



THE CITY
LAW SCHOOL
CITY, UNIVERSITY OF LONDON
— EST 1894 —

The Judicial Review of the European Commission's Economic Assessments

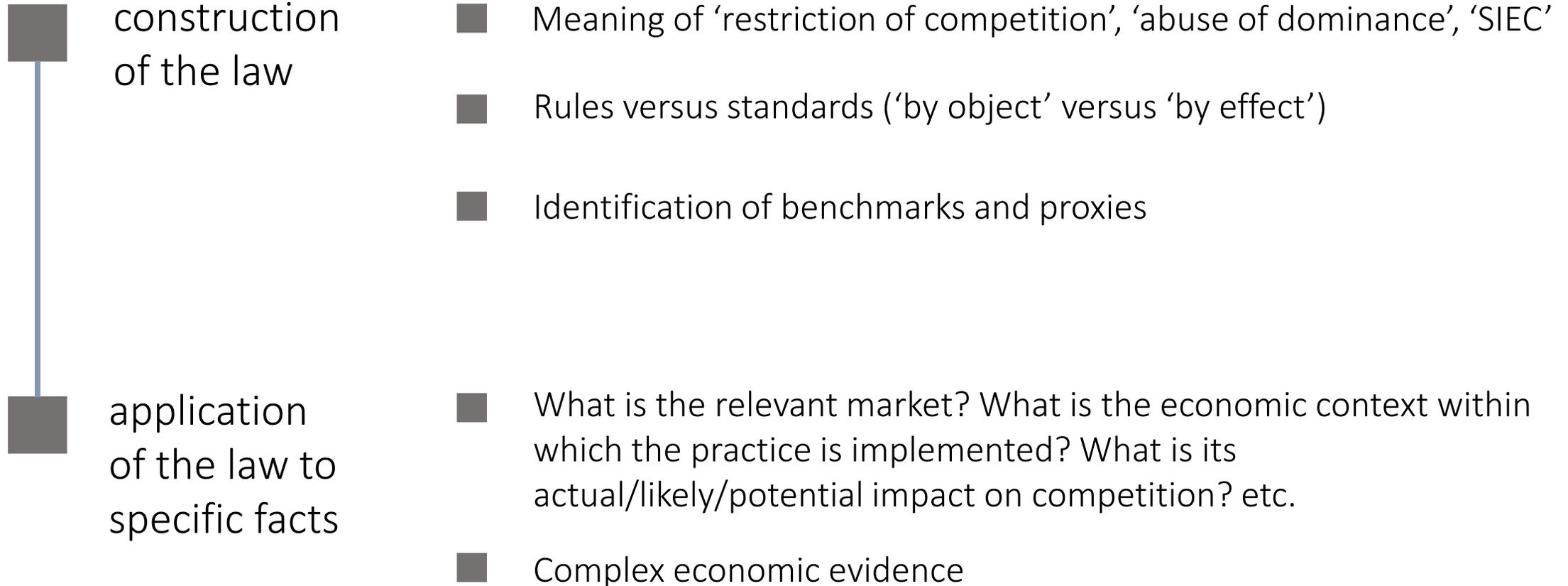
Dr Andriani Kalintiri

andriani.kalintiri@city.ac.uk

What is an economic assessment?



Varieties of economic assessments



Economic assessments and the law

What if the law
is unclear or
contested?

- *Lundbeck* – Should pay-for-delay agreements be subject to a rule of *prima facie* illegality, despite the fact that the underlying patents are presumptively valid?
- *Intel* – Should the grant of exclusivity rebates by a dominant firm be deemed to be *prima facie* unlawful?
- *Google Shopping Service* – Should the favouring by a vertically-integrated dominant firm of its own affiliates be prohibited?

Judicial review and questions of law

Article 19(1) TEU

‘The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. **It shall ensure that in the interpretation and application of the Treaties the law is observed.**’

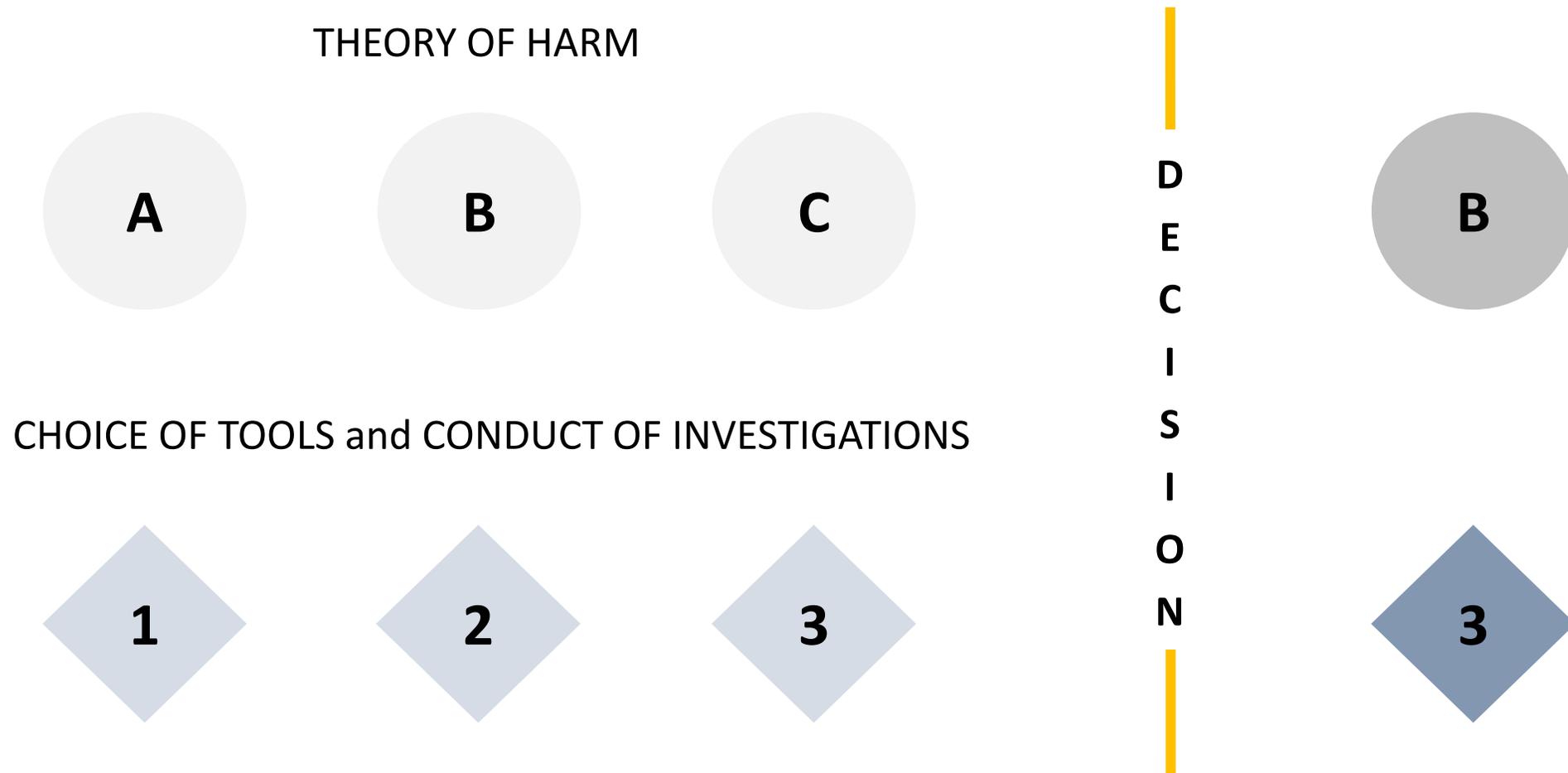
Chalkor, KME

‘(...) the Courts must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, **the Courts cannot use the Commission’s margin of discretion (...) as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.**’

Economic assessments and the law

- Given the administrative model of enforcement, the law is interpreted at first instance by the Commission, but in principle the authority enjoys no margin of appreciation in this regard.
- The Commission and the undertakings concerned may produce evidence in support of their preferred construction of the competition rules, but – formally speaking – the latter is not subject to the standard of proof.
- The General Court's record is mixed: some cases have signalled that it will thoroughly review the authority's construction of the competition rules in line with economics (e.g. *Airtours*); however, other cases, such as *Cartes Bancaires*, *Intel* and *Lundbeck*, may cast some doubt on this and have been appealed before the CJEU.

The Commission's margin of appreciation



Economic assessments and adjudication

What makes a
'manifest error
of assessment'?

- Failure to correctly assess the material facts underpinning the assessment
- Failure to take into account a relevant factor
- Taking into account an irrelevant factor, which distorted the outcome of the analysis
- Failure to meet the standard of proof

Economic assessments and evidence review



“Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the **evidence** relied on is **factually accurate, reliable and consistent** *but also* whether that evidence contains **all the information which must be taken into account** in order to assess a complex situation and whether it is **capable of substantiating the conclusions drawn from it.**”

Economic analysis and economic evidence

economic assessments



complex economic
evidence

- Economics-grounded competition analysis should not be equated with complex economic evidence. As the EU Courts have – rightly – explained, it is not necessary to produce economic evidence to substantiate an economic assessment. (*General Electric*, ECLI:EU:T:2005:456, paras 296 – 97, 299; *Ryanair*, ECLI:EU:T:2010:280, paras 132, 136; *Topps Europe*, ECLI:EU:T:2017:2 , para 82)
- In the light of the principle of unfettered evaluation of the evidence and the *Tetra Laval* formula, the probative weight of economic evidence should be determined independently by the General Court – irrespective of whether it has been produced by the Commission or by the undertakings.

Judicial review and economics

