Limits imported from economics

Anne-Lise Sibony
Introduction

- A more economic approach is generally considered a progress, a « modernization »
- Yet importing economic insights into legal decision-making can have some drawbacks
  - Limits are imported from economics into competition law
3 types of limits
1. Limits inherent to economic science (heuristics, methodology)
2. Context-specific limitations
3. Limits inherent to importation techniques
1. Limits inherent to economic theory

○ Postulates
  ● Rationality
    ○ For economists: heuristic outside the scope of discussion
    ○ But for judges, no reason not to admit discussion on validity of premises
    ○ If imported into law, postulates translate as legal fictions: not acceptable
  ➢ Limits the legitimacy of Chicago-style simple bright-line rules which rest on such postulates
Abstraction

- E.g. consumers
- Economist’s views on consumers often less abstract than legal views
  - Marginal consumer/average consumer
  - Categories of consumers
    ➢ Conceptual clarification ≠ openness to facts
- Yet notions such as consumer harm are still very abstract
  - Limits ability of parties to adduce evidence
  - Limits possibility for judges to make meaningful use of these notions
  - Refinements necessary for better empirical validity?
2. Context-specific limitations

- Examples
  - Lack/poor quality of available data
  - Lack of objective criteria to allocate common costs

- Limit administrability of
  - Quantitative criteria (e.g. cost benchmarks)
  - Qualitative criteria (e.g. consumer preferences)
 Judicial treatment of this limit
  - Rules on burden of proof
  - Rules on standard of proof
3. Limits inherent to importation techniques

- 3 main importation techniques + variations
- Choice of technique is partly governed by the nature of elements borrowed from economics (idea, value judgement, distinction, mode of reasoning, factual observation)
  - partly a matter of choice
- Choice should take specific limitations into account
Importation techniques

1. Interpretation
   a. Statement of relevance (of a fact)
   b. Way to regroup relevant facts
   c. Legal test
   d. Link between legal category and economic notion
   e. Choice of technique: the example of predation

2. Presumptions

3. Expert evidence
1. Interpretation

- Judicial interpretation of competition law incorporates elements of economics in several ways
- Ways differ in several respects
  - Degree of legal change
  - Flexibility
  - Fidelity to economic reasoning
- Limits associated to each method differ
1. Interpretation
   a. **Statement of relevance (of a fact)**
   b. Way to regroup relevant facts
   c. Legal test
   d. Link between legal category and economic notion
   e. Choice of technique: the example of predation
1. a. Statement of relevance

- Court states that a fact – called by an economic name – is relevant for the application of a legal provision/notion
  - E.g. “barriers to entry” relevant for assessing dominant position
- Least binding way for a judge to incorporate an element of economic reasoning
  - Legal reasoning is not fixed and may differ from economic reasoning (e.g. relevant market)
○ General characteristics
  ● Apt to incorporate economic viewpoint
    ○ Eg. « incentives matter »
  ● Legal change:
    ○ Normal method for case law evolution
    ○ Changes may be large
  ● Great flexibility
  ● Good first step in the absence of a full fledged legal test
  ● Fidelity: variable
• **Limits**
  - in the absence of reasons for relevance, fidelity may be low
  - in the absence of structure, legal certainty will be low

• **Great technique if coupled with explicit reasoning + structure**
  - ensures fidelity
  - allows for judicial control
Choice-of-technique issue

- When relevant fact is a **necessary condition** in the eyes of economists (e.g., recoupment for predation), importation as a legally necessary fact is easy.
- When relevant fact is a **sufficient condition** from an economic point of view, proof should not be made compulsory: fact should only be deemed relevant.
1. Interpretation
   a. Statement of relevance (of a fact)
   b. **Way to regroup relevant facts**
   c. Legal test
   d. Link between legal category and economic notion
   e. Choice of technique: the example of predation
1. b. Way to regroup relevant facts

- E.g. (EAGCP proposal) shift from dual structure
  - dominant position
  - abuse
  to
  - restriction of competition
  - absence of acceptable justification
- Largely same relevant facts but organised differently
- New intermediary notions
  - Overlap
  - Leveraging effect
  - Margin squeeze

- Practical importance
  - Disputes are organised around intermediate findings
- Good fidelity (focuses debates on economically significant points)
- Low flexibility: main limit
- Legal change
  - Small and a clear improvement if helps order multiple relevant facts not yet structured
  - Brutal if changes existing distinction (eg dominant position/abuse)
1. Interpretation
   a. Statement of relevance (of a fact)
   b. Way to regroup relevant facts
   c. Legal test
   d. Link between legal category and economic notion
1.c. Legal test

- Exhaustive and structured statement of relevant facts
- First best
  - High fidelity (potentially)
  - Legal certainty
- But rare examples (full tests)
  - Collective dominant position
  - Predation
○ **Limits**
  - Limited capacity of economic analysis to propose legal test
  - Low flexibility
    - e.g.: recoupment as part of the legal test for predation
  - Crystallisation: tests applied mechanically without regard to why various elements are relevant
    - Limitation may be overcome through reasoning: *Impala* (Case T-464/04) para. 251
  - Low fidelity (see: recent EC case law on predation)
1. Interpretation
   a. Statement of relevance (of a fact)
   b. Way to regroup relevant facts
   c. Legal test
   d. Link between legal category and economic notion
1. d. Link between legal category and economic notion

- Example: intention in abuse of dominant position
  - Legally relevant
  - Much criticised from an economic point of view
  - Yet may be a legal vehicle for strategic analysis
○ Characteristics
  ● Legal change
    ○ Very smooth (no change of legal notion)
  ● Fidelity
    ○ Variable
  ● Flexibility
    ○ Low if new content of legal notion is highly structured
1. e. Choice of technique: the example of predation

- **Cost benchmarks in AKZO**
  - Legal test or presumptions?
  - Recent case law (FR and EC): risk of crystallisation really exists

- **Recoupment**
  - Element of legal test (*Brooke*) (1.b)
  - Relevant but not necessary element (*Wanadoo*, cases T-340/03, and C-202/07 P) (1. a)
  - Could also be viewed as indication of intention (1.d)
2. Presumption

- Presumptions may block importation of economic approach
  - E.g.: consumer harm in article 82 EC case-law

- Presumptions may serve as an importation technique
  - Imported element: perception of economic normality or causality
Examples

- conglomerate merger do not restrict competition
- price volatility is not conducive to transparency
- predation is unlikely if recoupment appears impossible
○ Technique is apt to incorporate
  ● abstract judgements on probability (e.g. predation in the absence of possible recoupment)
  ● factual regularities
- Advantage over interpretation: presumption can be reversed ⇒ avoids complete crystallisation

- Limitations:
  - proving against the presumption may be difficult
  - brings scientific debate before the courts
  - doubt may persist ⇒ Allocation of burden of evidence is essential
  - Possible confusion between presumptions and elements of a legal test (e.g. AKZO)
Expert evidence

- In principle: incorporates only factual knowledge into decision making process
- Limit: experts influence interpretation
- Remedy: *Amicus curiae*
Conclusion

- Various techniques/sub-techniques to incorporate insights from economics into legal interpretation
  - legal interpretation
  - legal consequences of fact finding (presumption)
  - fact finding (expert evidence)
- Indications for each technique and limits are different
- There are some remedies
- Where choices have to be made (e.g. predation), courts should be aware of limits of various technique