it so hard for them to apply competition law to cases in the IP-heavy pharmaceutical sector.[68]

2.2.3. The 'More Economic Approach' to EU Competition Law

The EU Commission has advocated for applying a 'more economic approach' to competition law. This is characterized by differentiated case-by-case decisions rather than strengthening per-se rules. Moreover, the approach calls for balancing pro- and anticompetitive effects of the conduct under investigation not on overall social welfare, but rather on consumer welfare.[69]

Central aspects of the 'more economic approach' stand in conflict with ECJ jurisprudence and previously articulated opinions by the EU Commission, which has substantially contributed to even further legal uncertainty for the pharmaceutical industry: A focus on consumer instead of overall social welfare implications is not supported by the ECJ, which has made clear that competition law is supposed to protect competitive market structures rather than competitors or consumers.[70] *Straus* interprets the EU Commission's discussion paper on the application of Art. 82 of the EC Treaty (now Art. 102 TFEU) as also supporting this more traditional perspective: In the paper, the EU Commission would articulate the objective of protecting competition, not competitors.[71] The more traditional perspective is also supported by *Gassner*, who concludes with reference to the *GlaxoSmithKline* decision[72] that negative effect on consumer welfare should be consid-

68 See Josef Drexl, Pay-for-Delay – Zur kartellrechtlichen Beurteilung streitbeilegender Vereibarungen bei Pharma-Patenten, in Sektoruntersuchung Pharma der Europäischen Kommission – Kartellrechtliche Disziplinierung des Patentsystems? 13, 22 (Bardehle, Pagenberg, Dost Altenburg, Geissele eds., Carl Heymanns Verlag 2010).

69 See Dieter Schmidtchen, Der „more economic approach" in der europäischen Wettbewerbspolitik – Ein Konzept mit Zukunft, in Internationalisierung des Rechts und seine ökonomische Analyse 473, 473 (Thomas Eger et al. eds., 2008).

70 See e.g. Joint Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v. Comm'n (under appeal – not published yet, see Case T-168/01, GlaxoSmithKlineServices Unlimited v. Comm'n, 2006 E.C.R. II-2969.

71 See supra note 65 at p. 100.

72 See supra note 70.

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ered but should not be decisive in determining overall anticompetitive behavior.[73]

Nevertheless, even the application of this more traditional view may in practice be biased in favor of (short-term) consumer benefits: As *Etro* argues, quantifying effects e.g. from excessive pricing, which can be observed and measured, is much easier than determining implications on incentives to innovate, which would require a deeper evaluation.[74] The pharmaceutical industry thus may find it harder in the future to argue the legitimacy of behaviors which show substantial anticompetitive effects today but at the same time significant procompetitive effects on innovation in the future.

This bias is also mirrored in the public healthcare debate, where many economic studies – more or less successfully – have tried to quantify drug pricing effects from generic competition,[75] whereas few works have successfully empirically argued the effects on incentives to create pharmaceutical innovation.

2.2.4. The Sector Inquiry as an EU Competition Law Instrument

The EU Commission's pharmaceutical sector inquiry has further increased legal uncertainty for the pharmaceutical industry. The legal basis for this instrument can be found in Art. 17 of Council Regulation EC 1/2003, which generally allows the EU Commission to investigate for a specific sector on its own motion or acting on a complaint.[76]

In case of the pharmaceutical sector inquiry, the EU Commission *"suspected a potential systemic problem [with respect to] potential delays of market entry of generic companies"*.[77] Not surprisingly, the initiative was, *inter alia*, admittedly initiated by the European Generic Medicines Asso-

73 See Ulrich Gassner, Markteintrittsrelevante Vereinbarungen zwischen Original- und Generikaherstellern im Kreuzfeuer, 1 A&R 3, 9 (2010).
74 See Federico Etro, Competition, Innovation, and Antitrust, A Theory of Market Leaders and Its Policy Implications 186 (Pringer Verlag 2007).
75 See e.g. Michael C. Müller et al., Die Bedeutung der Generikaindustrie für die Gesundheitsversorgung in Deutschland (Accenture Management Consulting 2005), available at http://www.accenture.com/Countries/Germany/ Research_and_Insights/Generikaindustrie.htm.
76 See supra note 74 at p. 172 and supra note 10 at pp. 508-510.
77 Supra note 28.

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