

Limits imported from economics

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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 \neq 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

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- 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)

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- 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


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- Choice-of-technique issue
 - When relevant fact is a **necessary condition** in the eyes of economists (eg 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
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1. b. Way to regroup relevant facts

- E.g. (EAGCP proposal) shift from dual structure
 - dominant position
 - abuseto
 - restriction of competition
 - absence of acceptable justification
- Largely same relevant facts but organised differently

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- 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

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- 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

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- 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 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