable" if certain positive and negative conditions are met. But these conditions require an assessment to be made which is not purely economic. For example, the question whether an agreement "improves the production of goods" or "promotes technical progress" is not exclusively (if at all) a question of economics. Moreover, Article 81(3) does not address the question whether there should be a *de minimis* test or a rule of reason.

It follows that Article 81, as a measure of economic law, may not be an "economic good" for one or both of two reasons: first because the text is insufficiently precise and/or, second, because it is applied and enforced in a manner that is economically inept.

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7 See DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (Brussels, 2005)

A more striking illustration of the problem is found in the Commission's Decision in the *Microsoft* case.[8] This raised the question whether a dominant undertaking is required by Article 82 to disclose information to competitors in order to enable them to compete with it. From one point of view, the answer should be positive since the purpose of Article 82 is to promote competition and the presence on the market of a dominant undertaking diminishes or inhibits the free play of competition. From another point of view, competition law is intended to promote innovation and inventiveness and this will not necessarily be achieved by requiring successful undertakings to make available to their competitors the fruits of their innovation and inventiveness. Does the requirement of disclosure "limit technical development" contrary to Article 82, second paragraph, clause (b)?

More generally, the following questions arise:

- Is it the function of the regulator to *regulate the market* or simply to *regulate the conduct of those who operate in the market*?
- What is the proper line of demarcation between the role of the legislator, the role of the regulator and the role of the judge?
- Who is to decide whether competition should give way to moral considerations (e.g. prohibition or control of abortion services or lotteries) or to social considerations (e.g. the availability of health care or legal services, or the right to strike)?

Economic law provides no definitive answer to these questions nor, I would contend, do any supposed laws of economics. There is, as lawyers say, a margin of appreciation and no workable system of economic law can operate without it. The question that needs to be considered, case by case, is to whom the exercise of "appreciation" properly belongs – the legislator, the executive, the regulator, the judiciary or the opinion of economists?

Conclusion

"Economic law" is not a fixed, but a variable concept. Its meaning will depend on who is using the expression and in what context. In particular, those who use it may or may not agree as to what the laws of economics require.

Assuming that economic law means the body of law that is designed to condition the conduct of economic actors, the law-maker will be motivated and guided by a variety of considerations – political (what are the limits of the possible?), social (who should benefit and what desirable or undesirable social results may follow?) and economic (what is likely to be the economic result?). The choice will not be dictated, nor should it be dictated, exclusively by economic criteria.

What matters is that law-makers should be clear about the objectives they wish to pursue and put in place regulatory and other mechanisms that are appropriate to achieve them. These mechanisms should be transparent, objective and impartial. So they must include the checks and balances necessary to avoid arbitrary exercise of regulatory power. But good law and good mechanisms will not, by themselves produce economic good. That depends on human beings.

8 Case COMP/C-3/37.792 Microsoft. See also the judgment of the Court of First Instance in Case T-201/04 of 17th September 2007.