

Limits of Imports from Economics into Competition Law

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A “more economic approach” to EU competition law is generally considered progress. Competition authorities¹ and scholars alike find competition rules based on “sound economics” desirable. Yet economics does not always provide ready-to-use solutions to problems faced by enforcement authorities and courts. This is why more economics does not always mean better law. At the very least, improvement of the law through economic import is not automatic. This is particularly true of economic discourse on the goals of antitrust. Stressing that the sole goal of antitrust should be consumer welfare, for example, does not necessarily help clarify the law or make antitrust enforcement more administrable. This is not to say that economic discourse on goals should be discarded. Rather, it means that economic input in the legal process—whether it consists of a discourse on the goal(s) of antitrust rules or whether it pertains to other more detailed aspects of antitrust such as the legal test for a particular type of anticompetitive conduct—is only a starting point. Economic insights are not, in and of themselves, soluble in the law. Importing elements of economic discourse into the law requires some analytical work, if only because there may be several different ways to bring those elements to bear on a legal decision-making process. In other words, choosing the best importing technique for a given economic insight calls for careful analysis.

This chapter aims at describing these choice-of-importing-technique issues. It deliberately focuses on legal techniques available to import economics

and does not seek to make value judgments on the imported economic wisdom. Of course, these value judgments need to be made and are made by courts and competition authorities. Clearly, the question of how best to import any given suggestion stemming from economics only arises when the suggestion is deemed worthy of being imported. These necessary and preliminary value judgments are outside the scope of this chapter, which focuses instead on the next and less often explored step in the process of importing economics into the law. It aims at describing the technical choices courts and authorities face when they want to import insights from economics. More precisely, this chapter describes the importing techniques law offers and distinguishes among them, with a focus on the limits of each technique.

Interpreting the Law in Light of Economics

Competition law is par excellence an area in which interpretation of the law is sometimes modified in order to take into account insights from economics. Judicial interpretation of the law may incorporate elements borrowed from economics in several different ways. One reason why it is useful to try to distinguish them is that different interpretive techniques may display different properties with relation to legal certainty, flexibility, and administrability and therefore lend themselves to trade-offs.

While a general theory of importing techniques and their properties is outside the scope of this chapter, it may be useful, for each importing technique used in the field of competition law, to look at the following three properties: the degree of legal change it implies, the flexibility it affords, and its fidelity to economic reasoning. The degree of change a new, more economic interpretation brings, as compared with a previous, less economic interpretation of the same legal provision, may be defined as the capacity of the new interpretation of the law to change the outcome of a case. As courts do not envisage large changes lightly, it seems fair to assume that this dimension matters. The greater the change brought about by a new economics-based interpretation, the more thorough the scrutiny it will (or at least should) be subject to before it is adopted.

The degree of flexibility of an economics-based interpretation is the second factor to bear in mind when a new, more economic interpretation is considered. In the present context, flexibility refers to the relative ease with which it will be possible to change the new interpretation if, after some time, economics produces an even better insight on the same question. Third, vari-

ous ways in which a given economic insight is incorporated into legal construction may differ in terms of fidelity to the original economic reasoning. Partial transplant may, for example, result in low fidelity.²

With these aspects in mind, incorporation of economic insights by way of interpretation will be analyzed in four steps. The first step is concerned with the most basic of imports from economics, namely when an economic insight translates as a mere statement of legal relevance of certain facts. The second step deals with an important intermediary operation in the process of applying a legal concept, namely regrouping various relevant facts. The third step analyzes a final product of interpretation—a legal test inspired by economic analysis. This three-step analysis leads to a fourth step, the understanding of how a fact that is both economically and legally relevant may be linked to several different legal categories. The analysis proposed here uses predation to illustrate a discussion of choice of interpretive technique.

The simplest and single most significant contribution of economics to interpretation of competition law provisions happens when economists call the attention of courts to the relevance of certain facts. For instance, economists say (in essence), "Judge, if you are interested in 'dominant position' you ought to pay attention to 'barriers to entry.'"³ The European Court of Justice (ECJ), early on in its jurisprudence, had been confronted with the question of what other factors, besides market shares, were relevant to establish the existence of a dominant position.⁴ Economists helped to name such factors. More generally, economists introduce statements in the competition law discourse about the relevance of certain facts, which they call by an economic name. What matters is not so much the name, but the attribution of relevance itself. If courts rule that the facts to which economists refer are indeed relevant for legal purposes, they borrow from economics, even though they might use different names.⁵

This elementary importing technique is apt to incorporate fundamental elements of economists' viewpoints, such as "consumers matter"⁶ or "incentives matter."⁷ Yet, in itself, this technique does not guarantee any particular degree of fidelity to economic reasoning. Indeed, as long as courts only admit the relevance of certain facts without stating in the grounds of the judgment *how* the relevant facts must be taken into account or *why* they are relevant,⁸ legal reasoning remains open ended. It may coincide with or differ from the economic reasoning underlying the very suggestion, which is incorporated into legal interpretation.

Market definition is a case in point. Courts in the EU have learned to admit the relevance of cross-price elasticity for the purposes of defining a

market, but they keep requiring, as a matter of law, that markets be defined even where it does not make economic sense to do so, because market power is not at stake.⁹ Legal relevance (of cross-price elasticity) is assigned in conformity with the teachings of economics but the overall reasoning (about why markets need to be defined) is lost.¹⁰

Admission of legal relevance, as an importing technique, displays a variable degree of flexibility. One essential factor in this regard is whether courts deem the facts to which economists draw attention merely as *relevant* or whether they are considered as constituting a *necessary condition* for applying a particular legal idea.¹¹ If courts deem relevant a fact that economists stress, for example recoupment in predation cases, it will be up to the parties to discuss it, and if they choose to discuss it, courts will have to hear this discussion. This is much more flexible than if the economically relevant fact is made, by means of interpretation, a fact that as a matter of law must be established in all cases.

Considered from the vantage point of legal change, admission of relevance presents two noteworthy characteristics. First, it is a very ordinary legal technique; indeed, assigning relevance to facts is what courts routinely do when they interpret a rule. Because the technique is so common, it represents an easy and convenient way to incorporate economics into the law. If a suggestion emanating from economists that certain facts are relevant seems convincing to a court of law, the court will face no technical difficulty in accepting it. Second, this technique may result in varying degrees of legal change. Adding one relevant fact, like barriers to entry, to an already long list of criteria considered relevant for assessing dominant position may alter the outcome in only a few cases, especially if factors already taken into account capture part of what economists call barriers to entry. Yet the additional precision of naming relevant facts also may result in considerable change of the rule. If, for example, in order to make a case of financial predation, what a party needs to establish is not that the alleged predator has deeper pockets than the alleged prey, but rather that it has unequal access to financing,¹² it clearly makes a difference, as courts will have to look at a different set of facts altogether (such as how firms interact with banks). Thus, one crucial element in assessing how much a new admission of relevant facts changes the law is how the various relevant facts are linked.

Rearranging Different Relevant Facts

Knowing which facts are relevant for the purpose of applying a legal idea is only one part of interpreting a rule. How law rearranges and combines the various relevant facts is essential to further describe the legal reasoning leading to a particular outcome. Some ways of grouping relevant facts are very familiar. For example, under EU law, in any abuse of dominance case, courts divide their appraisal in two steps: they will first examine whether the firm holds a dominant position in a relevant market and only then will they consider whether the firm has committed an abuse. At least this is how courts present the reasoning. Economists had suggested an alternative way of rearranging facts: look first at whether there is a restriction of competition (this would take market power into account) and then at whether the conduct at stake may be justified.¹³ Essentially the same facts were to be taken into account under this proposal and under the then and current legal approach. Yet it is beyond doubt that rearranging the same relevant facts in a way that departs from the traditional and familiar two-step approach would have been regarded as a radical change had this part of the proposal been adopted.¹⁴

However, translating economic insights by adopting a particular way of rearranging relevant facts does not necessarily upset legal categories. It only does so when, as in the previous example, courts call into question an established structure of legal reasoning. When, on the contrary, courts weakly structure legal assessment, intermediary notions borrowed from economic analysis contribute to enhancing legal certainty by giving a better defined structure to legal assessment. The phrase "intermediary notions" used here is not intended to suggest that some notions possess an intrinsic characteristic of intermediariness; it aims at describing a particular legal use of some notions as marking intermediate steps in an overall assessment.¹⁵ Examples include "margin squeeze," "leveraging effect," or "overlap." These are notions that are not to be found in the legal provisions themselves but may command a step—modest in the case of overlap, very substantial in the case of margin squeeze—in the appraisal of a unilateral conduct or of a merger.

Incorporating an element of economic analysis as an intermediate step in a legal decision is of practical significance not only because there are many examples of economic notions used in this way in competition law but also because legal disputes are organized around intermediate findings. Such findings constitute the pressure points on which lawyers concentrate their argument when a case is litigated. When economic notions are used in this way, they therefore provide the very structure of legal argument.

This importing technique is characterized by a good degree of fidelity to economic reasoning, precisely because it helps focus the legal debate on economically significant points. Its main limit is low flexibility. Once a certain structure of legal argument becomes enshrined in legal practice, it solidifies as law and becomes hard to change. As noted above, in terms of intensity of legal change, initial adoption of a new way to rearrange facts inspired by economic analysis will represent a fundamental, and possibly unacceptable, legal change if traditional distinctions are upset. On the other hand, it may be perceived as a small change and a clear improvement if it helps order multiple relevant facts in an assessment method that is more structured than current court practice.

Legal Tests

Coining a legal test is the ultimate importing technique—it builds on the two techniques previously outlined and constitutes an improvement on both of them. A legal test based on economic analysis incorporates statements of relevance about all economically relevant facts and explicitly regroups those facts in meaningful bundles tied around intermediate economic notions. It also does more, in that it explicitly ties the bundles together. In other words, a legal test is a structured and complete statement of relevant facts. The test gives the structure of a correct answer to a legal question (such as “is this predation?”).

Legal tests are a first-best among importing techniques. Because they consist of an articulated set of questions, they usually translate economic reasoning with a good degree of fidelity. A legal test also offers a good degree of legal certainty as it makes assessment of facts more predictable. However, precisely because adoption of a new, more precise, economic-based legal test is generally considered progress (although there may be disagreement about the best test), legal tests may not be changed easily. One limit of this technique is, therefore, that it is characterized by a low level of flexibility.¹⁶ This is why it is essential to get the test right in the first place. A second limitation of legal tests is that, once adopted, they lend themselves to mechanical application, without regard to *why* specific facts are legally relevant. It is of course the specific virtue of legal tests to act as a checklist for the fact finder. Yet this may result in the reasoning underlying the test being lost and, if the test is less than perfect, in unsatisfactory outcomes.¹⁷

This risk of crystallization may be overcome by active attention of courts to the meaning of their findings in the specific context of the case, as opposed

to a box-ticking attitude. For example, in its *Impala* judgment, in which the Court of First Instance (CFI) had to assess whether the Commission erred in finding that a merger did not strengthen a collective dominant position, the court had regard to the test for collective dominance established in *Airtours*¹⁸ but also stated that

in the context of the assessment of the existence of a collective dominant position, although the three conditions defined by the Court of First Instance in *Airtours v Commission* . . . , which were inferred from a theoretical analysis of the concept of a collective dominant position, are indeed also *necessary*, they may, however, in the appropriate circumstances, be *established indirectly* on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position.¹⁹

In this judgment, the CFI did not depart from the *Airtours* test. It ruled, however, that this test should not be applied literally. Flexibility is infused in the test by holding that, if the relevant facts and links between these facts can be established through an analytical detour, due to the circumstances of the case, there is no point in insisting that all three cumulative *Airtours* conditions be established separately. It is enough to establish the analytical equivalence between the necessary conditions of that test and the facts of the case. This is somewhat like saying that, even though the necessary ingredients for a cake, according to a case law recipe, are flour, sugar, and eggs, the existence of a cake may be established even though it has not been proven that flour, sugar, and eggs were in the kitchen. Those three ingredients may be *necessary* for the cake to have been baked, but cake crumbs will also be *sufficient* evidence that a cake was there. The reason why the court in *Impala* can leave the *Airtours* test aside is that it does not consist of necessary and sufficient conditions, as would be the case in a perfect test.

Because it is generally hard to identify sufficient and necessary conditions for a conduct (or a merger) to restrict competition, there are not many full-fledged legal tests based on economic analysis.²⁰ Economics produces building blocks for legal tests but only rarely ready-made ones. This is not necessarily a bad thing, as conformity with sound economic analysis is not the only requirement for a good legal test. It is equally important that economically relevant facts be linked to existing legal categories, preferably with the right ones.

Linking an Economically Relevant Fact to the Right Legal Category

Economists, like everyone else, tend to think in their own categories. This is why the link between their reasoning about competition issues does not always have an obvious translation in legal terms. To overcome this difficulty, one possibility is to import economic categories into legal language. There are many examples of this. Originally, notions such as barriers to entry, substitutability, or margin squeeze neither were a part of statutory language nor belonged to common legalese. They were imported from economics into case law. But adding new words to the (legal) thesaurus is a translation technique that should only be used as a last resort. Even where it is appropriate to use it—i.e., when no legal term is adequate to express an economic idea worth importing—it will not stop the need to explicitly link the novel legal category to existing ones. Law is a system, and new additions need to be connected to the backbone formed of statutory language and existing case law. Such connection may take many different forms, such as creating a new distinction (e.g., between several types of predation), reversing established case law (e.g., holding that *ex ante* possibility of recoupment does need to be established to prove predation), and considering an economically relevant fact (e.g., recoupment) as an indication that a legally relevant fact (e.g., predatory intent) has been established.

Such translation issues do not always receive the kind of attention they deserve from economists or legal scholars. An example illustrates the type of discussion needed regarding translation. Intent is a legal category that economists and economically minded antitrust lawyers do not like much. Richard Posner gave a well-known expression to the criticisms directed against intent as a legally relevant fact for the purposes of assessing monopolization under Section 2 of the Sherman Act.²¹ Exclusionary intent should not matter, so goes the argument, because exclusionary intent is indistinguishable from competitive intent.²² An additional argument against including intent among legally relevant facts is that evidence of intent is easy to manipulate. Well-counseled dominant companies will leave no paper trail containing aggressive language, while less careful ones will be likely to do so. Punishing intent thus will unfairly discriminate in favor of polite corporations while not catching harmful conduct.

While this argument concerning direct documentary evidence of intent is convincing, it may not be decisive. Arguments against intent need to be balanced against the benefits of allowing intent to matter. One strong argument

in favor of intent is that this legal category is apt to capture economic analysis when it is framed in terms of strategy. Taking firms' strategies better into account was precisely one of the key recommendations contained in an economist's report commissioned by the European Commission when preparing the "Reform of [its interpretation of] Article 82."²³ It seems hard to find a better legal vehicle than the category of intent to do this. Both strategy and intent refer to what a firm aims at doing, its objectives, and the means it deploys to reach them. In this sense, they are close enough. Another good reason not to discredit intent, from a European perspective, is pragmatic. Under EU law, intent does matter, whether economists like it or not, and it is so enshrined in the case law that it is hard to imagine a reversal from EU courts on this point.²⁴ Although the solution may be second best (Posner's criticisms have some validity), using intent in abuse cases as the legal locus of where to incorporate economic reasoning relating to strategy may be the best we can do, taking legal constraints into account.

Giving a legal umbrella to economic reasoning by linking an economic category such as a firm's strategy to a legal one such as intent is a technique that makes legal change smooth, as, by definition, economics is imported through an existing legal category that already has its place in legal reasoning. Were it not for the inappropriate warfare connotation, it could be compared to a Trojan horse method for economic content to penetrate the legal sphere without alerting the guardians of the legal fortress.

Fidelity to economic reasoning when using this technique depends on the choice of a suitable legal category to incorporate one particular line of reasoning. This may be illustrated by considering, for example, the typical economic reasoning on the role of recoupment in predation cases. Without a reasonable expectation of recoupment, it is argued, it is not rational for a firm to engage in predation. There are at least two ways to link this reasoning to legal categories. First, one can infer that, in the absence of a reasonable expectation of recoupment, a predation strategy is unlikely (this assumes firms behave rationally). In other words, predatory intent is unlikely. Second, one can argue that, if recoupment is improbable, so is consumer harm. Economists would probably consider that the second link displays a higher degree of fidelity to the original reasoning. However, fidelity to economic reasoning is not the only dimension that counts. Arguably, it is more useful to link economic reasoning to a legal category that carries greater weight. If, for example, the recoupment argument is linked to effects, but effects do not matter in actual decisional practice,²⁵ fidelity will go hand in hand with the ineffectiveness of an economic

argument. In other words, when choosing to which legal category an economic argument should be linked, there may be a trade-off between fidelity to the original economic reasoning and the actual bearing of the economic import on legal outcomes.

Flexibility of this importing technique will depend on how structured the economic content imported into a legal category is. If, for example, a court rules that predation is one category of abuse and that there are three kinds of predation, it will be impossible to prove a case of predation without proving that it fits in any of the three categories. Such rigidity is inherent in importing a typology. When, however, the imported content is more loosely structured, linking economic insights to a particular legal category does not necessarily entail a rigid legal outcome.

Choice of Importing Technique: The Example of Predation

Predation has been mentioned in this chapter several times, as it is the example of choice to illustrate how different importing techniques described thus far may constitute alternative means when a court considers importing a particular economic idea or reasoning into the law. In EU law, the landmark case on predation is *AKZO*.²⁶ In this ruling, the Court adopted a price/cost test. In the Court's words:

Prices below average variable costs . . . by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive²⁷ [and] prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor.²⁸

This test has been considered good law ever since *AKZO*. What is more, it has been applied as the only valid test for predation. The CFI ruling in *Wanadoo* is a case in point. The CFI applied the test literally. It took the test to mean that, when prices are below average variable cost, price/cost comparison is the sole criterion; when prices are above average variable cost but below average total costs, there are two separate criteria for predation: (1) the price/cost comparison and (2) an additional element of intent.²⁹

One reason to disagree with this reading of *AKZO* is that it does not make logical sense. Contrary to what the CFI held, intention and price/cost comparison should not be treated as two distinct and cumulative elements, both at the same level in the reasoning. As is apparent in the first prong of the

AKZO test, price/cost comparison is an *indication* of intent (and a decisive one in the case of prices below average variable costs). It follows that under *AKZO*, however regrettable this may be, intent is the sole legal criterion. *AKZO* may be read to say that, in one case (prices below AVC), intent is inferred from price/cost comparison, while in the second case (prices above AVC but below ATC), the indication of predatory intent, which may be inferred from the price/cost comparison, is not conclusive and needs to be complemented by additional evidence of intent. In the CFI reading of *AKZO*, the price/cost comparison, borrowed from Areeda and Turner,³⁰ is an autonomous legal criterion, while in the reading we suggest, the same economic import only has the value of a presumption, as it is (implicitly but essentially) linked to the legal category of intent. The judgment of the Court on appeal in the *Wanadoo* case does not choose between these two readings,³¹ but it illustrates in another manner how a given economic argument may be given several different legal translations.

On appeal, France Télécom (the dominant undertaking accused of predation) argued that the CFI had erred in law because it failed to recognize that the possibility of recoupment is part of the legal test for predation. In essence, the appellant invited the Court to align EU law with the U.S. Supreme Court in *Brooke Group*.³² In spite of support of advocate general Mazák for this proposition, the Court stuck to its previous case law and refused to hold that the possibility of recoupment had to be established in all cases of predation.³³ It ruled however that the possibility of recoupment was a *relevant* fact.³⁴ Interestingly, the ECJ did not see the relevance of this fact in the same light as the U.S. Supreme Court. Indeed, it did not link it with the same legal category. In the court's judgment, the relevance of recoupment is not linked with the assessment of the effects of conduct on consumer welfare. Rather it seems to be linked, again, with the appraisal of exclusionary intent.³⁵ The economic argument according to which it is not rational for a firm to engage in predation if it cannot reasonably expect to recoup its losses is not seen under EU law as an argument on which a dominant undertaking may rely to deny predatory conduct. It is, on the contrary, an argument on which the Commission may rely to exclude rationales other than predatory intent that may be put forward by an alleged predator.³⁶

Some readers of the *Wanadoo* judgment may think the ECJ turned a sound economic argument on its head. Certainly, the Court did not follow the Organisation for Economic Co-operation and Development (OECD) recommendation to use the possibility of recoupment as a "filter," i.e., a preliminary

step to assess whether there is a *prima facie* predation case that deserves further analysis.³⁷ Instead, the Court tried to incorporate the assessment of an *ex ante* possibility of recoupment in the existing EU legal framework for predation, where it does not readily fit.³⁸ The new admission of relevance does not modify the existing legal test, it merely opens more refined discussions on the likelihood of predatory intent.

Whatever opinion one may have on the better rule for predation, it follows from the above that all interpretive techniques that may be used to incorporate an economic argument are not equivalent to one another. Holding that a fact must be established or judging it merely relevant, linking it with one legal category or another, adding it as a new prong to an existing legal test, or leaving it outside the existing test are choices that lead to vastly different policy implications.

While interpretive techniques are rich and versatile, they do not constitute the whole range of possible legal techniques for importing economic elements. Creating a presumption is a technique that constitutes a distinct category and can sometimes, though not always, serve to import economic input into the law.

Presumptions

Presumptions are to be distinguished from interpretation of the law in that they relate to proof. Questions of proof arise only once the law is interpreted and *what* needs to be proven has thereby been made clear. Only then does it make sense to ask *how* required facts may be proven and whether a presumption will lighten the burden of proof bearing on one party.

In competition law, presumptions may act either as barriers to economic imports or, on the contrary, as vehicles for importing economics. EU case law on abuse of dominance offers a good illustration of the first phenomenon. Economically minded commentators have long insisted that consumer harm should be established for a unilateral conduct to be found abusive and have now been heard by the Commission.³⁹ The Court, for its part, has ruled that consumer harm may be inferred from alteration of the structure of the market,⁴⁰ and this presumption is still good law.⁴¹ Even where consumer harm is required (i.e., under Article 102, subparagraph b),⁴² it is, according to the case law, enough to show competitor's harm. Such a presumption spares competition authorities and parties the burden of a fact-based assessment of consumer harm.⁴³ While this may make practical sense, due to the considerable difficul-

ties of such an assessment, it also clearly denies any relevance to economic arguments on consumer harm, which firms are particularly keen to develop. In this sense, the presumption goes against the introduction of a more sophisticated economic approach of consumer harm.

In other instances, on the contrary, presumptions may serve to import economic wisdom into the law. Even in those cases, presumptions create an evidentiary shortcut and keep some economic evidence out of the courtroom. This is the nature of a presumption. But unlike the presumption of consumer harm based on competitor's harm, some shortcuts are based on economic consensus. This is particularly the case where the element imported from economics is a perception of what is economically normal (rather than a statement of relevance, an inference, or any other element of economic reasoning). For example, in *Tetra*, the CFI relied on economic scholarship to hold that conglomerate mergers do not *normally* harm competition.⁴⁴ It should be noted that economic scholarly consensus, as used by the CFI in this ruling, plays exactly the same role as any statement based on common perception of causality in other areas of the law. Indeed, the perception of what is normal generally constitutes the basis for a presumption. For example, courts will presume that someone who has been convicted of controlling prostitution for gain, and who proves unable to account for the origin of his revenues, derives part of his revenues from his illegal activities. In much the same way as a general rule based on common (or judicial) experience, a statement about what *normally* happens with conglomerate mergers is used as a basis for a presumption. The only difference is that, instead of being rooted in common sense, the statement about normalcy that is being incorporated in the judgment is based on economic literature.

This part of the *Tetra* ruling has given rise to much discussion because it has been read, initially by the Commission, to relate to standard of proof. This is probably due to the fact that the CFI, after stating that conglomerate mergers normally do not harm competition, went on to rule that "the proof of anti-competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects."⁴⁵ On appeal, the Court confirmed the CFI judgment and held that, contrary to what the Commission argued, the CFI had not raised the standard of proof. According to the Court, it had "merely [drawn] attention to the essential function of evidence, which is to establish convincingly the merits of an argument."⁴⁶ In other words, the standard of proof being constant (and not named in EU law), it takes more evidentiary effort to establish a fact that is held to be intrinsically improbable, such as the

harmful character of a conglomerate merger, than it would prove to the same standard a fact that is intrinsically more probable, such as the harmful effect of a horizontal merger. This distinction between a variation of the standard of proof and a variation of evidentiary burden under a constant standard of proof has been aptly captured by Lord Hoffman in a now much quoted opinion.⁴⁷ As Lord Hoffman explained, it takes more evidence to convince a court that one has seen a lioness in Regent's Park, than to convince it to the same standard that the animal seen in that urban park was an Alsatian.⁴⁸ In much the same way, it takes more convincing evidence to prove to the requisite standard that a conglomerate merger harms competition than to prove that a horizontal or vertical merger has the same effect.

Tetra is therefore not about the standard of proof. It is about a presumption that alleviates the evidentiary burden of a party and, conversely, increases that bearing on the Commission. This presumption is based on a perception of economic normality. More generally, presumptions as an importing tool seem particularly suited to incorporating exactly this kind of statement, relating to what *normally* happens.⁴⁹ When a presumption is, as in this case, based on economics, one can observe that economic theory (rather than empirical observations) plays the same role that common knowledge does for ordinary presumptions, namely that of authority for a judgment on normality or on causality. As there is no common experience of economic causality, this does raise questions about how courts are satisfied that something really is "normal" economically.

The natural advantage of presumptions as compared to other importing techniques is that a true presumption is rebuttable. If a presumption based on economics is at odds with facts that can be established, it may, like any presumption, be reversed. This possibility to check against the facts of a case a general statement borrowed from economics (i.e., economic theory more often than empirical observations) avoids complete crystallization of possibly false economic consensus. In this respect, it displays more flexibility than a substantive rule. This being said, it will often be hard to prove against a presumption. Some presumptions may be so enshrined in judicial practice that one may wonder if they are still rebuttable. In EU law, the presumption already mentioned, that consumers are harmed when market structure is altered, is a case in point. This example also shows that, in order for presumption to be based on sound economics, or what is generally considered sound economics at any given point in time, there ought to be a way to challenge presumption and introduce state-of-the-art scientific—or, better still, empirical—argument

into the courtroom. This may be facilitated where provisions for *amicus curiae* to intervene exist, which is not currently the case before EU courts.

There are various legal techniques to import insights from economics into the law. Most of them relate to legal interpretation, but economics may also be incorporated into the legal decision-making process at the stage of proof through presumptions. While economists who advocate a particular idea often consider that it should translate to a new legal test, there are several different ways for a court or competition authority to take economic insights into account. Not all techniques are interchangeable. For example, creating a presumption is particularly suited when the borrowed element is a judgment on economic normalcy or economic causality. For other types of imports, such as statements of relevance or other elements of an analytical framework, several importing techniques may be available. As the discussion on the case law on predation illustrated, the choice between these competing techniques is neither obvious nor always explicit. The purpose of this chapter is to highlight some of the issues at stake in these technical choices. These issues have received less attention than choices between Type I and Type II errors. They deserve more attention from scholars and courts, as choices of importing technique influence the magnitude of legal change caused by an import, as well as future flexibility of legal rules, which is an important dimension when economics is the source from which the law borrows. On a more theoretical level, these technical choices also factor into the interaction between the law on the one hand and economics as a science on the other, as they display different levels of fidelity of the legal transplant to the original economic element. As there is only a limited set of legal techniques, choices faced by courts when they consider adopting an element of economic analysis may boil down to trade-offs between the respective limitations of available importing techniques.

Chapter 3

1. In the European Commission's language, a "more economic approach" is often associated with the term "modernization."
2. Market definition is an example of partial transplant—what has been borrowed by law (a method for defining markets) and the status market was given through the legal requirement that market be defined in (nearly) all cases miss the core economic message on why define markets.
3. I assume here that the fictional economist is addressing a European fictional judge and has been briefed by a lawyer to use the term "dominant position" rather than the more familiar "market power."
4. See Case 85/76, *Hoffmann-La Roche v. Commission* 1979 E.C.R. 461, ¶¶ 42–48.
5. See, e.g., Case T-102/96, *Gencor v. Commission*, 1999 E.C.R. II-753.
6. This leitmotiv of economic discourse about EU law of abuse of dominance is *inter alia* expressed—in these exact words—in the report commissioned from the Economic Advisory Group on Competition Policy (EAGCP) by the European Commission, *An Economic Approach to Article 82* (July 2005) at 7. As a leitmotiv, this idea has been adopted by the Commission. See Communication from the Commission—Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45) 7, ¶¶ 5 and 19. The effect on consumers has long been considered legally relevant by EU courts. See Case C-6/72, *Continental Can v. Commission*, 1973 E.C.R. 215, ¶ 26. The reason for the prevailing feeling that courts *do not* reason in accordance with "sound economic principles" is that the case law does not require separate evidence of consumer harm and continues to infer such harm from a change in market structure. Liza Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance* 115 (2010).
7. For an example of courts recognizing incentives as key elements in merger analysis, see *Gencor*, *supra* note 5.
8. This may of course be influenced by the style of judgments in a given legal culture. For example, French courts rarely give lengthy grounds for their judgments.
9. Cases T-68/89, T-77/89, and T-78/89, *SIV e.a. v. Commission*, 1992 E.C.R. II-1403, ¶ 159; Case T-17/93, *Matra Hachette v. Commission*, 1994 E.C.R. II-595, ¶ 85, ¶ 3.
10. Anne-Lise Sibony, *Le Juge et le Raisonnement Économique* (2008). For a convergent, more recent and more radical proposition from a U.S. perspective, see Louis Kaplow, *Why (Ever) Define Markets?*, 124 Harv. L. Rev. 438 (2010).
11. David Evans, *How Economists Can Help Courts Design Competition Rules: An EU and US Perspective*, 29 World Competition 93 (2005).
12. European Commission, *supra* note 6, at 21.
13. *Id.* at 4 (in the text, this proposal to restructure the assessment of abuse, which is a matter of law, is erroneously presented as a matter of "procedure").
14. Other elements of this report laid the basis of the Commission's communication on exclusionary abuses.
15. Advocates general sometimes use the phrase "interim conclusion" to mark those steps. See, e.g., Opinion of Advocate General Kokott in *British Airways*, 2007 E.C.R. I-2331, ¶¶ 62 and 133. In the context of this discussion, only economic categories are concerned, but in areas of law other than competition law, the same may be true of categories borrowed from, say, medicine or a particular trade. For a more extensive discussion see Sibony, *supra* note 10, at 446 et seq.

16. For example, EU courts refused to revise the *AKZO* test in light of economic argument that recoupment should be part of the legal test.
17. See, e.g., C. Scott Hemphill, *The Role of Recoupment in Predatory Pricing Analyses*, 53 *Stan. L. Rev.* 1581, 1610 (2001), arguing that the holdings of the U.S. Supreme Court in *Matsushita* became "ossified" in their application by lower courts.
18. Case T-342/99, *Airtours v. Commission*, 2002 E.C.R. II-2585, ¶ 62.
19. Case T-464/04, *Impala*, 2006 E.C.R. II-2289, ¶ 251.
20. Evans, *supra* note 11, argues that it is more reasonable to expect of economists that they identify sufficient or necessary conditions for a given conduct to be anticompetitive.
21. Richard Posner, *Antitrust Law* 214 (2nd ed. 2001). The same arguments apply to abuse of dominance under EU law. See, e.g., A. Bavasso, *The Role of Intent Under Article 82 EC: From "Flushing the Turkeys" to "Spotting Lionesses in Regent's Park,"* 26 *Euro. Common L. Rev.* 616 (2005).
22. For an attempt at distinguishing them, see Thomas Eilmansberger, *How to Distinguish Good from Bad Competition Under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses*, 42 *Common Market L. Rev.* 129 (2005).
23. European Commission, *supra* note 6.
24. Case 27/76, *United Brands Company v. Commission*, 1978 E.C.R. 207, ¶ 189; Case T-203/01, *Michelin v. Commission*, 2003 E.C.R. II-4071, ¶ 241.
25. See, e.g., Case T-340/03, *France Télécom v. Commission*, 2007 E.C.R. II-107, ¶ 195.
26. Case C-62/86, *AKZO v. Commission*, 1991 E.C.R. I-3359.
27. *Id.* ¶ 71.
28. *Id.* ¶ 72.
29. Case T-340/03, *France Télécom v. Commission*, 2007 E.C.R. II-107, ¶¶ 195, 197.
30. Philip Areeda & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 *Harv. L. Rev.* 697 (1975).
31. Case C-202/07 P, *France Télécom v. Commission*, 2009 E.C.R. I-2369.
32. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1992).
33. Case C-202/07, *supra* note 30, ¶ 110.
34. *Id.* ¶ 111.
35. *Id.* ¶ 112.
36. *Id.* For a different discussion on this point see Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* 410 (2010).
37. This recommendation, in line with economic thinking, was made inter alia in OECD, *Predatory Foreclosure*, DAF/COMP (2005), 14.
38. Rousseva, *supra* note 35, at 166.
39. Commission's Communication on Exclusionary Abuses, *supra* note 5, ¶ 19 et seq.
40. This presumption goes back to Case 322/81, *Michelin I*, 1983 E.C.R. 3461.
41. See, e.g., Case C-95/04, *British Airways v. Commission*, 2007 E.C.R. I-2331, ¶¶ 106-107.
42. "[L]imiting production, markets or technical development to the prejudice of consumers" is the only example of abusive conduct given in Article 102 TFEU where consumer harm is explicitly mentioned.
43. Following its communication on exclusionary abuse, the Commission now devotes more effort to show consumer harm. See, e.g., Commission's Decision in *Intel*, COMP/C-37.990 (May 13, 2009), ¶ 1604 et seq.
44. Case T-5/02, *Tetra Laval v. Commission*, 2002 E.C.R. II-4381, ¶ 155.
45. *Id.*
46. Case C-12/03 P, *Commission v. Tetra Laval*, 2005 E.C.R. I-987, ¶ 41.
47. See, e.g., David Bailey, *Standard of Proof in EC Merger Proceedings: A Common Law Perspective*, 40 *Common Market L. Rev.* 845 (2003).
48. Lord Hoffmann in *Secretary of State for Home Department v. Rehman*, [2003] 1 AC 153. Lord Hoffman draws on Lord Steyn in *In Re H. and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at 585.
49. For another presumption based on a statement of economic normality, see Case T-342/99, *Airtours v. Commission*, 2002 E.C.R. II-2585, ¶¶ 134 and 139, where the CFI similarly relied on

economic literature to hold that price volatility normally makes it harder for members of an oligopoly to observe each others' behavior.